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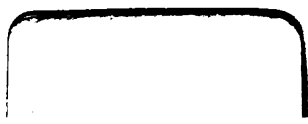
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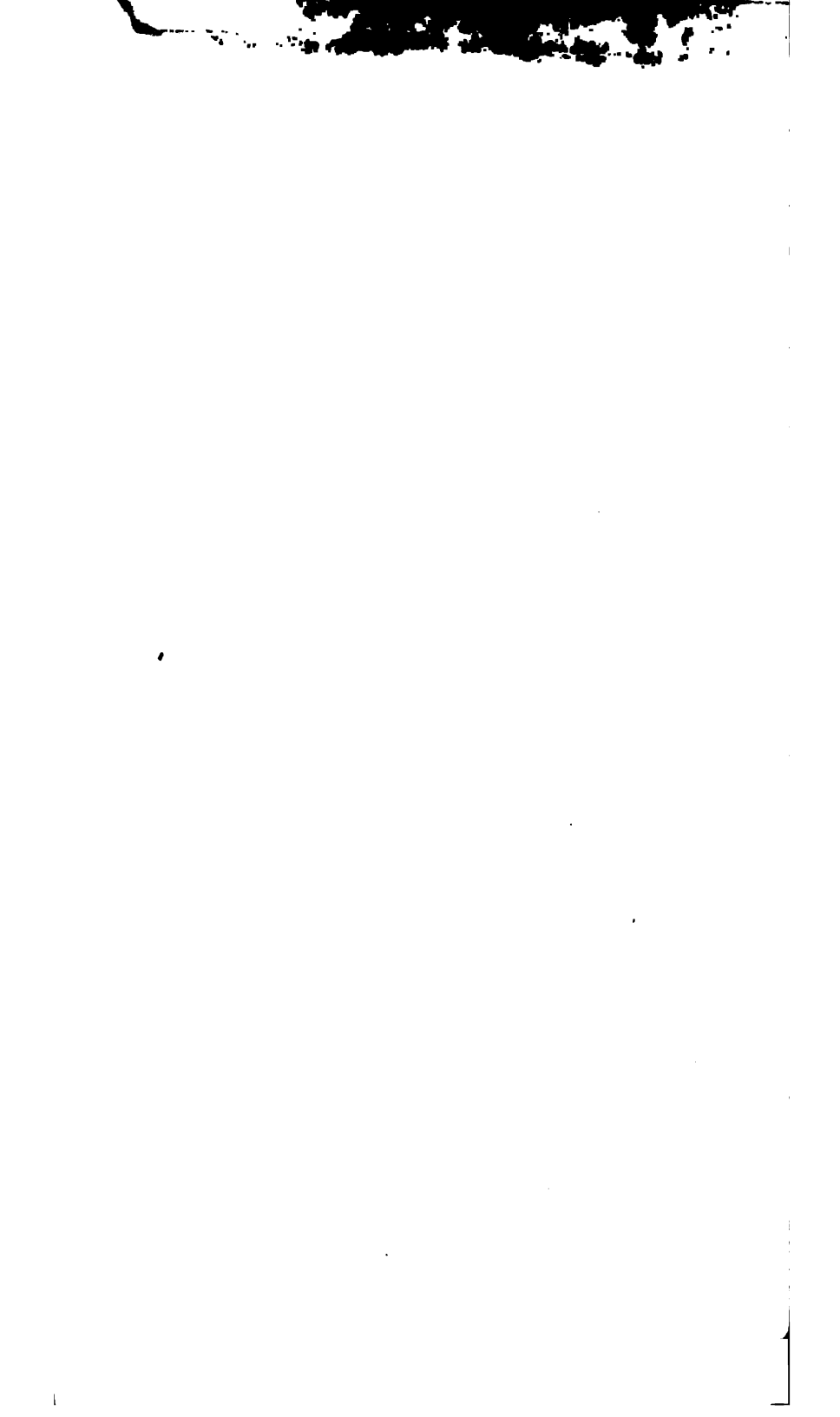
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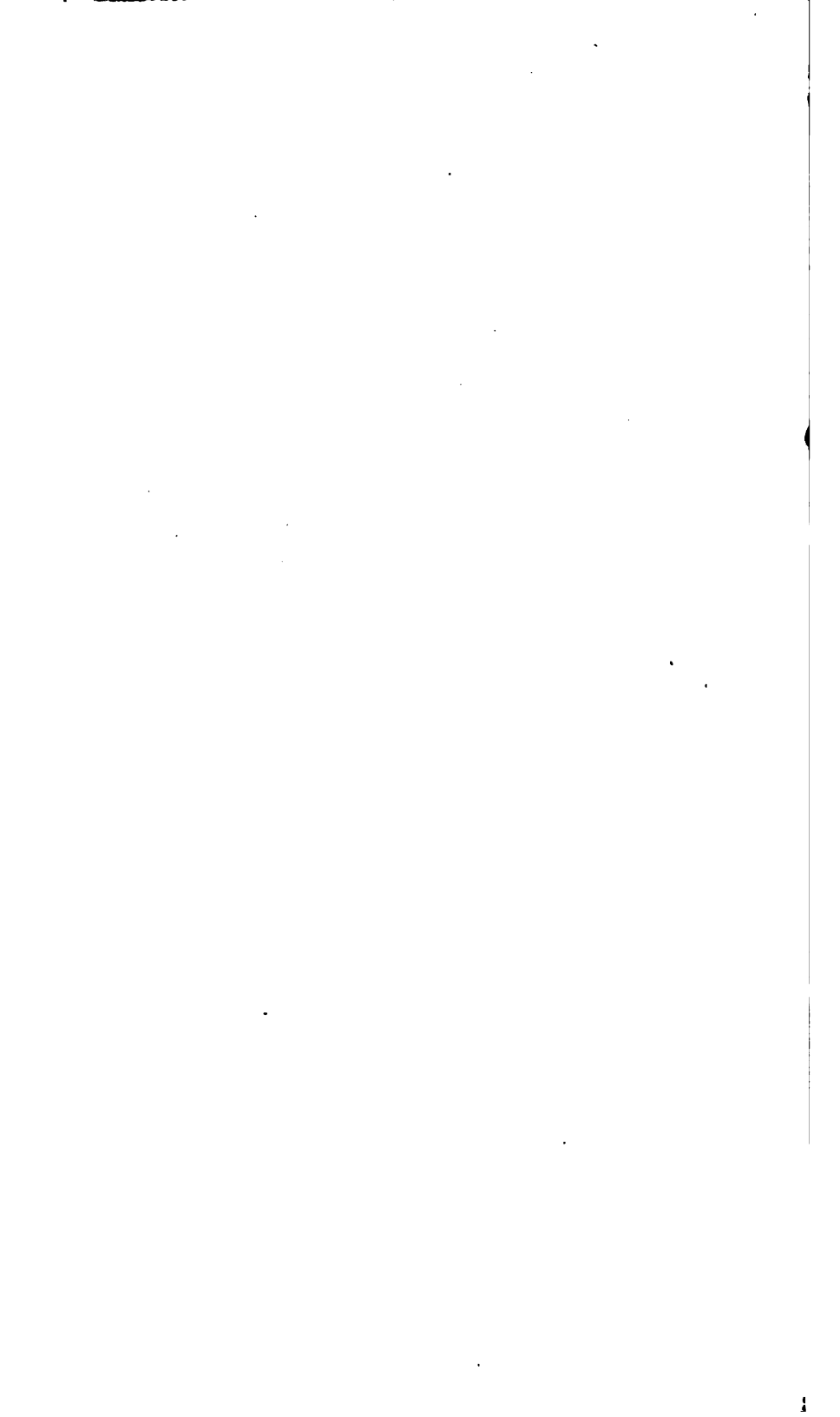
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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XLVIII.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1896.

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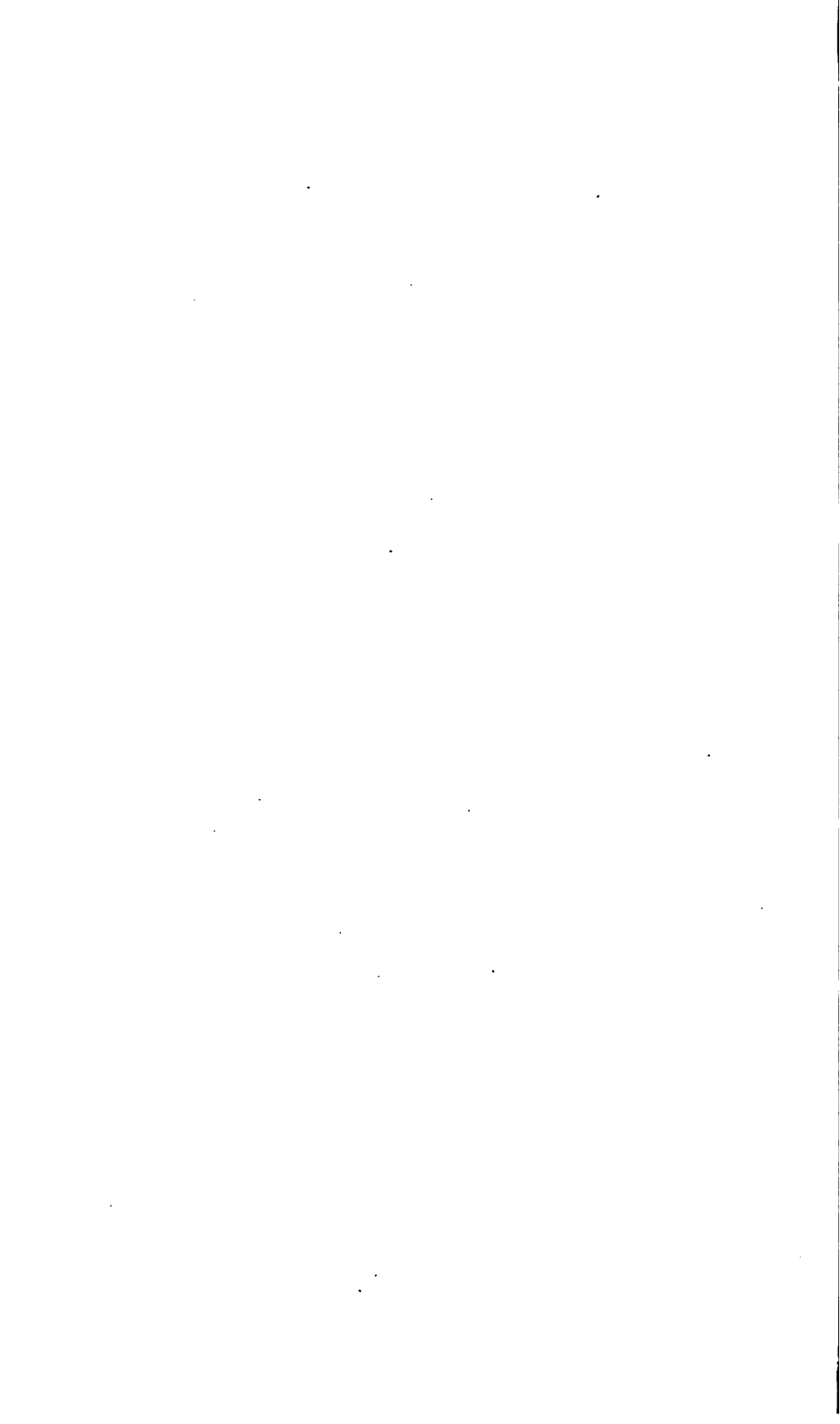
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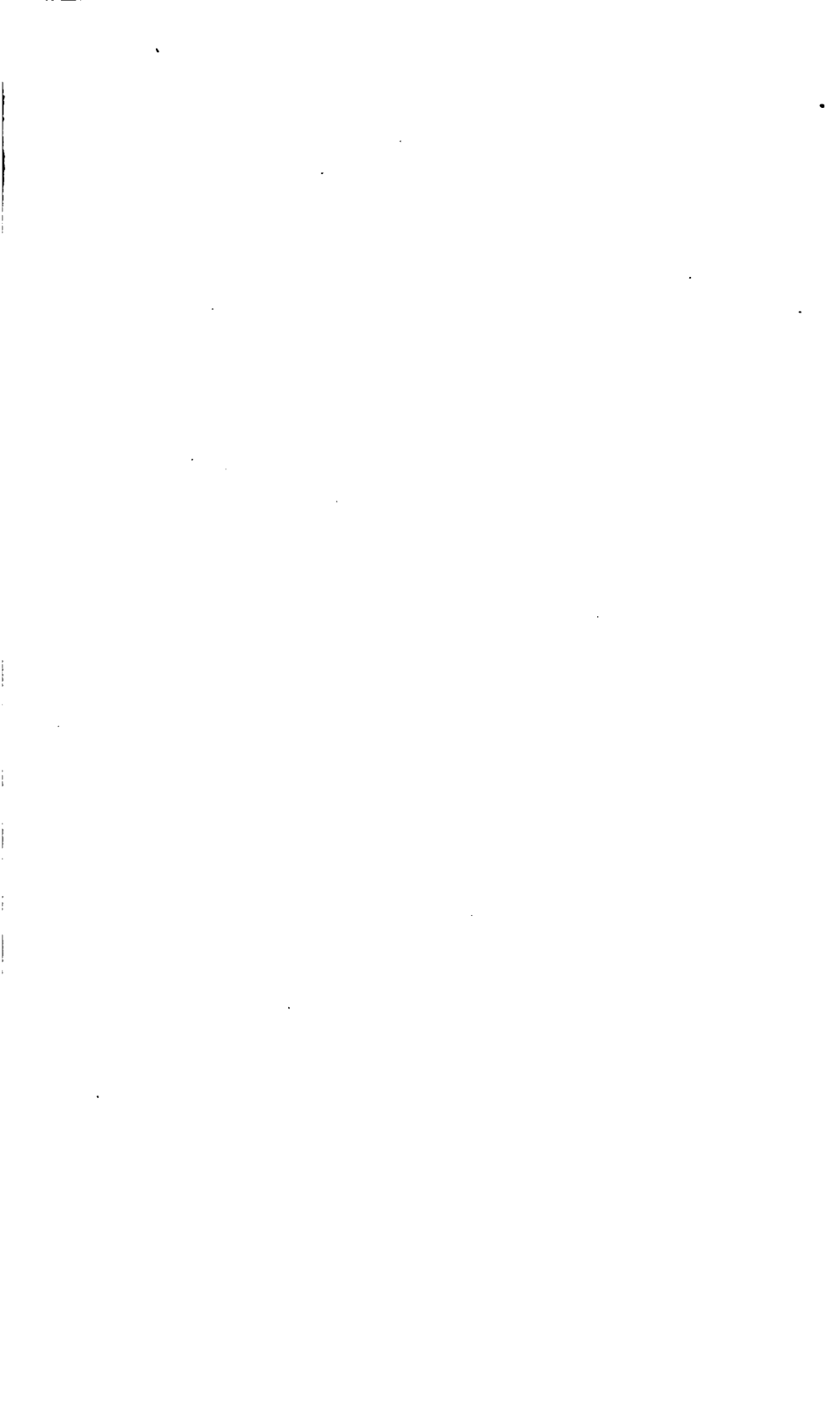
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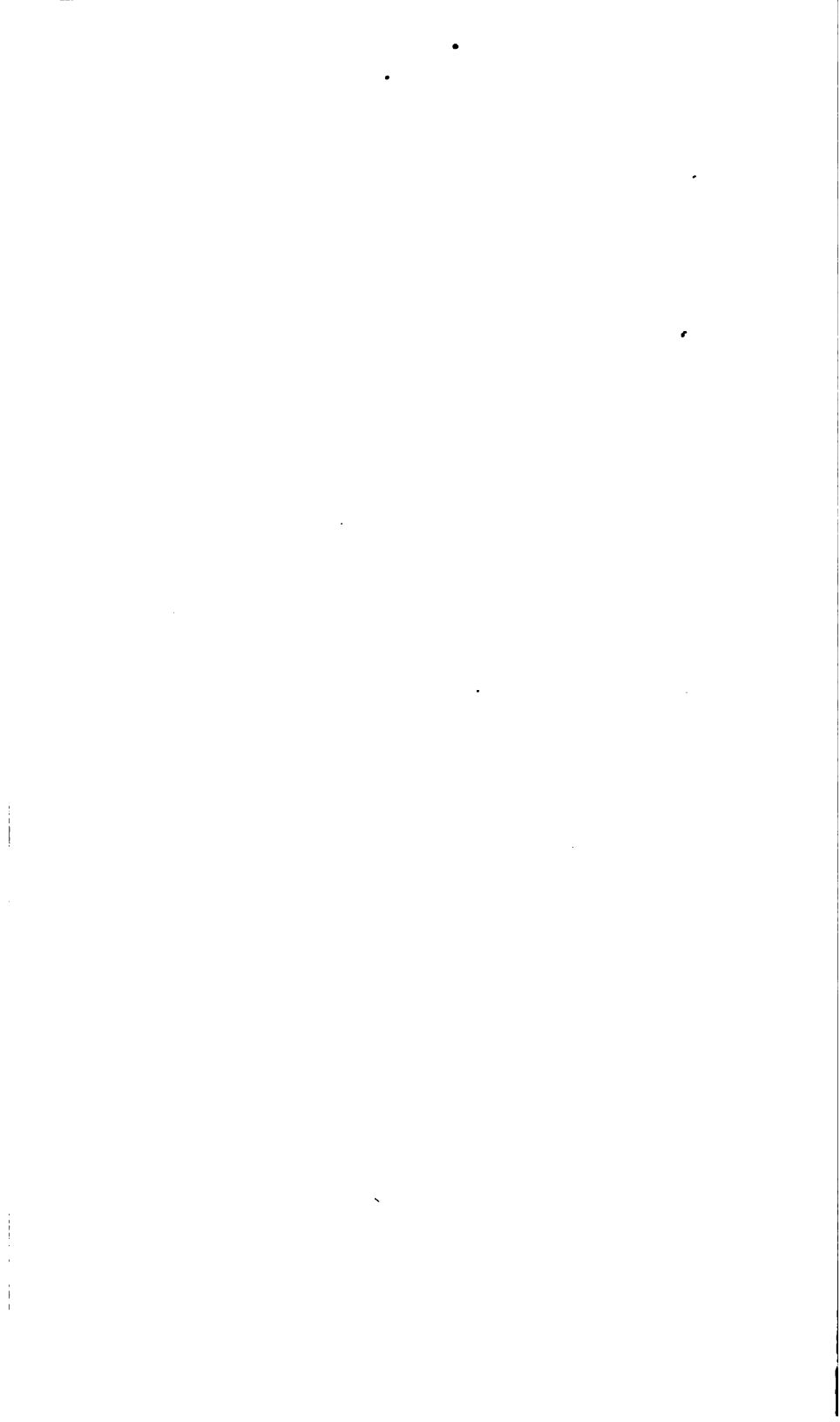
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AMERICAN STATE REPORTS
VOL. XLVIII



CASES
IN THE
SUPREME COURT
OF
ALABAMA.

MCNEILL v. STATE.

[102 ALABAMA, 121.]

JURY TRIAL—INSTRUCTIONS, HOW TO BE CONSTRUED.—A general charge of a trial court is to be construed as an entirety and in connection with the evidence. It should be read and considered in regard to the connection between its several sentences and propositions, each declaration being shaded and interpreted in the light of the context. If any part so construed, limited, or expanded asserts the law correctly, it will not furnish ground for reversal, however faulty the clause may be, if its meaning were not controlled by a prior or subsequent passage.

HOMICIDE—KILLING ADULTEROUS WIFE.—If a man finds his wife in the act of adultery, and, provoked by the wrong done him, and moved by the passion naturally engendered, he immediately kills her, he is not guilty of murder, but of manslaughter only. If, on the other hand, he does not strike and kill her until after there has been time for his passion to cool and for reason to assert itself, or, if he strikes and kills immediately, not moved thereto by heat of passion, but by prior malice, hatred, or desire to revenge the wrong done him, or by any other motive, or upon any design whatever except such as is presently engendered by the paroxysm of rage into which he is thrown by the extreme provocation, he is guilty of murder.

JURY TRIAL—ARGUMENT OF COUNSEL IN MURDER CASE.—The prosecuting attorney may, on a trial for murder, argue to the jury that they ought not to sentence the accused to imprisonment, because if they do so he may obtain a pardon afterward through the solicitation of his friends.

THE defendant was indicted and convicted for the murder of his wife. She was found dead in bed with a wound on the right side of her head, evidently made with an ax which was found on the bed near her body. The evidence tended to prove that the decedent slept in the main room with her infant and also with a niece and nephew, aged respectively

twelve and fourteen years; that before daybreak the niece wakened and saw the defendant leave the room and run downstairs; that the decedent had been washing for the defendant's brother in law, and that the evening before the homicide the brother in law and his wife and the decedent had met and a quarrel had ensued, after which the brother in law went away, but returned, knocked several times, and, failing to obtain any response, went away; that he met the defendant and conversed with him about some accusations made by the defendant relative to relations between the brother in law and the decedent, which relations were denied by the brother in law. The accused claimed that on the evening before the homicide he had discovered his brother in law and the decedent in the act of adultery, and on accusing her of infidelity, that he was attacked by her with an ax which he took from her, and, in a moment of passion, struck her, inflicting the wound of which she died. The court in its general charge to the jury instructed them as follows: "As mitigation in this case the defendant claims that the defendant had discovered his wife in the act of adultery, at or shortly before the time of the killing. The law is, that if a man discovers his wife in the act of adultery, and his passion was greatly aroused, and through this passion he strikes and kills his wife, it would not be murder, but manslaughter. The law does not say, that under all circumstances a man is not guilty of murder if he kill his wife, even if in the act of adultery at the time of the killing. The test is, does the slayer slay by reason of passion aroused or induced by revenge or malice? If a wife has lost her virtue, and continues to defile her marriage bed, and the husband knows this, and after so knowing and after reflection, while the mind is coolly operating, kills her to avenge his wounded honor, and not by reason of passion, it would be murder, not manslaughter. Therefore, in the case at bar, gentlemen of the jury, if you should find from the evidence that the defendant caught her in the act, and through the influence of passion shortly thereafter killed her, this would be manslaughter; but if you should find that the defendant caught his wife in the act of adultery, and before the killing there was sufficient cooling time, and a man kills his wife through hatred and revenge, this would be murder and not manslaughter." The defendant excepted separately to the giving of each portion of the general charge, and also to the refusal of the court to give the

charges requested by the defendant and numbered as follows: 1. "The court charges the jury that if from the evidence they cannot tell who provoked the difficulty, that it is their duty to give the defendant the benefit of the doubt, no matter how slight its weight"; 2. "The court charges the jury, that they may take into consideration, if proved, the want of virtue of the deceased, in determining whether the defendant is guilty of murder in either degree"; 3. "If the jury believe from the evidence that there was a motive which prompted the defendant to kill his wife, it is their duty to ascertain what that motive was, and if the evidence tends to show that the motive that prompted the killing was the infidelity or adultery of the wife on the night of the killing, and that the killing was the result of passion, they ought not to find the defendant guilty of any offense beyond manslaughter in the first degree"; 4. "If the jury believe from the evidence that there was a motive which prompted the defendant to kill his wife, it is their duty to ascertain what that motive was, and if the evidence tends to show that the motive which prompted the killing was passion engendered by the infidelity or adultery of his wife, they ought not to find the defendant guilty of any offense beyond manslaughter in the first degree." The defendant also made an objection and reserved an exception to that part of the argument of the solicitor of the state to the jury in which he submitted that they ought not to sentence the accused to imprisonment, because there might be a pardon granted through the influence of his friends, aided by petitions circulated and signed by good and influential citizens who either did not look at the petition or were too tender-hearted to refuse to sign it.

Samuel B. Brown and Henry Tonsmeire, for the appellant.

William L. Martin, attorney general, contra.

126 McCLELLAN, J. The general charge of a trial court given *ex mero motu* with reference to any point is to be considered as an entirety, and in connection with the evidence; and it "should be read and construed with regard to the connection between its several sentences and propositions, each declaration being shaded and interpreted in the light of the context; and if any part so considered, limited, or expanded asserts the law correctly, it will not furnish ground for reversal, however faulty the clause might be if its mean-

ing were not controlled by prior or subsequent passages": *Montgomery etc. R. R. Co. v. Stewart*, 91 Ala. 421, 427; *Williams v. State*, 83 Ala. 68; *O'Donnell v. Rodiger*, 76 Ala. 222; 52 Am. Rep. 322; *Louisville etc. R. R. Co. v. Orr*, 94 Ala. 602.

Considered in this way—and probably even without reference to the principle just stated—that part of the court's general charge to which exceptions were reserved asserts no more than this: that if a man find his wife in the act of adultery, and, provoked by the wrong done him and moved by the passion naturally engendered, he immediately kills her, he is not guilty of murder, but of manslaughter only; but that, on the other hand, if he does not strike and kill until after there has been time for his passion to cool and for reason to reassert itself, or if he strikes and kills immediately, but is not moved thereto by the heat of passion, but by prior malice, hatred, a desire to avenge the wrong done him, or by any other motive or upon any design whatever except such as is presently engendered by the paroxysm of rage into which he is thrown by this extreme provocation, he is guilty of murder. And this beyond all doubt is the law: 2 Bishop's Criminal Law, sec. 708; Wharton on Homicide, secs. 407-412; 9 Am. & Eng. Ency. of Law, 578, et seq.

Charge 1 requested by the defendant is bad in that it assumes there was a difficulty at the time of the mortal ¹²⁷ blow between the defendant and deceased, when the evidence for the state tends to show that the deceased was stricken while she slept.

Charge 2 requested for the defendant is palpably vicious in that its direct tendency was to have the jury find the defendant guilty of murder or not, as they should find the deceased to have been a virtuous or lewd woman.

Charges 3 and 4 were properly refused to defendant for that they premit all inquiry as to whether there had been time for defendant's passion to cool after he caught his wife in the act of adultery, if indeed he did see her in the act of adultery, and prior to inflicting the mortal blow upon her. If there had been such time it is wholly immaterial whether the passion aroused by the act of adultery had cooled or not, for though the paroxysm of anger and rage in fact continued and moved the defendant to the fatal blow after the lapse of sufficient cooling time, yet would he still be guilty of murder. These instructions, moreover, are, to say the least, confused, self-repugnant, and misleading in that they assume

there may be a motive for an act which is superinduced by and done in the heat of passion. The absence of motive is essential to the ascription of the act to unreasoning fury, and where there is motive the killing is murder and not manslaughter.

The court committed no error in its action with reference to that part of the solicitor's argument to which objection was made. No fact was stated by him, but, to the contrary, all he said was but the expression of his opinion or anticipation as to what would be the result of committing the defendant to the penitentiary for life instead of inflicting the death penalty—an argument for the death penalty proceeding on considerations the reasonableness of which was as much open to the jury as to counsel, and nothing said was beyond the limitations put upon the remarks of counsel to the jury by repeated decisions of this court: *Cross v. State*, 68 Ala. 476; *East Tennessee etc. R. R. Co. v. Bayliss*, 75 Ala. 466; *Wolfe v. Minnis*, 74 Ala. 386; *Noble v. Mitchell*, 100 Ala. 521; *Birmingham etc. R. R. Co. v. Harris*, 98 Ala. 326.

The judgment of the city court must be affirmed, and the time originally fixed for the execution of the sentence of death imposed thereby having passed, it is here ordered and adjudged that the sheriff of Mobile county ¹³⁸ will, on Friday, the eighteenth day of May, 1894, proceed to execute said sentence in the manner prescribed by law.

Affirmed.

TRIAL—INSTRUCTIONS, HOW CONSTRUED.—An error in a particular instruction is harmless if all the instructions taken together fairly present the case to the jury: *Markowitz v. Kansas City*, 125 Mo. 485; 46 Am. St. Rep. 498, and note, with the cases collected.

HOMICIDE—KILLING WIFE TAKEN IN ADULTERY.—Where a husband, finding his wife in the act of adultery, strikes her with intent to kill, this is murder; to reduce the offense to the grade of manslaughter the blow must have been given in the heat of passion and without intent to inflict death: *Slagden v. People*, 62 N. Y. 229; 20 Am. Rep. 493.

SULLIVAN v. STATE.

[102 ALABAMA, 125.]

JURY TRIAL.—THE COURT HAS NO RIGHT TO EXCUSE OR DISCHARGE a juror because his given name is incorrectly stated in the summons requiring him to appear and serve as a juror.

CRIMINAL TRIALS.—THE PRESUMPTION IS THAT ERROR OF THE TRIAL COURT injuriously affected the accused, and his conviction after such error has been committed will be reversed, unless this presumption is clearly repelled by the record.

EVIDENCE.—DYING DECLARATIONS MUST BE CONFINED TO THE RES GESTÆ, and cannot be received as evidence of any prior transaction out of which the difficulty grew. It is only such acts or statements done or uttered at the time of the final fatal encounter, and which tend to throw light upon it as a part of the res gestæ, which can be proved by dying declarations.

EVIDENCE.—A DYING DECLARATION THAT "Jim Sullivan cut me; he cut me for nothing; I never did anything to him," is admissible in evidence, but if such declaration include the farther words: "I pray God to forgive him," this part should be excluded because it does not in any way relate to, or shed light upon, the killing or what had apparently led to it.

HOMICIDE—DUTY TO RETREAT.—WHEN AN ASSAULT IS MADE IN A SUD- DEN QUARREL and a mutual combat ensues, retreat, if possible, to avoid further danger is a duty. In such a case, to establish excusable homicide in self-defense it must appear that the party killing had retreated; that he made a real effort to avoid the necessity of taking life.

HOMICIDE.—A PARTY MAY BE GUILTY OF MURDER, though he kills his adversary on a sudden quarrel or provocation, if he acts upon a formed design to take life.

HOMICIDE.—IF LIFE IS TAKEN BY A DIRECT STROKE OF A DEADLY WEAPON, the presumption is that the killing was pursuant to a formed design. Malice may be inferred from the use of an instrument known to be liable to produce death.

MURDER—MANSLAUGHTER.—THE UNINTENTIONAL TAKING OF A HUMAN LIFE is a higher offense than manslaughter if the act producing the death was done intentionally, and was likely to kill, as where the blow was with a deadly weapon directly aimed at the decedent. From the use of such weapon malice may be inferred.

INDICTMENT and conviction of murder in the first degree. The evidence tended to show that while the decedent and other persons were talking, the defendant came up to them and said: "We have had a big day to-day"; that decedent replied: "You have had several big days; you had one when you shot that man in the leg in front of the market-house"; that defendant responded with an oath, saying, "I did not have to shoot you in the leg," and, drawing a dirk, plunged it into the breast of the decedent, inflicting a mortal wound. The decedent, after saying repeatedly to the persons present

that he could not live, and was dying, added: "Jim Sullivan cut me; he cut me for nothing. I never did anything to him. I pray God to forgive him for it." These statements having been offered in evidence as dying declarations, the defendant objected to that part of them which affirmed that the decedent had been cut for nothing and that he prayed God to forgive the accused. The declarations were, nevertheless, received in evidence. The evidence, in behalf of the defendant, tended to show that the decedent, after being addressed by the defendant, replied in an angry manner and had started toward defendant with his left hand raised and his right hand upon or near his pistol pocket. The defendant excepted to the refusal to give charges numbered as follows: "1. The court charges the jury that if the defendant did not provoke or encourage the difficulty, but approached the deceased in an orderly and peaceful manner, and the deceased replied angrily and insultingly, and advanced toward the defendant and placed his hands behind him in such a manner as to indicate to a reasonable man that his purpose was to draw a pistol and fire, the defendant was authorized to anticipate him and stab him; and the rule in such case would not [be] varied, if it should turn out that the deceased was in fact unarmed, as the law of self-defense does not require the defendant to wait until the weapon is presented ready for deadly execution." "3. The court charges the jury that if the defendant did not provoke or bring on the difficulty, but approached the deceased in an orderly and peaceful manner, and the deceased replied angrily and insultingly, and advanced toward the defendant with one hand raised and the other placed upon or in the direction of a pistol pocket, in such manner as to indicate to a reasonable man that his purpose was to draw a weapon and use it, the defendant was authorized to anticipate him and cut first." "6. The court charges the jury that before they can convict the defendant of murder in the second degree they must be satisfied from the evidence, beyond all reasonable doubt, that the defendant unlawfully cut or stabbed W. L. Emmerson, and that he did the cutting or stabbing willfully or maliciously." "13. If two persons fight willingly on a sudden quarrel or provocation, and one kills the other, the statute makes the killing manslaughter in the first degree." "16. The court charges the jury that if one intentionally does an act calculated to take life, and

death is unintentionally produced, the homicide is manslaughter in the first degree." "18. The court charges the jury that the danger that will excuse one for killing another need not be real or actual. It may now be known that all the appearances of danger were false, and Emmerson never intended to do defendant any harm, and that he did not have a pistol or other deadly weapon; yet, if the jury believe from all the evidence in this case that the appearances of danger surrounding the defendant at the time were such as to produce a reasonable belief in the mind of the defendant that his life was in danger, or that he was about to suffer great bodily harm, and that there was no other reasonable means at the time open to the defendant to avoid the danger but by taking Emmerson's life, the defendant being without fault at the time, the law holds him harmless, and the jury must acquit him, although Emmerson may have had no pistol or other deadly weapon."

P. H. Pitts, for the appellant.

William L. Martin, attorney general, and *George H. Craig*, for the state.

¹³⁹ BRICKELL, C. J. The court made an order setting the day of trial, and that, with the persons drawn and summoned as petit jurors for the week, other names should be drawn so as to increase the number to seventy-five, a list of whom was to be served on the defendant. This course was pursued; and on the day of trial, in ¹⁴⁰ the process of the organization of the jury, the court was inquiring into and passing upon the qualifications of the persons appearing in obedience to the summons to serve as jurors. The name of Theodore Lacy was called, who was one of the regular jurors of the week. He responded, but said that though summoned by the name of Theodore, his true name was Theophilus Lacy. Thereupon, *ex mero motu*, the court excused or discharged him from service as a juror, to which the defendant excepted.

1. The special statute in relation to the drawing and impaneling of grand and petit jurors in the county of Dallas requires that whenever any person stands indicted for a capital felony, the court must, on the first day of the term, or as soon thereafter as practicable, make an order conforming to section 4874 of the code of 1876, commanding the sheriff to summon not less than fifty nor more than one hundred per-

sons, including those summoned on the regular juries for the week, from whom the panel for the trial is to be selected. Upon the court, on the day set for the trial, if the cause is ready for trial, is imposed the duty of inquiring into and passing "upon the qualifications of all persons who appear in court in response to the summons to serve as jurors"; and to cause the names of all those whom the court may hold to be competent jurors to try the defendant to be placed on lists, and to require the defendant to strike off from the lists two names, and the solicitor to strike off one, and this process is continued until only twelve names remain, who are to be sworn and impaneled as the jury. It is further provided that: "If the sheriff fails to summon any juror drawn, or any juror summoned fails or refuses to attend the trial, or there is any mistake in the name of any juror drawn or summoned, none or all of these grounds shall be sufficient to quash the venire or continue the case": Pamphlet Acts, 1884-85, p. 497.

It is obvious the power the court is authorized to exercise in the process of the organization of the jury is the inquiry into and determination of the qualifications as a juror of the person appearing in obedience to the summons. It may doubtless reject any or all who may be subject to any disqualification, or who may not have the statutory qualifications. So it may probably excuse ¹⁴¹ or discharge any person because of reasons personal to himself, which would render service as a juror oppressive. Beyond this, it is not contemplated by the statute the power which the court may exercise *ex mero motu* shall extend. If there be not an absence of the statutory qualifications, or a temporary disqualification, or reasons personal, rendering service as a juror oppressive, the duty of the court is to cause the names of all appearing to be placed on the lists from which the jury is to be selected. A list of all who are to be summoned to appear the law requires to be served on the defendant. The object is to enable him to prepare for his challenges; to afford him the opportunity of ascertaining whether causes for challenge exist; to exercise intelligently the right of peremptory challenge, and the power of selection, which the statute confers: *Parsons v. State*, 22 Ala. 50. There should not be interference with this right further than the statute sanctions. The juror was not incompetent; there was no disqualification; no request to be excused because service would be oppressive

The only reason for his discharge was the misnomer of his christian name; a misnomer not affecting his identity, for by it he had been summoned, and to it he responded. An error which, by the express terms of the statute, is immaterial; not ground for quashing the venire or a continuance of the cause. The court erred in the discharge of the juror. The error, it may be, was not of practical injury to the defendant. We deem it safer, however, to adhere to the long-settled rule that when error is shown, the presumption of injury arises, which must be clearly repelled by the record, or the judgment will be reversed: 1 Brickell's Digest, sec. 100, p. 780.

2. After the deceased had received the fatal stab, and after he had given up all hope of recovery, he made statements concerning the encounter, which were received in evidence against the objection of the defendant. Such statements—dying declarations—are exceptional testimony, and are received from the necessity of the case; the circumstances and the solemn surroundings being treated as supplying the sanction and restraining force over the declarant, which a solemn oath imposes in ordinary cases. But the declarant does not become a general witness. He can only speak of the ¹⁴³ transaction which causes the death, and such accompanying acts, statements, and conduct as shed light on it; the *res gestæ*, in a strict sense. Anything previously done or said, unless called up and made part of the altercation, cannot be proven as a dying declaration; and when so called up it can be proved as such only to the extent it is repeated or uttered in the altercation. It does not legalize any statement by the declarant of the past transaction out of which the difficulty grew. It is only such acts or statement, done or uttered at the time of the final fatal encounter and catastrophe, and which tend to shed light on it as a part of the *res gestæ*, which can be so proved: *Fonville v. State*, 91 Ala. 39; *Bibb v. State*, 94 Ala. 31; 83 Am. St. Rep. 88; *Louisville etc. R. R. Co. v. Pearson*, 97 Ala. 211; *Johnson v. State*, 102 Ala. 1.

Just before Emmerson, the deceased, expired, when he was conscious he was dying and so expressed himself, he made two declarations which were offered in evidence as dying declarations. Each was separately objected to, each objection was overruled, the testimony was admitted, and a separate exception was reserved to each ruling. One of the declarations was: "Jim Sullivan cut me; he cut me for nothing; I never did anything to him." The objections made to

this testimony were that it was the conclusion of the declarant—the opinion of the deceased—and that it did not relate to the circumstances or transaction of the killing. There is nothing in this objection. The statement certainly did relate to the act or transaction of the killing. The killing was effected by means of an incised wound. All the witnesses concur in that. He also said Sullivan cut him for nothing, and that he, the declarant, did nothing to Sullivan. True, this statement was very general, but it was admissible as a collective fact: 3 Brickell's Digest, secs. 458, 460, 463, 465, p. 437. The other part of the declaration was simply a continuation of the former: "I pray God to forgive him." This should have been excluded. It did not, in any way, relate to or shed any light on the act of killing, or that which apparently led to it.

3. It may be charges numbered 1 and 18, requested by the defendant, find support in charges which were pronounced correct in *De Arman v. State*, 71 Ala. 351. We are nevertheless constrained, in view of the more recent rulings of this court, to declare that the city court properly ¹⁴³ refused to give them in the form in which they were requested. When an assault is made on a sudden quarrel, and a mutual combat ensues, retreat, if possible to avoid the threatened danger, is a duty. For, as was said in *Commonwealth v. Drum*, 58 Pa. St. 1: "When it comes to a question whether one man shall flee or another shall live, the law decides that the former shall flee rather than the latter shall die": *Eiland v. State*, 52 Ala. 332; *Pierson v. State*, 12 Ala. 149. There may be cases of murderous assault, or of assault with intent to commit other atrocious felonies, from which it is not the duty of him who is assailed to retreat, or employ any other effort to avoid taking life. But in all cases of sudden combat, to establish excusable homicide in self-defense, it must appear that the party killing had retreated; had made real effort to avoid the necessity of taking life. Any instruction to the jury in such case, though it may assert every other fact essential to constitute homicide in self-defense, which does not necessitate the inquiry whether retreat or other effort to avoid the taking of life was practicable, is properly refused: *Holmes v. State*, 100 Ala. 80; *Webb v. State*, 100 Ala. 47; *Gibson v. State*, 89 Ala. 121; 18 Am. St. Rep. 96; *Cleveland v. State*, 86 Ala. 1. For the like reason, charge number 3 was properly refused.

Charge 6 should have been given. Charges 13 and 16 were rightly refused. The hypothesis of neither of them is a universal truism. Cases falling within each of the postulates might be murder, for there may have been formed design, and the homicide may have resulted from that formed design. If it did, according to their language, no matter how deadly the weapon, nor how directly aimed at Emerson, yet unless the killing was intentional, the crime could not be of higher grade than manslaughter. In other words, no matter how deadly the blow, or how likely to produce death, yet, unless the jury find there was a specific intention to kill, the homicide is only manslaughter. Manslaughter is the unlawful killing of a human being without malice. Every one must be held to intend the known consequences of an intentional act. When life is taken by the direct use of a deadly weapon, if there be nothing else in the transaction—no justifying or explanatory circumstances—the presumption is that the killing was done pursuant ¹⁴⁴ to a formed design. Malice may be inferred from the use of an instrument known to be liable to produce death: 3 Brickell's Digest, sec. 524, p. 216; *Hadley v. State*, 55 Ala. 81.

Reversed and remanded.

HARALSON, J., not sitting. —

EXCUSING JURORS BY COURT WITHOUT CHALLENGE is the subject of the monographic note to *People v. Barker*, 1 Am. St. Rep. 519.

APPEAL—PRESUMPTION THAT ERROR WAS MATERIAL.—If when a case is tried before a court without a jury one of the parties presents propositions of law to the court, to which, though correct, it refuses its assent, the error will be presumed to have been material and prejudicial, unless it appears that the party excepting thereto was not injured thereby: *Niagara etc. Ins. Co. v. Bishop*, 154 Ill. 9; 45 Am. St. Rep. 105.

HOMICIDE—DYING DECLARATIONS—RES GESTÆ.—Dying declarations of a deceased are admissible in evidence on a trial for murder to prove any relevant fact embraced in the res gestæ of the killing: *Wilkerson v. State*, 91 Ga. 729; 44 Am. St. Rep. 63, and note, with the cases collected.

HOMICIDE—SELF-DEFENSE—DUTY TO RETREAT.—To sustain a plea of self-defense in case of homicide, there must be shown a pressing necessity, real or apparent, to protect the life of the defendant, or his person from great bodily harm. He must not be the aggressor, and he must retreat from the combat if there be a mode of escape consistent with his safety: *Brown v. State*, 83 Ala. 33; 3 Am. St. Rep. 685, and note. The duty of a defendant feloniously assailed to retreat is imperative if he can do so with safety: *State v. Donnelly*, 69 Iowa, 705; 58 Am. Rep. 234. See, also, the note to *Gibson v. State*, 18 Am. St. Rep. 102.

HOMICIDE—KILLING IN SUDDEN QUARREL.—Where two persons become engaged in a sudden combat, and after they become heated thereby

one seizes a deadly weapon and slays his adversary, having no intent to do so when the combat commenced, his offense is manslaughter, but where an armed man attacks an unarmed man who seeks to avoid the contest, and kills him with a weapon prepared beforehand, he is guilty of murder: *State v. Hildreth*, 9 Ired. 429; 51 Am. Dec. 364. On this point see, also, *Gibson v. State*, 89 Ala. 121; 18 Am. St. Rep. 96.

HOMICIDE—PRESUMPTION OF MALICE FROM USE OF DEADLY WEAPON.—An intentional killing with a deadly weapon when admitted or proved raises a presumption of malice: *State v. Norwood*, 115 N. C. 789; 44 Am. St. Rep. 498, and note; unless this is repelled by the evidence which proves the killing: *Gibson v. State*, 89 Ala. 121; 18 Am. St. Rep. 96. See, also, the note to *State v. Deschamps*, 21 Am. St. Rep. 399.

MCCARTHY v. LOUISVILLE & NASHVILLE R. R. Co.

[102 ALABAMA, 198.]

CARRIERS, LIABILITY OF.—In an unconditional common-law contract of carriage the carrier insures the safe carriage of the goods to the consignee, and assumes liability for their loss or injury resulting from any cause, excepting only the act of God or of the public enemy, and the act or fault of the shipper of the goods. If they are not delivered, or are delivered in a damaged condition, the carrier cannot relieve himself from liability by proof of the highest possible care on his part.

CARRIER'S LIABILITY, WHEN AFFECTED BY THE FAULT OF THE SHIPPER OF GOODS.—The contributory negligence of the shipper of the goods cannot be pleaded to relieve a negligent carrier from liability. The carrier is liable for any injury done through the concurrent and contributory negligence of himself and the shipper.

CARRIER'S LIABILITY.—THOUGH THE MODE IN WHICH THE GOODS ARE PACKED or put into the cars for shipment by their owner may be improper or negligent, yet this will not relieve the carrier from liability for their loss or injury, unless it was the sole cause thereof, unaided by the act or negligence of the carrier.

WITNESS—EXPERT EVIDENCE.—A witness may be asked whether cars were well and properly loaded, if a sufficient predicate has been made to render his opinion on that subject competent.

CARRIERS—IMPROPER LOADING OF GOODS.—If goods are transported in closed cars, so that when received from one carrier by another the latter cannot, without opening the doors, see the condition of their contents, it is under no duty to open such doors, and is not answerable for a loss or injury to the goods resulting solely from their condition, and not from any fault of the carrier.

CARRIER'S LIABILITY—BURDEN OF PROOF.—If a carrier seeks to escape liability for the loss or injury of goods on the ground that such loss or injury occurred through the fault of the shipper, such carrier must assume the burden of proof by establishing that the loss or injury was not due to any contributing fault of his own.

ACTION on the case to recover for loss of, and injury to, certain terra cotta tiling shipped from Ottawa, Illinois, to Bir-

mingham, Alabama, and delivered in a damaged condition. The defendant in its answer asserted that the plaintiffs themselves were guilty of negligence in the improper loading of the terra cotta upon the cars by the Pioneer Fire Proof Construction Company, who, in such loading, were acting as agents of the plaintiffs, in that the improper loading contributed proximately to the injury of the terra cotta; that the cars were received by the defendant from the Chicago, Burlington & Quincy Railway Company closed so that their condition and contents were not visible; and that the defendant and its agents did not know when receiving the cars that they were improperly loaded. Further answering, the defendant alleged that the cars were improperly loaded at the point of shipment, and that such improper loading proximately contributed to the alleged injury of the terra cotta, and that the defendant when receiving the cars did not know they were improperly loaded. The plaintiff demurred to the pleas of the defendant upon the ground that they did not show that the improper loading was not apparent from an inspection of the cars, and did not allege that the receiving carrier did not know, or could not have known, that the terra cotta was improperly loaded, and that the defendant does not show that it was not guilty of negligence, nor that it was without fault, and that the negligence of the shipper in loading the cars cannot be charged to the plaintiff, and that the defendant in its pleas does not allege that the injury to the terra cotta was caused solely by the improper loading. These demurrers being overruled, the plaintiff excepted. The plaintiff excepted to the refusal of the court to give the following instructions: "1. The court instructs the jury that if they believe the evidence they shall find for the plaintiffs, and assess such damages as the plaintiffs have suffered from the failure to deliver the goods. 2. The court instructs the jury that if they believe the evidence they must find for the plaintiffs in this case, unless they find from the evidence that the terra cotta was broken solely on account of the improper loading, and that the defendant was not guilty of negligence in handling and hauling the terra cotta. 3. The court instructs the jury that if they believe from the evidence that the four carloads of terra cotta were delivered to the defendant as a common carrier for transportation to Birmingham, Alabama, and that the said goods were delivered to plaintiff by the defendant, or by any one for him, in a damaged or

broken condition, then the burden of proof is on the defendant to show affirmatively that it was not guilty of negligence in breaking and injuring said terra cotta." The plaintiff excepted to the giving by the court of the following instructions: "1. If the jury believe from the evidence that loading the terra cotta without straw or sawdust was negligent and improper loading, and that it contributed proximately to the breakage of the terra cotta, then they must find for the defendant, if the jury believe further from the evidence that the terra cotta was loaded without straw or sawdust. 2. If the jury believe from the evidence that there was an open space on one or more of the cars up to which on each side the terra cotta was piled, and the sides of such open space were not boarded up or braced, and that it was improper loading not to board or brace the terra cotta, and that the want of boards or braces contributed proximately to the injury, then the jury must find for defendant."

James A. Mitchell, for the appellants.

Hewitt, Walker & Porter, contra.

199 **MCCLELLAN, J.** Appellants are plaintiffs and appellee is the defendant in this action. The complaint contains four counts. It is conceded by counsel on either hand that the third count presents the case relied on by plaintiffs, and that upon that count alone the trial was had. The case made thereby is the following: In October, 1890, the Pioneer Fire Proof Construction Company delivered to the Chicago, Burlington & Quincy Railroad Company, at Ottawa, Illinois, four carloads of terra cotta for carriage, and consigned to plaintiffs at Birmingham, Alabama. The defendant was also a common carrier operating a connecting line of railway on the route from Ottawa to Birmingham, and as such received the consignment from the initial carrier, "and undertook to deliver the same to plaintiffs at Birmingham for a reward." This undertaking was not performed, the complaint avers, but, to the contrary, the defendant "did not deliver all of said goods to them [the plaintiffs], and did not deliver said goods to the plaintiffs in good or proper condition, or in the condition they were in when shipped and consigned to plaintiffs, but that said goods when delivered were badly broken and injured, and a large part thereof rendered wholly unfit for use." The damage to the goods is laid at four hundred dollars, which the complaint seeks to recover.

It is manifest that the case made by the averment of these facts tendered no issue of negligence *vel non* on the part of the defendant. The contract averred is an unconditional common-law contract of carriage without reservations or exceptions. By its terms the defendant insured the safe delivery of the goods to the consignee, and assumed liability for any loss or injury resulting from any cause except such as afforded the carrier a defense at common law. The strictest proof of all possible care on the part of the carrier in the transportation and delivery of the goods would have been no defense, and, ²⁰⁰ of course, proof of the carrier's negligence was in nowise essential to a recovery. The defenses, which a carrier under such a contract may interpose to an action for failure to deliver in good condition, are commonly mentioned as two only, namely, that the loss or injury was due either to the act of God or to the act of a public enemy. But there is in reality a third resting on the fault of the owner of the goods or his agent. This latter defense, while the fault involved in it may consist merely of negligence imputable to the plaintiffs, is in no sense, and bears little analogy to, the defense of contributory negligence, available in actions against common carriers of passengers, sometimes in actions against carriers of livestock, and even, it may be, in actions against carriers of goods—inanimate things—under contracts of affreightment, which limit liability to loss or injury occasioned by the carrier's negligence. Nowhere in the books can any reference be found to the defense of contributory negligence against the common-law liability of common carriers of goods. And in the nature of things there can be no such defense, to speak with any approach to legal accuracy. There must always be negligence on the part of a defendant, or else it cannot be said that a plaintiff has been guilty of contributory negligence. Or, in other words, "there can be no contributory negligence on the part of a plaintiff, except in cases where there has been negligence on the part of the defendant. Contributory negligence exists only when the negligence of both parties has combined and concurred in producing the injury": 4 Am. & Eng. Ency. of Law, 18. This is illustrated in numerous cases decided by this court, where damages were claimed for the results of wantonness and the like, and pleas of contributory negligence were held bad; and it is illustrated in the case at bar, where the gravamen of the action is a failure to deliver goods, with-

out reference to the inquiry whether the failure was due to defendant's negligence. To allow a plea of contributory negligence to such action would be to allow the defendant to change the case made by the complaint, by confessing a fact which is not averred in it, and which is not necessary to the plaintiff's recovery, and then to escape on proof of a fact which is a defense only against the case he has thus made for the plaintiffs. There is no room in this case for the plea of contributory negligence. The ²⁰¹ special pleas 6, 7, and 8, filed by the defendant were pleas of this character. They charge that plaintiffs themselves were guilty of negligence in that they or their agents improperly and negligently loaded the terra cotta on the cars in which it was to be and was carried from Ottawa to Birmingham, and that such improper loading proximately contributed to the alleged injury complained of. This was to say that the defendant was guilty of negligence, but that it ought not to be held liable for the consequences thereof because its negligence was aided to the damnifying result—was contributed to—by the concurring negligence of the plaintiffs. These averments, in short, were admissions of negligence on the part of the pleader, coupled with charges of negligence on the part of the plaintiffs. The further averments of these pleas, that the cars were closed when they were received by the defendant from the first carrier, so that the condition of their contents was not visible, and that defendant and its agents did not then know that said cars were improperly loaded, if intended to negative all negligence on the part of the defendant, are repugnant to and inconsistent with the admissions of defendant's negligence implied in the allegation that plaintiff's negligence contributed to the injury. On the other hand, if these further averments are not to be taken as negating all negligence imputable to defendant, and that is probably the true construction of them, the pleas are yet bad, for, as a carrier is liable for loss or injury resulting from the act of God aided by his own negligence, or from the act of a public enemy to which his own fault contributed, so he is liable for any loss or injury which is due to the concurring and contributory negligence of himself and the shipper; and, as when he pleads the act of God or of the public enemy, he must bring himself within these exceptions to the common-law rule of liability by averring his own want of concurring negligence, so when he relies upon the other

exception to that rule of liability, that which rests upon the fault of the shipper, he must bring himself entirely and perfectly within it by negating all contributing fault of his own: *Lawson's Contracts of Carriers*, 177, 178; *Steele v. Townsend*, 37 Ala. 247; 79 Am. Dec. 49; *Grey v. Mobile Trade Co.*, 55 Ala. 387; 28 Am. Rep. 729; *South etc. R. R. Co. v. Henlein*, 52 Ala. 606; 23 Am. Rep. 578; *Louisville etc. R. R. Co. v. Touart*, 97 Ala. 514; ²⁰² *Angell on Carriers*, sec. 202; *Hutchinson on Carriers*, sec. 766. The rule governing this class of cases cannot be more perspicuously stated, perhaps, than by comparing it with and differentiating it from the doctrine which obtains in respect of causes of action resting primarily on defendant's negligence in the carriage of persons. In these latter cases the contributory negligence of the plaintiff neutralizes and renders innocuous the causal negligence of the defendant, and destroys a cause of action resting upon it. But in the other class of cases, that to which the case at bar belongs, negligence upon either hand is regarded from an entirely different standpoint, and accorded an entirely different and contrary effect and operation, so to speak, on the rights of the parties. The unaided, uncontributed-to negligence of the plaintiff producing the injury is a defense, but where there is negligence also on the part of the defendant, without which, notwithstanding plaintiff's fault, the injury would not have happened, this fault of the defendant neutralizes and eviscerates the negligence of the plaintiff as a ground of defense. In the one case, plaintiff's contributory negligence destroys the cause of action; in the other, defendant's concurring negligence destroys the defense.

The evidence tended to show that the goods, for injury to which this action is prosecuted, were improperly and negligently packed or loaded by the consignor, who sold the goods to plaintiffs, and it afforded an inference, or rather room for an inference, that but for this fault of the seller and consignor the injury would not have occurred. But, though the jury had found in line with this tendency of the evidence, and deduced the conclusion therefrom that plaintiffs, or those for whose acts or omissions in the premises plaintiffs were responsible, were at fault, and that such fault had a causal connection with the injury, it was yet their duty to indulge the presumption that the defendant was also negligent in and about the transportation and delivery of the

goods, and that this negligence aided plaintiff's negligence to the result complained of, there being no evidence whatever on the part of the defendant, upon whom the burden in this regard rested, nor indeed any averment, to the contrary. It follows on this state of case the evidence without conflict showing the injury, ²⁰³ and the defendant having failed both in averment and proof to bring itself within the exception under which it in some measure attempted to shield itself from liability, that the jury should have been instructed, as requested in writing, to find for the plaintiffs if they believed the evidence. Upon the same considerations charge 3 requested by plaintiffs should have been given, charges 1 and 2 given for the defendant should have been refused, and defendant's pleas numbered 6, 7, and 8 should have been held bad. Charge 2 of plaintiffs' series is abstractly unsound, in that it is open to a reasonable construction whereby its effect would be to hold carriers liable when the loss or injury results from the fault of the shipper co-operating with the act of God or the public enemy. It is not essential to exemption from liability that the damages claimed should have resulted solely from any one of the exceptional causes. If two or all of such causes combine to produce the injury and the carrier is without fault, he, of course, is not liable.

The only other error we find in the record lies in the exclusion of the testimony of the witness Slater, to the effect that these cars were "well and carefully loaded." This was the mere opinion of the witness, it is quite true, but we think a sufficient predicate had been laid to render his opinion on that subject competent evidence.

If the consignor was at fault in the loading of the consignment, the plaintiffs, in our opinion, would be responsible therefor; the fault is imputed to them, the consignor having undertaken to properly load the goods for transportation to them. If the improper loading was apparent, that is, was a fact which addressed itself to the ordinary observation of the carrier's servants, or if it was not apparent, but the carrier was yet guilty of negligence, but for which the injury would not have happened, the carrier would be liable notwithstanding the negligence of, or imputable to, the plaintiffs. If the cars used in this transportation were close cars and came to the defendant with their doors closed, so that without opening the doors the condition of their contents could not be seen, we should say the improper loading, if they were indeed

improperly loaded, was not apparent within the meaning of the rule we have stated; in such case there would be, we think, no ³⁰⁴ duty on the connecting carrier to open the cars and inspect their contents, which were not of a character to require such attention, assuming proper loading in the first instance. Whether these cars were open or close cars, and if the latter, whether they were in fact closed when they came to defendant's road and while being transported over it, was not made to appear in the evidence adduced on the trial.

What we have said will, it is thought, be sufficient for the guidance of the lower court on another trial.

Reversed and remanded. _____

CARRIERS—LIABILITY OF.—A common carrier is virtually an insurer against all perils of transportation except the act of God or public enemies: *Willock v. Pennsylvania R. R. Co.*, 165 Pa. St. 184; 45 Am. St. Rep. 674, and note; *Adams Express Co. v. Darnell*, 31 Ind. 20; 99 Am. Dec. 582; and note; *Lewis v. Ludwick*, 6 Col. 368; 98 Am. Dec. 454, and note; note to *Richmond etc. R. R. Co. v. Benson*, 22 Am. St. Rep. 452.

CARRIERS—NEGLIGENCE OF SHIPPER—MANNER OF PACKING GOODS.—Where the plaintiff sent goods by defendant's railroad, having himself packed and secured them on the car, but so insufficiently that they broke from their fastenings and were damaged without defendant's fault, it was held that defendant was not liable even though the insufficient packing was known to its servants before starting: *Ross v. Troy etc. R. R. Co.*, 49 Vt. 384; 24 Am. Rep. 144. When there are hidden defects in the packing of goods delivered to a carrier, and damage results from that cause, the damage is held to be the act of the owner and the carrier is not responsible: *Klauber v. American Exp. Co.*, 21 Wis. 21; 91 Am. Dec. 452, and note.

CARRIERS—LIABILITY OF—BURDEN OF PROOF.—A loss of goods by a common carrier is presumed to have resulted from his negligence in the absence of any evidence as to how it occurred: *Georgia R. R. etc. Co. v. Keener*, 93 Ga. 808; 44 Am. St. Rep. 197; *Central R. R. Co. v. Hasseltus*, 91 Ga. 382; 44 Am. St. Rep. 37, and note; *Buck v. Pennsylvania R. R. Co.*, 150 Pa. St. 170; 30 Am. St. Rep. 800, and note.

ASHFORD v. PREWITT.

[102 ALABAMA, 264.]

ESCROW, DELIVERY OF DEED TO AGENT OF GRANTOR.—The mere delivery of the manual possession of a deed is not necessarily a delivery of the deed. In cases where the acceptance of an agency from both involves no violation of duty to either, it is competent for the releasor to make the agent of the releasee his own agent for the purpose of holding the deed as an escrow and returning it to him, the releasor, in case of non-performance of a stipulated condition. There is no such personal identity between the grantee and his agent as to exclude the latter from becoming the depository of the escrow.

A DEED DELIVERED IN ESCROW BECOMES OPERATIVE ONLY FROM THE PERFORMANCE of the condition and the actual delivery to the grantor.

RES JUDICATA.—JUDGMENT against a defendant rendered after a deed to him for the plaintiff has been placed in escrow, but before the happening of the condition upon which its delivery is authorized, does not affect title subsequently acquired by the actual delivery of such deed to the grantee therein.

R. C. Brickell, D. D. Shelby, and R. W. Walker, for the appellant.

J. B. Moore and Roulhac & Nathan, contra.

260 **STONE, C. J.** This litigation, in some of its forms, has been many times before this court. The land, which has been the subject of the various suits, is a tract of about seven hundred acres, lying in Lawrence county, south of the Memphis & Charleston Railroad. The descriptive numbers of the land are shown in the transcript. For the purposes of this suit we need go no farther back than to the time when the title was in Thomas H. Ashford, husband of Caroline Ashford, appellant in this cause. Some time between 1855 and 1860 Thomas H. Ashford sold and conveyed these lands to Richard Prewitt, Caroline, his wife, joining in the conveyance. They conveyed by warranty deed, and Prewitt went into immediate possession under his purchase. Some question was raised in some of the stages of the litigation whether Prewitt paid to Ashford the purchase money of this land; but we think the proof satisfactorily shows its payment long before any question was raised as to the rightfulness of his title. We will show further on that although the title was taken and held in the name of Thomas H. Ashford, the husband of Caroline, she claims that it was paid for with her money, part of the corpus of her statutory separate estate, invested by her husband and trustee in the land, and the title improperly taken in his name. Against this claim and

attempt of Mrs. Ashford to trace her money into the land, and to fasten an equity upon it, both Richard and Josephine Prewitt separately plead and set up that they are bona fide successive purchasers of the land from the said Thomas H., without notice of the equitable claim of said Caroline. This plea is in form sufficient, its averments are proved, and we think there is a failure of proof to trace notice to either of them. We have made these statements for the purpose of slabbing off these inquiries, as not presented by the present record: *Prewitt v. Wilson*, 103 U. S. 22.

In 1871 Mrs. Caroline Ashford, then the widow of Thomas H. Ashford, instituted a suit in chancery against the administrator of her deceased husband against Richard Prewitt, Josephine Prewitt, and certain creditors ²⁷⁰ of Richard Prewitt, the purpose of which was to have it declared and decreed that the lands in controversy, together with other lands, the title to which had been taken in the name of Thomas H. Ashford, had been purchased by him with moneys which were of the *corpus* of her statutory separate estate, and were rightfully her property. Richard Prewitt's defense was, that he had bought and paid for the lands and received a conveyance from Ashford and wife, without notice that her money had been used in the purchase. Josephine, who had title from Richard Prewitt, supplemented his defense with the averment and plea, that while she was single, in consideration that she would marry the said Richard, he, in 1866, conveyed said lands to her by warranty deed, and that thereupon, and in consideration thereof, she did marry the said Richard and became his wife; and that not until long afterward had she any knowledge or notice that the moneys of said Caroline had purchased the lands.

The administrator of one Liles, a creditor of said Richard Prewitt, had instituted proceedings to subject the lands in controversy to the payment of a debt of said Richard. The ground of his contention was, that the deed from Richard to Josephine Prewitt was fraudulent. A decree had been rendered dismissing the bill, and the case was pending on appeal in this court. In this condition of things, an agreement, in the nature of a compromise of the conflicting claims to the lands involved in this suit, was entered into between Mrs. Ashford and the Prewitts. That agreement, however, in no way affected the suit by Liles to subject the land to the payment of his claim. The agreement was entered into in No-

ember, 1875, and consisted of the following: Mrs. Ashford signed a quitclaim deed to Richard Prewitt, duly attested, which contains this clause: "In consideration of said alleged payment (payment of the purchase money by Richard Prewitt to Thomas H. Ashford), and other considerations me thereunto moving, I have, and do by these presents convey all the right, title, and interest I have in said above-described lands south of said line of railroad [the lands here sued for] to said Richard Prewitt." This deed was not delivered to Richard Prewitt, and was not intended to be delivered to him, except on a future contingency. It was delivered to J. B. ²⁷¹ Moore in escrow, accompanied by the written power and authority of Mrs. Ashford, which was also signed by her, and properly witnessed. Its terms were, and are here copied: "I have this day executed a quitclaim deed to certain lands in Lawrence county, Alabama—705 acres lying south of the Mem. & Ch. R. R.—to Richard Prewitt. Said lands are described in said deed. I have delivered said deed to J. B. Moore as an escrow, to be delivered to said Prewitt upon the happening of the following contingency: If a certain suit now pending in the supreme court of Ala.—*Lile's Admr. v. said Prewitt et al.*—is affirmed (decided in favor of Prewitt) said Moore is to deliver said deed to said Prewitt. Otherwise, he is to hold subject to my order."

One of the terms of the agreement was that the Prewitts were to desist from all further defense to the said suit of Mrs. Ashford for the recovery of other lands, in which she was seeking to fasten the same equity she asserted in the lands involved in this case. There is a contention that Prewitt, as one of the terms of the compromise, agreed and promised to furnish certain important testimony for Mrs. Ashford, in aid of her claim to the other lands sued for, and that he failed to do so.

This is denied. We do not think the proof in regard to the last alleged promise and its breach renders it necessary that we should comment upon it.

The result of said agreement of compromise was that the Prewitts, husband and wife, and their solicitors ceased to give attention to the cause, ceased to look after it, and prepared and offered no proof on its final hearing. They strictly observed and kept their agreement to make no further defense to the suit of Mrs. Ashford.

In October, 1877, Mrs. Ashford's suit to enforce a trust in

the lands was brought to a final hearing. She had a recovery as to the other lands sued for, and the Prewitts not being represented and offering no proof, it was decreed that she was entitled to the lands south of the railroad—the lands which are the subject of this suit. The decree of the chancellor declared that the legal title was vested in her, but no deed was made, or ordered to be made. Some steps were afterward taken to get rid of this decree, but nothing was accomplished by them. On an appeal from it to this court, it was affirmed ²⁷³ on certificate, no transcript having been filed.

The case of *Lile's Admr. v. Prewitt* was not finally disposed of in this court until October, 1881, when it was affirmed, the court holding that Josephine Prewitt's title under her deed from Richard Prewitt was paramount to the claim of the creditors of the latter. Richard Prewitt died in 1882, and in the year 1887 J. B. Moore delivered to his heirs the deed which Mrs. Ashford had placed in his hands as an escrow in 1875.

In 1887-88 the decree which Mrs. Ashford had recovered against the Prewitts in 1877 was executed, and she was put in possession of the lands, which are the subject of this suit, thus evicting Mrs. Prewitt and her subvendees. Thereupon, the persons thus evicted brought their several statutory real actions against Mrs. Ashford for the purpose of regaining the possession. Those suits were decided by the circuit court in favor of Mrs. Ashford; but, on appeal to this court, the judgments of the circuit court were reversed, this court holding that the legal title to the land was not in Mrs. Ashford, but was in Mrs. Prewitt and those holding under her, by virtue of Mrs. Ashford's quitclaim deed: *Prewitt v. Ashford*, 90 Ala. 294. One principle declared by this court was, that the facts of the case did not bring it within the influence of section 3595 of the code of 1886, and, not being governed by that statute, the "decree rendered by the chancery court, purporting to divest the legal title to land out of one person and vest it in another, does not, *proprio vigore*, confer a legal title which can avail anything in an action at law." This court further declared that "the plaintiff, on the facts proved, would have been entitled to the general affirmative charge in his favor."

The object of the present bill by Mrs. Ashford was and is to enjoin those statutory real actions for the recovery of the possession of the lands, and to obtain a decree declaring that by virtue of the decree in her favor rendered in 1877, she

became clothed with a paramount equity, which dominates the title of Mrs. Prewitt, and those claiming under her. The case was tried on pleadings and proof, and the chancellor denied her all relief, and dismissed her bill. From that decree the present appeal was prosecuted.

In *Jones v. Woodstock Iron Co.*, 95 Ala. 551, ²⁷² the case of *Prewitt v. Ashford*, 90 Ala. 294, was overruled as to the principle noted above. Under the later ruling, if held applicable to this case, we would feel forced to hold that the decree of the chancellor rendered in the former suit in 1877 vested the legal title in Mrs. Ashford, so far as the court was then capable of so vesting it. But to obviate any wrong or injustice that might grow out of the change, we added this clause to that opinion: "That no injustice may be done to litigants who, under the influence of the decision made in the case of *Prewitt v. Ashford*, 90 Ala. 294, have instituted proceedings to procure the legal title, we declare and hold that as to such cases the case of *Prewitt v. Ashford* operates as a rule of property." The effect of this declaration, which we have no intention of departing from, is to hold that the decree of 1877 did not clothe Mrs. Ashford with a legal title to the property sued for, but left it to be governed by *Prewitt v. Ashford*, 90 Ala. 294.

It is contended for appellant that the effect of the decree in *Ashford v. Prewitt et al.*, in 1877 was to bar and cut off all claim to the property involved in that suit, as against all parties to it; and inasmuch as Mrs. Prewitt was a party, she is concluded by the decree, and will not be heard to assert any rights in opposition to it. We regard this as the question of merit on this appeal.

In the original suit of Mrs. Ashford against the Prewitts, et al.,—the suit of 1871—J. B. Moore was solicitor for the Prewitts. The deed in escrow was placed in his hands to be delivered to Richard Prewitt, in the event the case of *Lile's Admr. v. Prewitt* was decided in favor of the latter. It is contended for appellant that inasmuch as said Moore was the attorney of Prewitt in that litigation, he could not be made the agent to receive and hold the deed in escrow, with authority to deliver to his own client on a contingency. The logic of this argument, if sound, would lead to this result: The delivery to Moore would be a delivery to Prewitt, his client, making it a completely executed conveyance—an operative title from that time. If that be the true doctrine as applied to the facts

of this case, the legal title to the lands was vested in Richard Prewitt, and through him in his wife, in 1875. Having the title, they could and should have defended the suit of 1871; and failing to do ²⁷⁴ so, the decree of 1877 in favor of Mrs. Ashford is a bar to the assertion of any title the Prewitts then held. *Shelby v. Tardy*, 84 Ala. 327, is relied on in support of this contention. It employed this language: "The general rule is, that a delivery of a deed to a grantee, or to his attorney, cannot be a delivery in escrow." The case of *Duncan v. Pope*, 47 Ga. 445, 451, had said: "If delivered to the grantee, or his agent, the delivery is complete, and the paper is not an escrow." What is said in *Shelby v. Tardy*, 84 Ala. 327, is certainly the general rule. As a general rule the attorney or other agent simply represents—stands in the shoes of—the client or principal, and a delivery to him as such attorney or agent is a delivery for the benefit of the principal, and is equivalent to a delivery to the principal. The controlling reason why a delivery to the principal, or to his agent as such, cannot be shown to be a delivery in escrow is, that when a deed is found in the possession of the grantee, the law presumes it is rightfully there, and that it has been delivered in consummation of the contract of sale. To allow parol proof that it was not a delivery in absolute right, but to take effect conditionally, would let in all the mischiefs intended to be guarded against by the statute of frauds: *Miller v. Fletcher*, 27 Gratt. 403; 21 Am. Rep. 356.

In *Cincinnati etc. R. R. Co. v. Iliff*, 13 Ohio St. 235, it was decided that "the mere delivery of manual possession of the deed is not necessarily a delivery of the deed; and in cases where the acceptance of an agency from both involves no violation of duty to either, it is competent for the releasor to make the agent of the releasee his own agent for the purpose of holding the deed as an escrow, and returning it to him, the releasor, in case of nonperformance of a stipulated condition. There is no such personal identity between the releasee and his agent as to preclude the latter from becoming the depositor of an escrow." In *Watkins v. Nash*, L. R. 20 Eq. Cas. 262, the court ruled that "The delivery to the solicitor of the grantee of an instrument executed by the grantor will not convert the instrument from an escrow into a deed, provided the delivery is of a character negating its being a delivery to the grantee." In Tiedeman on Real Property, enlarged edition, section 815, is this language: "It is always necessary

in delivering a deed as an ²⁷⁵ escrow to be explicit as to the intent with which the delivery was made, and it would be much more prudent if the delivery is accompanied by a memorandum in writing, explaining the character of the delivery to the bailee, and the terms of the condition upon which the delivery to the grantee depends. . . . In an escrow no title vests in the grantee until the second delivery": See, also, 1 Devlin on Deeds, sec. 316, and note 4; *Southern Life etc. Co. v. Cole*, 4 Fla. 359; 5 Am. & Eng. Ency. of Law, 450, note 1.

In this case, as we have shown above, we are not left in doubt, nor required to rely on the dangers and uncertainties attending oral testimony, in arriving at Mrs. Ashford's intention in delivering the paper to Mr. Moore. Her selection of him to be her agent, and the authority she conferred upon him, are all expressed in writing, signed by her, attested by her solicitor, and delivered to Moore contemporaneously with the paper with which he was intrusted, and which he was to deliver on the happening of an event, at that time contingent. We hold that the delivery in escrow was legal and valid, and that the paper did not take effect as a deed delivered at the time it was placed in his hands.

It is contended for Mrs. Ashford that the affirmance of the decree and judgment in the case of *Lile's Admr. v. Prewitt* was not the sole contingency, nor the sole consideration, on which the quitclaim deed was to be delivered. We confess that we are not satisfied by the testimony, either that an additional agreement was made, such as is claimed, or that if made, it has been violated. We will not discuss that proposition further, but decline to consider it as exerting any influence in reaching a proper conclusion in this case.

It will be remembered that the event upon which the quitclaim deed was to be delivered did not transpire until 1881. Till then there was no authority to deliver the paper; and if it had been delivered it would have vested no title, legal or equitable, in the grantee. It was not delivered until after the affirmance of *Lile's Admr. v. Prewitt*. What effect does the decree of 1877, rendered in the original suit of *Ashford v. Prewitt et al.* have on the right of Mrs. Prewitt and those holding under her to defend this suit? She was a purchaser for value from Richard Prewitt, and held his deed with full covenants ²⁷⁵ of warranty. Whatever title he acquired after executing that deed, no matter how acquired, passed *eo in-*

stanti to Mrs. Prewitt, his grantee, by virtue of the covenants in his deed to her: *Chapman v. Abrahams*, 61 Ala. 108, and authorities cited.

In *Frost v. Beekman*, 1 Johns. Ch. 288, Chancellor Kent said: "Every deed takes effect from the delivery; and the reasonable inference from the transaction is to consider the deed as operating from the time of the performance of the condition and the actual delivery to the grantee." In Tiedeman on Real Property, section 815, the author says: "The importance of distinguishing escrows from other deeds like those above described lies in this fact: escrows can operate only from the time that the condition is performed. A delivery before the performance of the condition will not have the effect of passing the title to the grantee, not even against innocent purchasers for value of the grantee": *Black v. Shreve*, 18 N. J. Eq. 455.

In 5 American and English Encyclopedia of Law, page 450, the principle is thus expressed: "If the deed is handed to a stranger, with instructions that the delivery of the deed shall depend upon the happening of an uncertain event, it is an escrow. . . . Escrows can only operate from the time when the condition is performed. A delivery before the performance of the condition will not have the effect of passing the title to the grantee. In an escrow no title passes until the second delivery." To the same effect see 6 Am. & Eng. Ency. of Law, 867.

In 3 Washburn on Real Property, marginal page 585, it is said: "Whether putting a deed into a third person's hands is a present delivery or an escrow, depends upon the intent of the parties. If the delivery depends upon the performance of a condition, it is an escrow; otherwise it is a present grant. . . . But if it be expressly delivered as an escrow, to be delivered at a future time, it is not a present conveyance. . . . When a deed has been delivered as an escrow, it has no effect as a deed until the condition has been performed, and no estate passes until the second delivery has been made; though when such second delivery has been made it relates back to the first for many purposes, and is considered as a consummation of an inchoate act then begun." Same author on page 586: "Until the performance of the condition, it [the deed] must remain a mere scroll in writing, ²⁷⁷ of no more efficacy than any other written scroll; but when, upon the performance of the condition, it is delivered to the

grantee or his agent, it then becomes a deed to all intents and purposes, and the title passes from the date of the delivery." Continuing on pages 586, 587, the same author says: "If, at the time of the first delivery, the lessor be a *feme sole*, and before the second delivery she take a husband, or, if before the second delivery she dieth, in this case if the second delivery shall not have relation to this intent to make it the deed of the lessor *ab initio*, but only from the second delivery, the deed in both cases should be void; and, therefore, in such case, for necessity, and *ut res magis valeat quam pereat*, to this intent by fiction of law it shall be a deed *ab initio*; and yet, in truth, it was not his deed until the second delivery": See *Hinman v. Booth*, 21 Wend. 267; *Hathaway v. Payne*, 34 N. Y. 92; *Coleman v. Lansing*, 65 Barb. 64; *Flagg v. Mann*, 2 Sum. 486.

We have now stated the rule which declares when an escrow deed takes effect, and we have stated the exceptions, the reason and necessity they rest on, and the extent of their operation. None of the exceptions affect this case, for Mrs. Ashford is not shown to have married or died after placing the writing in J. B. Moore's hands as an escrow. It had no effect as a conveyance of property, or any interest therein, until the happening of the event on which it was to be a second time delivered. Till then it could not be made the ground of an action or defense, either at law or in equity: *Malloney v. Horan*, 49 N. Y. 111; 10 Am. Rep. 335.

We hold that the decree of 1877, rendered in the suit of 1871, is no bar to the defense set up in this case, and that the quitclaim deed of 1875, under the testimony shown in this record, is a complete defense to this suit.

The decree of the chancellor is affirmed.

DEEDS DELIVERED IN ESCROW—WHEN BECOME OPERATIVE.—An escrow generally becomes operative from the date of the second delivery: *Well-born v. Weaver*, 17 Ga. 267; 63 Am. Dec. 235, and note. A deed delivered as an escrow does not, in general, take effect until the condition is performed: *Jackson v. Rowland*, 6 Wend. 686; 22 Am. Dec. 557, and note; *State Bank v. Means*, 15 N. J. L. 155; 28 Am. Dec. 400, and extended note; *Harkreider v. Clayton*, 56 Miss. 383; 31 Am. Rep. 369, and note; *Everts v. Agnes*, 4 Wis. 343; 65 Am. Dec. 314, and note; *Smith v. South Royallton Bank*, 32 Vt. 341; 76 Am. Dec. 179, and note.

DE LOACH v. ROBBINS.

[102 ALABAMA, 288.]

EXECUTIONS.—**MERE CLERICAL ERRORS** and failure to recite the judgment with strictness do not avoid the execution. If from the whole writ, taken in connection with other facts, the court feels assured that the execution offered in evidence was intended, issued, and enforced as an execution upon the judgment shown to the court, the writ should be received and respected.

AN EXECUTION PREMATURELY ISSUED on a valid judgment is not on that account void.

AN EXECUTION ISSUED ON A DORMANT JUDGMENT before revivor is not void, and if not set aside, a sale under it must be sustained.

JUDGMENT AND EXECUTION, EVIDENCE TO CONNECT.—**PAROL EVIDENCE** is admissible to explain any mere immaterial variations between an execution and a judgment, and an execution docket is admissible to identify and unite the judgment and execution issued upon it.

EXECUTION SALES.—**A SHERIFF'S SALE MADE UNDER TWO EXECUTIONS** is good if either is valid.

APPELLATE PROCEDURE.—**WHERE A BILL OF EXCEPTIONS DOES NOT PURPORT** to disclose all the evidence given, the appellate court will not presume that errors in excluding evidence offered by the losing party were cured by evidence offered by his adversary, and therefore, could have justified a general charge in favor of the latter.

PLAINTIFF as the administrator of John Black recovered judgment at the fall term of 1868 of the circuit court against the defendant for six hundred and eighty-four dollars and ninety-five cents and costs of suit. In the spring term of 1873, John B. Colly recovered judgment against the defendant for two hundred and thirty-nine dollars and fifty-three cents. Executions were issued, or attempted to be issued, on these judgments, but the date of the first-named judgment was described as of the 15th of October, 1868, and the other judgment and the execution issued upon it were described as of the 24th of April, 1873. On the first judgment three alias executions were issued, the two first of which give the date of the judgment as October 13, 1868, and the last described the judgment correctly in all respects, except that its amount was stated to be six hundred and eighty-four dollars, and its date April 20, 1871. The plaintiff, to connect the judgment in evidence with the execution, testified that he had never recovered or had any other judgment against the defendant than the one admitted in evidence, and that there was no judgment on the records of the court in favor of John De Loach as administrator except the one offered in evidence. The court sustained the defendant's objections to

these executions and excluded them from evidence, and also refused to receive a certain docket in evidence for the purpose of connecting the judgment and executions relied upon. The court, at defendant's request, gave a general charge in his favor to which the plaintiff excepted. Judgment for defendant, plaintiff appealed.

J. W. Posey, for the appellant.

J. N. Miller, *contra*.

294 HARALSON, J. 1. While it is true that an execution should follow and correspond with the judgment on which it issues, yet, justice and reason do suggest that mere clerical errors or failures to recite the judgment with strictness ought not to avoid the execution; and it is everywhere, so far as we have observed, so decided. And when an execution is offered in evidence to support a sale made under it by a sheriff after levy, and it varies from the judgment in some respects, the question then before the court is, "Did this execution issue on this judgment? If from the whole writ, taken in connection with other facts, the court feels assured that the execution offered in evidence was intended, issued, and enforced as an execution upon the judgment shown to the court, then, we apprehend, the writ ought to be received and respected. . . . Where sufficient appeared on the face of the execution to connect it with the judgment, courts have frequently disregarded variances in the names of parties, in the date, or in the amount of the judgment": Freeman on Judgments, sec. 43, p. 113, note 3, and authorities there cited; 7 Am. & Eng. Ency. of Law, 123, 124, note 13; *Samples v. Walker*, 9 Ala. 726; *McCollum v. Hubbert*, 13 Ala. 282; 48 Am. Dec. 56; *Steele v. Tutwiler*, 68 Ala. 110; *Sandlin v. Anderson*, 76 Ala. 403; *Davis v. Kline*, 76 Mo. 310. In the case last named, two executions and the sheriff's deed thereon recited judgments in the year 1875, while the minutes of the court showed they were rendered in 1876. There being other evidence to show that the executions were in fact issued on these judgments, it was held that the variance was a clerical misprision, and would not invalidate the execution.

2. Where an execution has prematurely issued on a valid judgment, as we have held, it is not on that account void, but only irregular and voidable, and not having been set aside in a direct proceeding for that purpose ²⁹⁵ a sale under it cannot be collaterally impeached, and, where exe-

cution has issued after the lapse of ten years from the date of the last preceding one, it is merely irregular and voidable, and a sale under it, as for such an irregularity, as we have repeatedly held, will be sustained: *Sandlin v. Anderson*, 76 Ala. 403; *Leonard v. Brewer*, 86 Ala. 390; *Waldrop v. Friedman*, 90 Ala. 157; 24 Am. St. Rep. 775; *Olmstead v. Brewer*, 91 Ala. 124.

3. Parol evidence is always admissible to point out and connect the writing with the subject matter, and identifying the object proposed to be described. And so such evidence is admissible to explain away any mere immaterial and not substantive variations between an execution and the judgment on which it issued: *Guilmartin v. Wood*, 76 Ala. 204; *Corbitt v. Reynolds*, 68 Ala. 378; *Doe v. Pickett*, 51 Ala. 584. And, on still higher grounds, the execution docket of the clerk is admissible, in such connection, to identify and unite a judgment and executions which issued on it, for this is record evidence, such as the law requires to be kept for such purposes among others: Code, sec. 768, subd. 7.

4. Let the foregoing principles be applied to this case. The two judgments on which the executions issued were, so far as appears, in all respects regular and valid: one in favor of the plaintiff, John DeLoach, as administrator of John Black, at the fall term of the circuit court of Monroe county, 1868, against defendant, T. J. Robbins, for six hundred and eighty-four dollars and ninety-five cents, besides costs; and the other, in favor of John B. Colly against the defendant, at the spring term of said court, 1873, for two hundred and thirty-nine dollars and fifty-three cents and costs. Executions issued, as was shown, on each of these judgments, returnable to the next term of the court after their rendition, respectively. The plaintiff in the second judgment, John B. Colly, died after its rendition, and plaintiff, DeLoach, became his administrator, and, on proof of these facts by affidavit of plaintiff, the clerk of the court thereafter issued execution on said judgment in favor of the plaintiff, as administrator of said Colly, under which the land in question was sold by the sheriff, and plaintiff became the purchaser, the sale having been made under this and the other execution issued in the Black administration case at the same time.

In the other case—that of DeLoach, administrator of Black, against the defendant—after the issuance of the ²⁹⁶ original execution, aliases were issued on the 25th of October, 1876,

15th of May, 1887, and 9th of June, 1885. In some of these there were irregularities, some slight and others of a graver character. It is unnecessary to mention them. A sale of the property levied on was made by the sheriff under the last-named execution, but when it was offered, and the sheriff's deed with it, objection was made on account of a variance between the judgment and execution. The plaintiff offered evidence, all of which was admissible for the purpose, to explain the variance and to show that it was the result of clerical error, and that the execution, as a matter of fact, issued on the judgment in evidence. The objection of the defendant to the introduction of this evidence was improperly sustained by the court. It showed a judgment against defendant, an execution thereon, levy and sale to the plaintiff by the sheriff, and a proper deed from him to the plaintiff, to convey the interest of defendant in the lands. But if there were any legal objections to the validity of the sale under this execution, alias executions were issued afterward on both of said judgments—presumably to obviate any irregularities which might have intervened as affecting the first sale, by which it might be set aside—were placed in the hands of the sheriff, together with the execution in the Colly case, were both levied on the same land, which was sold thereunder by the sheriff, and plaintiff again became the purchaser, and the sheriff made him a deed, in all respects formal and duly executed, to convey to him the right and title to the lands as sold under said execution. The only alleged barrier to the validity of this last sale, so far as appears, is that the execution in the DeLoach judgment was issued on a judgment on which no execution had issued for more than ten years, a fact not sustained by the evidence, but which, if true, did not render said sale void, even as to that execution. A sheriff's sale, when made under two executions, as in this case, either of which is valid, is sufficient to transfer to the purchaser the defendant's title to the property sold: 12 Am. & Eng. Ency. of Law, 225, note 4.

5. The bill of exceptions does not purport to set out all the evidence. The greater part of that offered by plaintiff, and on which he rested his right to recover, was excluded by the court; and, on this state of case, ²⁹⁷ the defendant asked, and the court gave, the general charge in his favor. This charge could not have been properly given if the evidence

offered by plaintiff, which was improperly excluded, had been admitted. We cannot presume that any other evidence which defendant might have offered, if any, not included in the record, would have cured the error of the exclusion of plaintiff's evidence, and justified the general charge given for defendant.

Reversed and remanded. —

EXECUTION.—VARIANCE BETWEEN AN EXECUTION AND A JUDGMENT does not render the former void if it is shown to be intended, issued, and enforced as an execution upon the latter: *Anderson v. Gray*, 134 Ill. 550; 23 Am. St. Rep. 696. See, also, the extended note to *Graham v. Price*, 13 Am. Dec. 201-203.

EXECUTION—EFFECT OF PREMATURE ISSUE.—An execution prematurely issued on a valid judgment is irregular and voidable, but not void: *Waldrop v. Friedman*, 90 Ala. 157; 24 Am. St. Rep. 775, and note with the cases collected.

EXECUTIONS ISSUED ON DORMANT JUDGMENTS.—Under a statute providing that after five years an execution shall not issue upon any judgment except on motion followed by the issuance of summons, as in actions at law, an execution issued without such proceedings is not absolutely void, but merely voidable, and is not subject to collateral attack: *Eddy v. Coldwell*, 23 Or. 163; 37 Am. St. Rep. 672. If the right of action on a judgment is barred by the statute of limitations, execution cannot issue thereon, nor can a valid levy or sale be made thereunder: *Ludeman v. Hirth*, 96 Mich. 17; 35 Am. St. Rep. 588, and especially the note thereto.

PARRISH v. HASTINGS.

[102 ALABAMA, 414.]

VENDOR'S LIEN.—Where the purchase price is promised to be paid in money, even if there be a stipulation that it may be discharged in something else, and there is a failure to so discharge it at the time stipulated, a suit may be maintained to enforce a vendor's lien for the amount remaining unpaid.

VENDOR'S LIEN—PURCHASE PAYABLE IN PROPERTY OR SERVICES.—If a purchaser of real property, in addition to paying a sum designated, agrees to fence it and to construct stock gaps where the outer fences are crossed and to provide road crossings at convenient places, no vendor's lien exists for the amount of damage sustained in the event of the failure of the vendee to perform the acts agreed by him to be done. The only remedy is either by an action at law for damages or by a suit in equity to enjoin the use of the land until the terms of the contract of purchase are complied with.

SUIT to enforce a vendor's lien against certain lands which had been sold to be used as a right of way for a railroad. The deed recited the payment of a consideration of three

thousand dollars and the agreement by the vendee to fence the lands and to make stock gaps where the outer fences are crossed, and to provide common road crossings at convenient places. While the money had been paid, the vendee had not done the other acts agreed by him to be done, in consequence of which it was alleged that the vendor had been damaged in the amount of two thousand dollars. He therefore asked that a lien be declared against the property for that sum, or that the defendant be compelled to do the things required in the deed of conveyance. The defendants demurred to the bill, and the demurrer being overruled, they appealed.

Simpson & Jones, for the appellant.

Jackson & Sawtelle, contra.

⁴¹⁵ STONE, C. J. The bill in this case was filed to enforce a vendor's lien. There is probably no principle of common or equity law which has given rise to more divergence, if not contrariety of judicial opinion, than the one which is presented by this record: 3 Pomeroy's Equity Jurisprudence, sec. 1251, and note. The decisions of this court have extended the relief as far as those of any other court, and much farther than several of them have gone. Many principles connected with this doctrine are so clearly established as to require only to be stated. Of these clearly established principles we state only the following: The subject of the sale must be only an interest in real estate, and the price promised must have no other consideration than the land purchased. If anything other than the land ⁴¹⁶ constitute part of the consideration, and the promise to pay is of a sum in gross for the two or more things purchased, then a bill to enforce a vendor's lien cannot be maintained. In such case it cannot be known how much of the promise to pay rested on the land for its consideration: *Jones v. Ball*, 94 Ala. 529; *Bridgeport Land etc. Co. v. American etc. Car Co.*, 94 Ala. 592; *Betts v. Sykes*, 82 Ala. 378; *Williams v. McCarty*, 74 Ala. 295; *Stringfellow v. Ivis*, 73 Ala. 209.

When sale is made on credit, and title is retained by the vendor, there is a lien for the unpaid purchase money, whether independent, separate security is taken or not: *Chapman v. Chunn*, 5 Ala. 397; *Kelly v. Payne*, 18 Ala. 371; *Conner v. Banks*, 18 Ala. 42; 52 Am. Dec. 209; *Wimbish v. Montgomery etc. Assn.*, 69 Ala. 575; *Lowery v. Peterson*, 75 Ala. 109.

When sale and conveyance are made, the purchase money

remaining unpaid, there is a lien for the unpaid purchase money, unless independent, separate security has been taken; but this lien will not be enforced against a bona fide purchaser of the land, who purchased and paid in ignorance that the purchase money was unpaid: *Burns v. Taylor*, 23 Ala. 255; *Moore v. Clay*, 7 Ala. 742; *Wells v. Morrow*, 38 Ala. 125; *Shorter v. Frazer*, 64 Ala. 74.

When the purchase price is promised to be paid in money, even if there be a stipulation that it may be discharged in something else, and there is a failure to so discharge it at the time stipulated, this leaves the agreement as nothing less than a promise to pay money, and a bill can be maintained to enforce the vendor's lien: *Bridgeport Land etc. Co. v. American etc. Car Co.*, 94 Ala. 592, and authorities cited; *Plowman v. Riddle*, 14 Ala. 169; 48 Am. Dec. 92. The foregoing principles are very clearly settled.

It is contended for appellants that the bill in this case will not lie; that it presents no case for the enforcement of a vendor's lien, and if the complainant, Hastings, has any remedy, it is a suit at law for a failure on the part of Parrish and Riverton Land Company to execute their part of the agreement, namely, to erect the stock gaps, construct the crossings and fence the railroad track, as their deed bound them to do. Among other authorities ⁴¹⁷ they rely on *McDonald v. Elyton Land Co.*, 78 Ala. 382, and *Bridgeport Land etc. Co. v. American etc. Car Co.*, 94 Ala. 592.

In the cases referred to there was no agreement on the part of the purchasers to do any service or work on, or adjoining to, the lands the sellers retained, with a view to the betterment or less disturbed enjoyment thereof. Neither the nature nor the object of the works stipulated to be done looked to that end. Their object was to enhance, incidentally, the value of other landed interests retained by the vendor, or to promote some other interest which was not the direct subject of the negotiation and sale. Neither of those cases furnished a rule or money standard by which the injury suffered from the breach could be measured or ascertained. They sounded in damages merely, were entirely speculative. Still, they were not decided on that ground. The case in 78 Alabama went off largely on the fact that Mrs. McDonald was a married woman, and could not make a binding personal covenant; while the subsequent change of the contract also exerted its influence in leading to the conclusion reached by this court.

So, in the case of *Bridgeport Land etc. Co. v. American etc. Car Co.*, 94 Ala. 592, the bill failed, because the land sale was not a simple, single sale of the land at an agreed price, but it was blended in one transaction with other agreements and stipulations, which neither furnished nor left any data for determining definitely the agreed purchase price of the land.

The present case is not distinguishable in principle from *Hooper v. Savannah etc. R. R. Co.*, 69 Ala. 529. In that case, as in this, a money price was paid for the right of way, with a further stipulation by the railroad company "to fill, level, or grade every street which leads to or around Block A, where George D. Hooper resides, which is cut by said railroad, in such a manner and to such an extent as to make the crossing of said railroad by each of said streets as ample and as convenient as it is possible to make them, consistently with the running and use of said railroad, and this grading, filling up, and leveling to extend to the width of twenty feet, and to be always kept up by the company; provided, however, that a bridge, if deemed advisable by both parties, may be built by the company across the railroad on Washington 418 street." The railroad company paid the money agreed to be paid, but failed and neglected to do the work on the streets they had agreed to do. Hooper filed a bill to enforce a vendor's lien, and to recover the damages he alleged he had sustained by the railroad's failure to keep its contract in reference to the streets. This court held he was entitled to the relief he prayed. We said: "Entering upon the lands, acquiring possession by contract with the appellants, the relation of the parties is that of seller and purchaser. If the company had stipulated to pay, and the appellants had agreed to accept, a specific sum of money, as just compensation for the lands taken, that sum would, of necessity, have embraced all compensation the appellants could have claimed for the interruption or obstruction of the highways leading to and from these lots, or because of the diminished value of the lots from any cause, in the appropriation of parts of them to the uses of the company. That sum would have been as essentially the purchase money of lands, or of a right and interest in and to lands, as when between natural persons there is a bargain and sale for a specified price. What difference is there in right and principle, when a specific sum is promised and paid as partial compensation, and there is

a promise to repair an injury by work and labor, which lessened the value of the remaining lands of the owner, for which he is entitled to compensation? If the injury is not repaired, the owner suffers loss, and the company gets the land without making the compensation justly due, without paying the consideration upon which it was let into possession. The real foundation of the lien of a vendor for the purchase money of lands is, that it is against good conscience for one man to get and keep the lands of another, without paying the consideration promised to be paid for them. For the performance of the contract by the company, in all its parts, it is evident the appellants relied, and the company intended they should rely, on the lands taken as a security. The retention of the legal title is very strong, if it is not conclusive evidence of this reliance. The terms of the contract are conclusive—it is only in return for the performance by the company of the contract that the appellant's promise to give the company 'the right to run their road through said block, on the roadbed, as at present graded, and ⁴¹⁹ to the use of all of lot number 4, on the north side of said railroad track, and the right of way on lot number 4 to the extent of twenty-five feet from the center of said railroad track.'

The case of *Hooper v. Savannah etc. R. R. Co.*, 69 Ala. 529, is supported by *Cooper v. Anniston etc. R. R. Co.*, 85 Ala. 106; *Walker v. Ware etc. Ry. Co.*, L. R. 1 Eq. Cas. 195; *Pierce on Railways*, 169, note 5; *Dayton etc. R. R. Co. v. Lewton*, 20 Ohio St. 401; *Trustees v. Lynch*, 70 N. Y. 449; 26 Am. Rep. 615. The following decisions of this court assert a kindred principle: *Neel v. Clay*, 48 Ala. 252; *Cordova Coal Co. v. Long*, 91 Ala. 538; *Smith v. Vaughan*, 78 Ala. 201.

In *Bridgeport Land etc. Co. v. American etc. Car Co.*, 94 Ala. 592, the case of *Hooper v. Savannah etc. R. R. Co.*, 69 Ala. 529, is referred to without express dissent, but there is a statement, not necessary to the decision rendered, which can hardly be reconciled with the *Hooper* case. That statement is as follows: "In the case at bar, if the plaintiffs had obtained a judgment in a court of law against the respondents for a breach of contract for failing to perform the covenants agreed to as the consideration for the conveyance of the land, and there were no other difficulties in the way, we hold a vendor's lien could be enforced against the land to secure the payment of the judgment."

In that case there was a reason for requiring that the

amount of damages should be first ascertained by the verdict of a jury. The nature of the contract and the consequence of its breach were such that the amount of the injury could not be measured by any money standard. In the case we have in hand, like the case of *Hooper v. Savannah etc. R. R. Co.*, 69 Ala. 529, the amount of damages is the diminution in value of the land retained by the vendor, caused by the purchaser's violation of his contract. In other words, the comparative value of the land, with and without the fences, stock gaps, and road crossings.

My own wish is to adhere to the decision rendered in the case of *Hooper v. Savannah etc. R. R. Co.*, 69 Ala. 529. That decision was rendered twelve years ago, and has been quoted with apparent approval: *Cooper v. Anniston etc. R. R. Co.*, 85 Ala. 106. See, also, *Thornton v. Sheffield etc. R. R. Co.*, 84 Ala. 109; 5 Am. St. Rep. 337.

My brothers, however, hold that in a case like the present, a bill will not lie to enforce a vendor's lien, on ⁴²⁰ the facts set forth in this bill. The result is that the decretal order of the district court must be reversed.

We all agree that in a case like the present appropriate relief can be sought for in an action at law for damages, or by injunction to restrain the use of the right of way until the terms of the contract are complied with: *New Orleans etc. R. R. Assn. v. Jones*, 68 Ala. 48; *Jones v. New Orleans etc. R. R. Assn.*, 70 Ala. 227; *Thornton v. Sheffield etc. R. R. Co.*, 84 Ala. 109; 5 Am. St. Rep. 337; *Cooper v. Anniston etc. R. R. Co.*, 85 Ala. 106; *Cordova Coal Co. v. Long*, 91 Ala. 538; *Jersey City etc. R. R. Co. v. Jersey City etc. Horse R. R. Co.*, 20 N. J. Eq. 61; *Cozens v. B. Ry. Co.*, 1 Ch. App. 593.

Reversed and remanded.

VENDOR'S LIEN—WHEN DOES NOT ARISE.—To create a vendor's lien there must be a debt for unpaid purchase money in fixed amount, due directly to the vendor. If the vendee's obligation consists of a collateral covenant, or is the discharge of the liability of a third person and the conveyance is absolute, no lien is retained: *Harvey v. Kelly*, 41 Miss. 490; 93 Am. Dec. 267, and note, citing *Denson v. Taylor*, 53 Miss. 700, in which it was held that the purchase price of the land was to be paid other than in money, still a vendor's lien might be enforced.

GOLDTHWAITE v. JANNEY.

[102 ALABAMA, 431.]

PARTNERSHIP.—REAL ESTATE ACQUIRED WITH PARTNERSHIP FUNDS OR CREDIT AND FOR PARTNERSHIP PURPOSES is regarded in equity as partnership property, and as such it is subject to the payment of the partnership obligations in preference to the individual debts of the partners. It is not material in whom the legal title stands.

PARTNERSHIP.—REAL ESTATE.—PRIMA FACIE the ownership of lands standing in the name of the partners is vested in them as tenants in common. This presumption may be rebutted by evidence, whether parol or not, that in the intention of the parties it was purchased for and used as partnership property.

PARTNERSHIP.—WHETHER REAL ESTATE BELONGS TO THE FIRM or to the individuals composing it depends on the intention of the parties.

PARTNERSHIP REAL ESTATE.—A PARTNERSHIP IS NOT ESTOPPED from proving that real property purchased with firm funds by one of the partners who took a conveyance thereof in his own name and placed it on record is partnership assets, except as against bona fide purchasers without notice. Creditors of the partner in whose name the property stands of record are not entitled to protection as bona fide purchasers, though he and the firm have become insolvent, and the assets are subject to distribution in a court of insolvency.

PARTNERSHIP.—CREDITORS AS SUCH HAVE NO LIEN ON THE PARTNERSHIP ASSETS, and the creditors of an individual partner cannot acquire any greater interest in such effects than the partner himself is entitled to.

PARTNERSHIP REALTY.—PRIORITIES BETWEEN PARTNERSHIP AND INDIVIDUAL CREDITORS.—If a partnership becomes insolvent, a creditor of one of the partners cannot diminish the partnership assets to the prejudice of those who are creditors of the firm only.

PARTNERSHIP.—REAL ESTATE PURCHASED FOR PARTNERSHIP PURPOSES AND WITH INTENT TO MAKE IT PARTNERSHIP PROPERTY, though the title is taken in the name of one partner only, is not his individual property to the extent of his claims against his firm for advancements made by him to it, and therefore his individual creditors are not entitled to a lien on such real property to the extent of the advances so made.

PARTNERSHIP.—FUNDS UNLAWFULLY APPLIED TO THE PURPOSES OF, LIEN UPON.—If one holding money as receiver lends it to the firm of which he is a member, he is guilty of a breach of trust, but this does not create any lien against the property of the firm in favor of the persons entitled to the moneys so misappropriated by the receiver.

SUIT by trustees under a general assignment by the firm of Moses Brothers, consisting of H. C., A. H., and M. L. Moses. Adolph, Isaac, and Rose Abraham petitioned in their own behalf and in behalf of other individual creditors of H. C., A. H., and M. L. Moses, alleging that in the property assigned by Moses Brothers was included a large amount of private property owned individually by the respective members of the firm. They prayed that the private property of the partners be ascertained, and that the individual claims

against the partners be paid out of such property, and that the trustees be restrained from paying the general creditors of the firm any portion of the property until the individual debts were paid in full. It was decreed that all the property assigned by the partners for the benefit of creditors, whether the title stood in the name of the firm or any part thereof, except certain residences of members of the firm, constituted firm assets to which the firm creditors were primarily entitled. In September, 1883, Robert Goldthwaite, as receiver in the suit of *Paul v. Knox et al.*, joined himself as a party complainant in the petition of the Abrahams, alleging that, as such receiver, he was the successor of H. C. Moses, who, while acting as receiver, had loaned to the firm trust funds to the amount of eighteen thousand dollars and upwards; that the firm was indebted to H. C. Moses for the amount which he thus advanced to the firm; and that he held the legal title to some real estate which in equity belonged to the firm. The petition then prayed that it be directed and ordered that all the property to which H. C. Moses held the legal title at the date of the assignment of the firm be regarded as his individual property so far as this petitioner was concerned, and that out of the proceeds of such property there be paid to him the amount thus misappropriated by H. C. Moses for the benefit of his firm. Demurrers were sustained to all the petitions, and both the Abrahams and Goldthwaite appealed.

Brickell & Gunter, for Robert Goldthwaite, and *David T. Blakey*, for Abraham.

Tompkins & Troy, and *Horace Stringfellow*, contra.

427 HARALSON, J. The sole question for decision in this case, as respects the rights of the Abraham petitioners is, whether the property in question belonged to the individuals composing the firm of Moses Brothers or to the firm itself; and Goldthwaite, receiver, has, also, an equal interest in the determination of that question. If it was individual property it must be distributed among the individual creditors of that insolvent firm; but if in equity it belonged to the partnership, it is to be distributed, with the other property belonging to the firm, to its creditors. There was real estate, the title to which stood in the names of the individual members, and stocks standing on the books in the names of one or another of the individuals, schedules of which real estate and stocks

are attached to the petitions. These lands and stocks were included in the general assignment of Moses Brothers, and came into the possession of the appellees, as assignees, and they claim them as the property of the said firm, subject to distribution among its creditors, and not to the creditors of the individuals composing the said firm, whereas the petitioners claim said property as belonging to the individuals in whose name the bills appear, and not to the firm of which they were members.

It is a rule of universal recognition that real estate acquired with partnership funds, or on partnership credit, and for partnership purposes, is regarded in a court of equity as partnership property, and is subject to the payment of partnership debts, in preference and priority to the separate debts of the several parties; and it is wholly immaterial, says Judge Story, "in the view of a court of equity, in whose name or names the purchase is made and the conveyance is taken; whether in the name of one ⁴²⁸ partner, or of all the partners; whether in the name of a stranger alone or of a stranger jointly with one partner. In all these cases, let the legal title be vested in whom it may, it is in equity deemed partnership property, not subject to survivorship; and the partners are deemed the *cestuis que trust* therefor": 2 Story's Equity, sec. 1207; *Hatchett v. Blanton*, 72 Ala. 423; *Little v. Snedecor*, 52 Ala. 167; *Offutt v. Scott*, 47 Ala. 104; *Coles v. Coles*, and *Dyer v. Clarke*, 1 Am. Lead. Cas., Hare & Wallace's notes, 592, 595.

Whether the land belongs to a firm or to one of the individuals composing it—when the title is in his name, and not in that of his firm—must be solved by what appears to have been the intention of the parties. Prima facie, ownership is where the muniment of title places it, but if by all the circumstances attending the transaction—which may be shown by parol if there is no written evidence—it is made to appear that in the intention of the parties it was purchased for and was treated as partnership property, that presumption of ownership arising from the face of the deed will be overcome, and the property will be treated as belonging to the partnership: Authorities supra.

It had been insisted that when a partner buys real estate for his firm with its money, and takes the title in his own name, which title is spread upon the records of the county, those who have financial dealing with him are presumed to have done so on the faith and credit of that property, and

the partnership is estopped afterward to claim the property against the claims of the creditors of such partner. This doctrine is true, certainly, in cases of bona fide purchasers of such property for value, and without notice that it belonged to the partnership. But it cannot be extended further without overthrowing all our adjudications on the subject, as well as the general current of authorities everywhere. No man has a lien on the property of another with whom he deals, whether he is a member of a partnership or not, unless it is conferred by contract or by some rule of law. A creditor of one who is a member of a partnership can never put his hand on such a partner's interest in the firm, until the assets of the firm have been applied to the full payment and discharge of all debts and liabilities of ⁴³⁹ the partnership, and after discharging these the residuum is still held in trust for distribution among the several partners, according to their several interests. A lien exists in favor of each partner on the partnership effects to secure these results, and for the one as well as the other. This lien, as a general thing, exists only in favor of the several partners. They may sell the firm's property, may convey it to one of their own number, may partition or divide, and the lien will thereby be destroyed.

Creditors, as such, cannot be said to have any lien on the partnership effects. There are conditions in which a creditor has been allowed to avail himself of this quasi lien of a partner, but it is derivative only, and not of original existence. But in no event can a creditor of an individual partner acquire any greater interest in the assets of the firm of which the partner is a member than the partner himself is entitled to, which is nothing if the partnership is insolvent. The stream, in law, cannot, any more than in nature, rise higher than its source.

Lindley, in his work on Partnerships, states the principles so aptly, we quote what he says on the subjects. Subject to certain exceptions, within which this case does not fall, he says: "It is an established rule that a partner in a bankrupt firm shall not prove in competition with the creditors of the firm. They are, in fact, his own creditors, and he cannot be permitted to diminish the partnership assets to the prejudice of those who are not only creditors of the firm, but also of himself. If, therefore, a partner is a creditor of a firm, neither he nor his separate creditors (for they are in no better position than himself) can compete with the joint credit-

ors as against the joint estate. Lord Hardwicke, it is true, in *Ex parte Hunter*, 1 Atk. 223, allowed this to be done; but that case has not, in this respect, been followed, and has long been considered as overruled": 2 Lindley on Partnership, Rapalje's ed., *721, and authorities cited; *Hart v. Clark*, 54 Ala. 490; *Warren v. Taylor*, 60 Ala. 218; *Farley v. Moog*, 79 Ala. 153; 58 Am. Rep. 585; *Goldsmith v. Eichold*, 94 Ala. 116; 33 Am. St. Rep. 97; *Buchan v. Sumner*, 2 Barb. Ch. 167; 47 Am. Dec. 305; *Jones v. Fletcher*, 42 Ark. 422; *Paige v. Paige*, 71 Iowa, 318; 60 Am. Rep. 799; Story on Partnership, secs. 97, 360, 361; 13 Am. & Eng. Ency. of Law, 611; 17 Am. & Eng. Ency. of Law, 1195.

The written agreement executed between the partners ⁴⁴⁰ on the 17th of May, 1879, recites that, in the course of their business, the three brothers, composing the firm of Moses Brothers, had acquired titles to real estate in the individual names of one or the other of said parties, and it was provided by that agreement that all real estate or interest therein then held by either of the members of that firm, in his individual name, was the property of the partnership, having been brought into the firm, or bought with its funds for partnership purposes.

The testimony of M. C., H. C., and A. H. Moses, taken before the register, shows that the acquisition of real estate after that agreement was signed continued as before, viz., that in many instances the title was taken in the names of the partner effecting the transaction, but all real estate, whether the title was so taken or in the name of the firm, was bought for the firm, paid for out of its funds, and was taken and treated as its property, and not as the property of the member in whose name the title stood, excepting the residences of H. C. and A. H. Moses in Montgomery, and the residence of said A. H. Moses in Sheffield, and a lot given to him in Sheffield by the Sheffield Iron & Coal Company. A careful review of all the evidence satisfies us that the decree of the chancery court on this question was correct.

Let us now refer specially to the petition of Robert Goldthwaite, as receiver in the case of *Paul v. Knox*, in which it is stated that petitioner's claim had been adjudicated and allowed in this case for eighteen thousand one hundred and eight dollars and eleven cents, as a claim against the estate of H. C. Moses; that said claim arose on account of trust funds in said Moses' hands as a receiver in the case of *Paul*

v. *Knox*, which he advanced to the firm of Moses Brothers, of which he was a member, without taking the security required by the court; that Moses Brothers were indebted to said H. C. Moses for said advances at the time of the general assignment made by them and the members of said firm, and are still indebted to him for the same, and at the time of said assignment, "besides the property belonging to H. C. Moses individually, and to which he had the legal title, he also held the legal title to some real estate, which, in equity, belonged, after the adjustment and payment of the claims of said H. C. Moses against said firm, to said firm of Moses Brothers; that as between said H. C. Moses ⁴⁴¹ as an individual and the said firm of Moses Brothers, the said H. C. was, at most, the trustee of the legal title of the property so held by him for said firm after the adjustment and payment of the said debt due by said firm to him, on account of said funds so advanced by him for the use of said firm, and that said property to which he, said H. C. Moses, thus held the legal title individually, was the individual property of said Henry Moses in equity, to the amount and extent of said advances for said firm, and being so, petitioner, as the creditor of said Henry C. Moses and the holder of said debt, is entitled to have said property regarded as the individual property of said Henry C. Moses, and to be paid out of the proceeds thereof, if the same is sufficient therefor." We have quoted this language of the petition to show the more plainly the position and contention of the petitioner. In short, this is the statement of the proposition, that real estate belonging to a partnership, but standing in the name of one of the partners at the time of the insolvency of the firm, is the individual property of such partner to the extent of his claim against the firm, so that, to such extent, such property must be distributed among his individual creditors rather than among the creditors of the partnership.

When H.C. Moses lent the money in his hands, as receiver, to Moses Brothers he was guilty of a breach of trust, in which his firm participated if they knew the character of the fund that was lent them. By so doing he incurred a personal liability on himself to account for the money, and the borrowers, if chargeable with a knowledge of the violated duty, incurred a similar pecuniary liability; but, in contracting the debt, even if they participated in the breach of duty—as we before now, in reference to this same matter, decided—that fact did

not change the nature of the obligation, so as to fasten a lien on their property for its payment. A lien, as we have said, is never an incident of a contract or money obligation, unless made so by the contract or by some rule of law.

The proposition submitted does not differ materially from the same question presented and decided in cases heretofore before us on appeal. It cannot be sustained without overruling these and many other cases in this and other courts: *Goldthwaite v. Ellison*, 99 Ala. 497; ⁴⁴³ *Ellison v. Moses*, 95 Ala. 221; 17 Am. & Eng. Ency. of Law, 1195, notes 2, 3.

What we have said is equally applicable to each of the cases set forth in the transcript—that of *Robert Goldthwaite, Receiver, v. Janney & Cheney, Trustees etc.*, and of Adolph Abraham and others against same parties.

There was no error in the rulings of the court below, and the decrees in each case must in all respects be affirmed. Let the appellants each pay one-half of the costs of this appeal.

Affirmed.

PARTNERSHIP—CREDITORS.—The rights of individual and partnership creditors as against one another in the settling up of the affairs of an insolvent partnership are fully treated in the monographic note to *Smith v. Smith*, 43 Am. St. Rep. 364-380.

Partnership Real Estate.

Difference between Partners and Cotenants.—A partnership resembles a joint tenancy in some respects. The partners have a joint interest in the assets of the partnership, and are required to sue and be sued jointly in reference thereto. Upon the death of one, the others have a right of survivorship, entitling them to continue in the sole possession of the personal assets. This right is, however, but temporary, and practically amounts to nothing more than a power to wind up the concerns of the late firm. That power being executed, the representatives of the deceased copartner are entitled to his share of the remaining assets: *Dyer v. Olark*, 5 Met. 562; 39 Am. Dec. 697. Partnership property is not held by those unities which next to the *jus accrecedi* are the chief characteristics of a joint tenancy. In this latter respect, a partnership resembles a tenancy in common. But the two differ from each other in this, that the former creates a joint, and the latter a several interest. Partnership is distinguished from both species of cotenancy by the means and by the result of its creation. The means of its creation necessarily include an agreement between the parties; whereas neither a joint tenancy nor a tenancy in common need rest upon any agreement. The result of its creation is a relation between the parties, whereby each is the agent of the other, with authority to manage and dispose of the firm property, and to make all contracts within the scope of the business in which the firm was designed to engage. No such result arises from a joint tenancy, nor from a tenancy in common. Partnership and tenancy in common

also differ from each other in other important particulars. Each cotenant "buys in, or sells out, or encumbers his interest at pleasure, regardless of the knowledge, or consent, or wishes of his coproprietors, and without affecting the legal relation between them, beyond the going out of one and the coming in of another. One cannot buy in or sell out of a partnership at pleasure. Such an act would of itself work a dissolution of the partnership, and necessitate its final settlement and closing out. A tenancy in common results from a rule of law by which it is also controlled and governed. A partnership, on the contrary, is the result of an agreement between parties, which also supplies the rule for its government. The former relation is undisturbed by a change of tenants, but the latter admits of no change in its members; and where a change takes place by the consent and agreement of all the parties concerned, the old firm is thereby dissolved and a new one created. Thus the incidents annexed to each have a different origin and are diverse. Also, the proceedings for a dissolution of these relations are grounded upon entirely different facts. As to the first, the mere desire of one of the tenants is sufficient to set the court in motion; but as to the latter, cause must be shown": *Bradley v. Harkness*, 26 Cal. 77.

At Law Real Estate cannot Belong to a Partnership.—We have seen that a copartnership and a cotenancy differ from each other in the means of their creation and in the relations which they respectively produce between the parties in interest. A statement of even the general principles regulating the rights and duties of copartners and controlling the final disposition of their assets is not within the scope of this note. It is well known that these principles are essentially different from those embodied in the law of cotenancy, and while this note does not involve any inquiry into the general law of copartnership, it will attempt to show under what circumstances and for what purposes property may be withdrawn from the law of cotenancy and placed within the dominion of the law of partnership. Both at law and in equity the personal assets of a firm are entirely subject to the law of partnership. This is too well settled to require any citation of authorities. Beyond this these two systems of jurisprudence do not go. The law does not admit that realty owned by two or more persons can be held otherwise than in cotenancy. "The principles and rules of law applicable to partnerships, and which govern and regulate the disposition of the partnership property, do not apply to real estate. One partner can convey no more than his own interest in houses or other real estate, even when they are held for the purposes of the partnership. There may be special covenants and agreements entered into between the partners relative to the use and enjoyment of real estate held by them jointly, and the land would be considered as held subject to such covenants; and in the absence of all special covenants the real estate owned by the partners must be considered and treated as such, without any reference to the partnership": *Coles v. Coles*, 15 Johns. 159; 8 Am. Dec. 231; *Thornton v. Dixon*, 3 Brown Ch. 199; *Balmain v. Shore*, 9 Ves. Jr. 500; *Hoxie v. Carr*, 1 Sum. 176; *Sigourney v. Munn*, 7 Conn. 11; *Peck v. Fisher*, 7 Cosh. 390; *Andrews v. Brown*, 21 Ala. 437; 56 Am. Dec. 252; *Columb v. Read*, 24 N. Y. 505; *Buchan v. Sumner*, 2 Barb. Ch. 165; 47 Am. Dec. 305; *Miller v. Proctor*, 20 Ohio St. 448; *Baca v. Ramos*, 10 La. 417; 29 Am. Dec. 463; *Baker v. Wheeler*, 8 Wend. 505; 24 Am. Dec. 66. In truth, accurately speaking, there is no such a thing as partnership real estate, and when that term is employed, all that is meant is that the real estate has been so acquired and held that equity will treat it for certain purposes as partnership assets, and will compel its application to the discharge

of obligations existing against the partnership, whether in favor of third persons or of one of its own members.

Realty Held by Partners, how Treated in Equity.—That real estate, though held as a joint tenancy, or as a tenancy in common, so far as the mere legal title is concerned, may, in equity, be treated as personalty, is well established by numerous authorities: *Moline etc. Co. v. Rummell*, 14 Fed. Rep. 155; *Rust v. Chinolm*, 57 Md. 376; *Messer v. Messer*, 59 N. H. 375; *Divine v. Mitchum*, 4 B. Mon. 488; 41 Am. Dec. 241. But precisely what circumstances in regard to its use or acquisition will authorize such treatment, and whether, when authorized, the treatment shall continue for all purposes, or for some only, are matters upon which the decisions are not in full harmony. We shall first consider what realty, of which the legal or equitable title is held by two or more in undivided interests, may, in equity, be regarded as for any purpose, withdrawn from the law of cotenancy; and next, for what purposes and to what extent this withdrawal may affect the control, enjoyment, and final disposition of the property.

Equitable Title is Regarded in Equity—Property Standing in Name of One Partner.—The rule that real property may, for certain purposes, be treated as partnership assets and impressed with the characteristics of partnership personalty is an equitable rule and not a rule of law. Hence it follows that the title of the partnership need not be a legal title if it is such as is recognized and enforced in equity. One of the natural consequences of this is that it is not material whether the legal title is vested in all or any of the partners. If vested in one only of them when the circumstances of its acquisition were such that it equitably belongs to the firm, the partner in whose name the conveyance has been taken holds the property as partnership assets to the same extent as if the conveyance had named all the partners as grantees therein: *Evans v. Gibson*, 29 Mo. 223; 77 Am. Dec. 565; *Moreau v. Saffurans*, 3 Sneed, 595; 67 Am. Dec. 582; *Holladay v. Land etc. Co.*, 57 Fed. Rep. 774; *Robinson Bank v. Miller*, 153 Ill. 244; 48 Am. St. Rep. 883; *Rice v. Pennypacker*, 5 Houst. 279. While the intent of the partners themselves is often material, and sometimes controlling, in determining whether real property is to be treated as partnership assets, yet this circumstance is not always conclusive. Thus a partner may, without the knowledge of his copartners, divert firm moneys and invest them in real property, taking the title either in his own name or in the name of a third person, acting with the intent that the property should not be treated as firm assets, yet, because the circumstances are such that his intent ought to be disregarded, the realty will be held to be that of the partnership: *Daniels v. McCormick*, 87 Wis. 255.

Intention of the Partners.—Except where the assets of the firm are taken by some of its members and invested in real estate without the knowledge of the others and with an intent to misappropriate the funds so invested, the intention of the partners is controlling, and the realty acquired will be treated as firm property or not according to their intention at the time of its acquisition: *McKinnon v. McKinnon*, 56 Fed. Rep. 409. There need not be any express agreement between the partners upon the subject: *Jurvis v. Brooks*, 27 N. H. 37; 59 Am. Dec. 359; but in every case there is an agreement, either express or implied: *Arnold v. Wainwright*, 6 Minn. 358; 80 Am. Dec. 448; and courts of equity, in effect, carry out this agreement by controlling the legal title so as to accomplish its objects.

The Agreement that realty shall be treated as partnership property need not be manifest upon the face of any conveyance, or attested by any instru-

ment in writing. Therefore, if one of the partners puts real property into the partnership at an agreed valuation but without any conveyance, he holds the legal title in trust for the firm, and equity will treat the realty as partnership assets: *Wiegand v. Copeland*, 14 Fed. Rep. 118. So it has been held that the placing of permanent and valuable improvements upon lands belonging to one of the partners, and which the partners held as tenants in common, may show an intention to make it firm property and the partner to whom it belonged a creditor of the firm to the extent of its value: *Wheatley v. Cuthoun*, 12 Leigh, 284; 37 Am. Dec. 654. *Contra*, *Parker v. Bowles*, 57 N. H. 491.

Conveyances to a Partnership.—Because the legal title to real property cannot be vested in the partnership, it has been held that a deed purporting to convey property to the partnership or to persons designated by a partnership name only was entirely inoperative as a transfer of a legal title, as where the grantees were designated in the grant as "F. & G. & Company": *Tidd v. Rimes*, 26 Minn. 201; *Gille v. Hunt*, 35 Minn. 357. This view is not, however, supported by the weight of authority: *Blanchard v. Floyd*, 93 Ala. 53. If the surnames of the partners are given, as where the conveyance is to Black & White, parol evidence is admissible to show what particular Black and White were intended, and that being shown the legal title will be regarded as vested in them as tenants in common: *Menage v. Burke*, 43 Minn. 211; 19 Am. St. Rep. 235; *Frost v. Wolf*, 77 Tex. 456; 19 Am. St. Rep. 761; *Lindsay v. Hobe*, 21 Ala. 542; *Beaman v. Whitney*, 20 Me. 413, *Morse v. Carpenter*, 19 Vt. 613; *Dunlap v. Green*, 60 Fed. Rep. 242. If, however, the full name of any of the partners is given in the conveyance, as where it is John Doe & Company, the surname of no other partner appearing, the authorities agree that the conveyance is operative to the extent of vesting the whole legal title in the partner named: *Gille v. Hunt*, 35 Minn. 357; *Moreau v. Saffarane*, 8 Sued. 595; 67 Am. Dec. 582; *Arthur v. Weston*, 22 Mo. 378; *Winters v. Stock*, 29 Cal. 411; 69 Am. Dec. 57.

Parol Evidence.—In many cases it has been insisted that the intention of the partners that real property should become partnership assets must be manifested by some writing, and therefore that it cannot be established by parol. Courts of Pennsylvania early announced this view, and maintained it long and tenaciously: *Hale v. Henrie*, 2 Watts, 143; 27 Am. Dec. 289; *Lefevre's Appeal*, 69 Pa. St. 122; 8 Am. Rep. 229; *Ridgway's Appeal*, 15 Pa. St. 177; 53 Am. Dec. 536; *McCormick's Appeal*, 57 Pa. St. 54; 98 Am. Dec. 191; see, also, *Parker v. Bowles*, 57 N. H. 491; but it is doubtful whether they ever meant to assert anything except that the claim that the property was partnership could not be urged to the prejudice of purchasers and lien creditors whose rights had been acquired without knowledge of the partnership equities: *Shafer's Appeal*, 106 Pa. St. 49; *Collmer v. Greig*, 137 Pa. St. 606; 21 Am. St. Rep. 599; *Warriner v. Mitchell*, 128 Pa. St. 153.

Partnership to Deal in Real Estate.—The most familiar and unquestionable instance of a partnership in lands provable by parol is when two or more persons agree orally to form a partnership for the purpose of dealing in lands generally, or of purchasing a specific tract or tracts with a view to disposing of it or them and sharing the profits or losses. There is now no doubt that on the execution of the agreement by the purchase of lands they become partnership realty, nor that parol evidence is admissible to prove that they are such and what are the interests of the respective partners therein: *Shueffer v. Balir*, 149 U. S. 248; *Bates v. Babcock*, 95 Cal. 479; 29 Am. St.

Rep. 133; *Williams v. Gillis*, 75 N. Y. 201; *Speyer v. Desjardines*, 14 Ill. 641; 36 Am. St. Rep. 473; *Holmes v. McCray*, 51 Ind. 358; 19 Am. Rep. 735; *Chester v. Dickerson*, 54 N. Y. 1; 13 Am. Rep. 550; *Richards v. Grinnell*, 63 Iowa, 44; 50 Am. Dec. 727; *Fountain v. Menard*, 53 Minn. 443; 39 Am. St. Rep. 617; *Ludlow v. Cooper*, 4 Ohio St. 1; *Darbey v. Darbey*, 3 Drew. 495; 2 Jur., N. S., 271; 25 L. J. Ch. 371; 4 Week. Rep. 413.

The Presumption is against Real Estate being Partnership Property.—With the exception of the cases in which it appears that the partnership was created for the purpose of dealing in real estate, and treating it as a commodity to be sold for the purpose of realizing profits to be divided between the partners, the presumption, though it appears that real property was purchased during the existence of a partnership, and a conveyance taken in the name of the partners, who are furthermore described as a firm or partnership, is that the title is held by them as cotenants and not as partners: *Robinson Bank v. Miller*, 153 Ill. 244; 46 Am. St. Rep. 883; *Alkire v. Kahle*, 123 Ill. 496; 5 Am. St. Rep. 540. Where land is already held in cotenancy, any agreement looking to the concurrence of its owners in developing and making it profitable, and to that end, to the expenditure of moneys upon it, will not alone convert it into partnership property either at law or in equity. As illustrations of this principle may be mentioned the agreement of cotenants of an oil lease, or of other mining property, to drill an oil well on the leased premises at the common expense, or to otherwise develop it for mining purposes: *Butler Savings Bank v. Osborn*, 159 Pa. St. 10; 39 Am. St. Rep. 665; *Dunham v. Loverock*, 158 Pa. St. 197; 38 Am. St. Rep. 838. In view of the rule that the acquisition of real property by persons who are then partners does not raise any presumption that it was intended to be by them treated as partnership assets, it becomes material to inquire how the presumption that property, though conveyed to partners, is yet held by them as tenants in common can be overcome. The mere fact that the grantees happened to be partners does not itself throw any light on the transaction. Their purchase may have been paid for out of funds in which the partnership had no interest, and the fact of their being partners may be an accidental circumstance having no connection with their purchase of, or their payment for, the realty purchased. On the other hand, the payment for the property out of the partnership assets is doubtless a circumstance worthy of consideration, and the probability of the purchase being for partnership purposes is much greater when the payment is made out of partnership funds than when made out of the separate estates of the several partners. Evidence of the source from which the purchase money came is admissible, but it is by no means conclusive. The partners may have intended to draw that amount out of their firm business, and to invest and hold it as cotenants. Partners may, like other persons, join in a purchase of realty independent of their partnership, intending to hold their interests severally. Whenever such an intention exists, the property, though paid for out of the moneys or effects of the firm, retains in equity, as well as at law, the character of real estate: *Hunt v. Benson*, 2 Humph. 459; *Dyer v. Clark*, 5 Met. 562; 39 Am. Dec. 697; *Smith v. Smith*, 5 Ves. 193; *Coder v. Huling*, 27 Pa. St. 88; *Black v. Seipt*, 12 Phila. 360; *Wheatly v. Calhoun*, 12 Leigh, 264; 37 Am. Dec. 654; *Providence v. Bullock*, 14 R. I. 353; *Lefevre's Appeal*, 69 Pa. St. 122; 8 Am. Rep. 229. "When the price of land conveyed to the partners is paid by copartnership money or effects, or is taken in satisfaction of a debt due the concern, the real estate becomes partnership property, or is individual property according to the legal effect of the

conveyance, as the intention of the purchasers shall appear to have been. It may be either the one or the other: *Collumb v. Read*, 24 N. Y. 513; *Wiegand v. Copeland*, 14 Fed. Rep. 118; *Holmes v. Self*, 79 Ky. 297.

Presumption Arising from Purchase with Firm Assets.—Though the intention of the partners, rather than the means of payment, is the criterion by which to determine whether the realty acquired by them has been converted into partnership estate, still the fact that payment was made out of the firm assets has been regarded as raising a presumption that it was intended to form a part of the partnership property. Such seems to be the conclusion of Judge Denio, as will be seen from the following quotation written by him and approved by the other judges of the New York court of appeals: "Prima facie, I should say that, where the land was taken in payment of a debt, it might be considered, in equity, as property of the same class as that which was parted with in making the purchase. So much of the undisputed property of the partnership has been exchanged for the land; it may possibly have been thus invested in order to pay a dividend to the several partners, to whom the land is conveyed; but the stronger probability would always be, in such a case, that it was taken as an expedient for collecting a debt. A conclusion which is to be adopted in the place of precise proof should always be in favor of the theory which is the most probable, and it is upon this rule that the burden of proof is most usually adjusted": *Collumb v. Read*, 24 N. Y. 513. But the weight of the authorities sustains the proposition that the mere fact that payment is made out of the partnership funds is not even prima facie proof of the conversion of real into personal estate. It must be shown, in addition to this fact, that the purchase was connected with the firm business, or was in pursuance of some agreement, express or implied, that it should be held for the benefit of the concern: *Smith v. Jackson*, 2 Edw. Ch. 28; *Cox v. McBurney*, 2 Sand. 561; *Woodridge v. Wilkins*, 3 How. (Miss.) 360; *Altire v. Kahle*, 123 Ill. 496; 5 Am. St. Rep. 540; *Baca v. Ramos*, 10 La. 417; 29 Am. Dec. 463. Where real property is purchased with partnership funds by the consent of all the partners, and is not needed nor used for firm purposes, the moneys so used will be regarded as withdrawn from the partnership and the lands so acquired as the individual property of the partners, and therefore as subject to their individual debts rather than to the debts of the partnership: *Chandler v. Jessup*, 132 Ind. 351.

Realty Taken in Satisfaction of Partnership Demands.—The circumstances of the acquisition of the property may be such as of themselves to show that it was not intended as an investment of the partners personally, but was taken to carry out some partnership purpose, or as an incident of the partnership business. Thus, whatever that business may be, it must frequently happen that the firm is compelled to accept property, both real and personal, in satisfaction of demands due to it. In such a contingency the property accepted in satisfaction of the firm obligation, though it consists of real estate, will be treated as partnership assets when moneys must have been so treated had they been received in payment instead of such real estate: *Putnam v. Dobbins*, 38 Ill. 394; *Paton v. Baker*, 62 Iowa, 704; *Flanagan v. Shuck*, 82 Ky. 617; *Collumb v. Read*, 24 N. Y. 505.

The Books of the Partnership may be kept in such a manner as to indicate that the realty was deemed and treated by the partners as a partnership asset. Hence where lands were purchased by partners and paid for out of partnership moneys, and the transaction entered and kept on the books of the firm under an account entitled "The T. Estate Company," they were

held to be partnership assets, although each of the partners had built thereon a house for himself out of his own private estate: *In re Streetfield*, 7 Jur., N. S., 715; 9 Week. Rep. 892; 4 L. T., N. S., 801.

Moneys Withdrawn with Consent of All the Partners.—While, as we have heretofore shown, lands purchased by one partner and the title taken in his name may be regarded as held by him in trust for the firm, and that this is necessarily the case where he has misappropriated the funds of the firm without the knowledge of his copartners in making his acquisition, no such result follows when this use of the firm funds is made with the consent of his copartners, and the circumstances indicate that it was his intention and theirs that the property should be acquired for himself, and that he should be regarded as a debtor of the firm to the extent to which he had thus employed its funds: *Boozar v. Webb*, 25 S. C. 82.

Really Acquired Outside of Partnership Business.—Realty acquired by the partners as cotenants, prior to the formation of the partnership, as well as that acquired by them in common during the partnership, but independent of their partnership relations, and without the use of their partnership funds, may afterward be appropriated to the use of the firm. The question then arises whether this appropriation impresses this real estate with the character of firm property. In one case the answer has been made that it does not, because the resulting trust cannot arise in favor of the firm, without any writing, where the partnership has not contributed any portion of the purchase money: *Delaney v. Hutcheson*, 2 Rand. 183. But the question is, no doubt, one of intention merely. If the parties intended to bring this realty into their business, and thereby to increase their partnership assets, and their intent was consummated by an appropriation of the property to partnership purposes, then it should be regarded as a contribution to the stock in trade, and, as such, subjected to the law of copartnership. But this intention is not to be inferred from the mere fact that the property, even in pursuance of an agreement so to do, has been used by the firm or for the firm purposes. There must be evidence sufficient to raise the presumption that they intended not only to use the property, but also to contribute it to their joint capital in trade: *Frink v. Branch*, 16 Conn. 261; *Brooke v. Washington*, 8 Gratt. 256; 56 Am. Dec. 142; *Thornton v. Dixon*, 3 Brown Ch. 199; *Balmain v. Shore*, 9 Ves. 500; *Cookson v. Cookson*, 8 Sim. 529; *Ware v. Owens*, 42 Ala. 215; 94 Am. Dec. 642; *Pecot v. Armelin*, 21 La. Ann. 667. "There can be little doubt that the purchase of land by the partners, for the purposes of the partnership, and subject to an express or implied agreement that it shall be held for the benefit of the firm, will render it partnership property, even when the whole of the consideration is furnished by the partners individually, and no part of it comes from the assets of the partnership": 1 White and Tudor's Cases in Equity, 241; *Roberts v. McCarty*, 9 Ind. 16; 68 Am. Dec. 604. Where, however, real property has been acquired by the partners before the commencement of their partnership relation, and it is subsequently used for partnership purposes, the evidence necessary to fix upon it the attributes of partnership property must be clear and convincing, and the intention of the owners to change their relations as to it from those cotenants to those of partners will not be assumed so readily as if it had been purchased after the partnership began: *Perin v. Megibben*, 53 Fed. Rep. 86; *Robinson Bank v. Miller*, 153 Ill. 244; 46 Am. St. Rep. 883; *Butler Sav. Bank v. Osborn*, 159 Pa. St. 10; 39 Am. St. Rep. 665; *Dunham v. Loverock*, 158 Pa. St. 197; 38 Am. St. Rep. 838. "The weight of authority seems to us to support the position, that, where persons who afterward become

partners, buy land in their individual names, and with their individual funds before the making of a partnership agreement, the land will be regarded as the individual property of the partners in the absence of a clear and explicit agreement subsequently entered into by them to make it firm property, or in the absence of controlling circumstances which indicate an intention to convert it into firm assets": *Robinson Bank v. Miller*, 153 Ill. 244; 46 Am. St. Rep. 883; *National Union Bank v. National Mechanics' Bank*, 80 Md. 371; 45 Am. St. Rep. 350.

The Mere Use of Land for Partnership Purposes does not convert it into partnership assets: *Goepper v. Kinsinger*, 39 Ohio St. 429; *Ware v. Owens*, 42 Ala. 212; 94 Am. Dec. 642; *Robinson Bank v. Miller*, 153 Ill. 244; 46 Am. St. Rep. 883. In truth, an analysis of the decisions will show that no single circumstance is conclusive, but that each case is to be determined from all the circumstances: *Ex parte McKenna*, 3 De Gex, F. & J. 645; that the real inquiry is, What was the intention of the parties? *Holmes v. Self*, 79 Ky. 297; *Murrell v. Mandelbaum*, 85 Tex. 22; 34 Am. St. Rep. 777.

The Intention that Real Estate shall be Deemed Partnership Property has been inferred from the fact that lands were purchased on credit to be cultivated for the joint benefit of the purchasers and the profits to be applied to the improvement of the land: *Berry v. Folkes*, 60 Miss. 576. "If land, in addition to being paid for out of partnership funds, is brought into the partnership and used for partnership purposes, there is no doubt that it will, in equity, be treated as partnership stock, unless there is some agreement to the contrary, or 'the price is charged to the partners respectively in their several accounts with the firm': *Howard v. Priest*, 5 Met. 582; *Burnside v. Merrick*, 4 Met. 537; *Jarvis v. Brooks*, 27 N. H. 67; 59 Am. Dec. 359; *Oerholt's Appeal*, 12 Pa. St. 222; 51 Am. Dec. 598; *Moderwell v. Mulholland*, 21 Pa. St. 259; *Tillinghast v. Champlin*, 4 R. I. 173; 67 Am. Dec. 510; *Ludlow v. Cooper*, 4 Ohio St. 1; *Moreau v. Suffrans*, 3 Sneed, 595; 67 Am. Dec. 582; *Lime Rock Bank v. Phettleplace*, 8 R. I. 59; *Robertson v. Baker*, 11 Fla. 192; *Briffum v. Buffum*, 49 Me. 108; 77 Am. Dec. 249; *Mauck v. Mauck*, 54 Ill. 281; *Maddock v. James*, 13 N. J. Eq. 126; *Bryant v. Hunter*, 6 Bush, 75; *Berry v. Folkes*, 60 Miss. 576; *Spalding v. Wilson*, 80 Ky. 589; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Willis v. Freeman*, 35 Vt. 44; 82 Am. Dec. 619; *Lang v. Waring*, 25 Ala. 625; 60 Am. Dec. 533; *Duhring v. Duhring*, 20 Mo. 174; *Davis v. Christian*, 15 Gratt. 11; *Holland v. Fuller*, 13 Ind. 195; *Phillips v. Phillips*, 1 Mylne & K. 649; *Broom v. Broom*, 3 Mylne & K. 443; *Moran v. Palmer*, 13 Mich. 367; *Fowler v. Bailey*, 14 Wis. 125; *Cilley v. Huse*, 40 N. H. 358; *Arnold v. Wainwright*, 6 Minn. 358; 80 Am. Dec. 448; *Galbraith v. Tracy*, 153 Ill. 54; 46 Am. St. Rep. 867. "If, in the conveyance, the grantees should be described as tenants in common, it would be a circumstance bearing on the question of intent, though perhaps it might be considered a slight one; because these words would merely make them tenants in common of the legal estate, which, by operation of law, they would be without them": *Dyer v. Clark*, 5 Met. 562; 39 Am. Dec. 697; *Matlock v. Matlock*, 5 Ind. 403; *Abbott's Appeal*, 50 Pa. St. 238. "If the tenants in common are at the same time copartners, and the land was purchased with partnership funds, and for partnership purposes, it is deemed in equity converted into personal property, and is liable to be administered as such in winding up the affairs of the firm": *Columbia v. Read*, 24 N. Y. 509; *Meily v. Wood*, 71 Pa. St. 488; 10 Am. Rep. 719; *Baird v. Baird*, 1 Dev. & B. 524; 31 Am. Dec. 399; *Thomas v. Scott*, 3 Rob. (La.) 258; *Donkison v. Bank of Cape Fear*, 1 Dev. Eq. 103; 18 Am. Dec. 577; *Hancock v. Talley*, 5 Va. L. J.

584. See, however, *Farrand v. Gleason*, 56 Vt. 633. "Where real estate is purchased with partnership funds, for the use of the firm, and without any intention of withdrawing the funds from the firm for the use of all or any of the members thereof as individuals, I believe it has never been doubted in England that such real estate was, in equity, to be considered and treated as the property of the members of the firm collectively, and as liable to all the equitable rights of the partners as between themselves. And for this purpose the holders of the legal title are considered, in equity, as the mere trustees of those beneficially interested in the fund, not only during the existence of the copartnership, but also upon the dissolution thereof by the death of some of the copartners, or otherwise": Chancellor Walworth, in *Buchan v. Sumner*, 2 Barb. Ch. 199; 47 Am. Dec. 305. The same principles of equity which direct the administration of real estate, the legal title of which is held by the members of the firm as tenants in common, operate with like force and effect when this legal title is held by one partner only, or even by a third person, if it is held for the use and benefit of the firm jointly: *Nicoll v. Ogden*, 29 Ill. 323; 81 Am. Dec. 311; *Usher v. Semple*, 20 N. J. Eq. 288; *Jarris v. Brooks*, 27 N. H. 37; 59 Am. Dec. 359; *Pugh v. Currie*, 5 Ala. 446; *Deveney v. Mahoney*, 23 N. J. Eq. 247; 12 Am. Law Reg. 63; *Diggs v. Brown*, 78 Va. 295; *Rank v. Grote*, 50 N. Y. Sup. Ct. 275; *Shunks v. Klein*, 104 U. S. 18; *Wiegand v. Copeland*, 7 Saw. 442; 14 Fed. Rep. 118.

For what Purposes Realty Treated as Personality.—Whether the conversion of partnership realty into personalty prevails for all purposes is a question which Judge Story "considered as open to many distressing doubts": Story on Partnership, sec. 93. The doubts are no less distressing now than when they first perplexed the learned judge, but, by considering the number of the adjudications in the two countries, it will be readily ascertained where the weight of the authorities in both England and America rests; and the results thus ascertained in regard to the two countries will be found to be in irreconcilable conflict with each other. The earlier English decisions were in favor of the proposition that the conversion of realty into personalty extended no further than was necessary to an equitable adjustment of the claims of the firm creditors, and of the rights of the members of the firm between themselves. Subject only to those claims and rights, the real property continued to be distinguished by its ordinary legal incidents, and liable to disposition according to the rules of law. It therefore passed to the heirs or devisees: *Thornton v. Dixon*, 3 Brown Ch. 199; *Bell v. Phyn*, 7 Ves. 453; *Balmain v. Shore*, 9 Ves. 501; *Cookson v. Cookson*, 8 Sim. 529. But this construction of the law of partnership is now certainly overthrown in England: *Essex v. Essex*, 20 Beav. 442; *Ripley v. Waterworth*, 7 Ves. 425; *Houghton v. Houghton*, 11 Sim. 491; *Broom v. Broom*, 3 Mylne & K. 443; *Phillips v. Phillips*, 1 Mylne & K. 649; *Fereday v. Wightwick*, 1 Russ. & M. 45; *Crawshay v. Maule*, 1 Swanst. 459; *Kirkpatrick v. Sim*, 5 Pat. App. 525; *Semkrig v. Davies*, 2 Dow. 230; *Townshend v. Devaynes*, 1 Montague on Partnership, note 2 A., Appx. 96; *Morris v. Kearsley*, 2 Younge & C. 139; *Holroyd v. Holroyd*, 7 Week. Rep. 426; *Murtagh v. Hulbuck*, 10 Q. B. Div. 473; 13 Irish Law Rep. 275; *Waterer v. Waterer*, 15 L. R. Eq. 401. After fully considering the decisions then existing, the vice-chancellor, in a leading case on this subject, thus summed up his own reasons and the result to which those reasons, as well as the prior adjudications, led him: "I should, therefore, feel no hesitation in coming to this conclusion, that the mere contract of partnership, without any express stipulation, involves in it an implied con-

tract, quite as stringent as if it were expressed, that, at the dissolution of the partnership, all the property then belonging to the partnership, whether it be ordinary stock in trade, or a leasehold interest, or a fee simple estate in land, shall be sold, and the net proceeds, after satisfying all partnership debts and liabilities, be divided among the partners; and that each partner and the representatives of any deceased partner have a right to insist on this being done. Now, if it be established that, by the contract of partnership, all the partnership property is to be sold at the dissolution of the partnership, then any real property which has become the property of the partnership becomes, by force of the partnership contract, converted into personalty; and that, not merely as between the partners to the extent of discharging the partnership debts, but as between the real and personal representatives of any deceased partner": *Darby v. Darby*, 3 Drew. 505. In a case decided by the court of appeals of Kentucky, it was said: "Upon a review of the authorities, the analogies, and reasons of the law, we conclude that a safe and reliable rule may be deduced as to that class of property to which this evidently belongs; that is, when property is bought with partnership funds, to be used in carrying on and facilitating the partnership business, and operations and profits, it is then partnership property, impressed with the characteristic of personalty for any and all purposes, not only as between the partners inter se and the firm and its creditors, but also as to distribution between the administrators, distributees, and heirs": *Cornwall v. Cornwall*, 6 Bush, 369; *Bank of Louisville v. Hall*, 8 Bush, 678. This language was cited with apparent approval in a subsequent case, but was not there relevant, because the court determined that the circumstances were not such as to impress upon the realty in question the character of partnership estate: *Lowe v. Lowe*, 13 Bush, 688. The later decisions in this state, however, modify the earlier and bring the law as there understood into substantial harmony with what we shall hereafter state to be the American rule upon the subject: *Duncan v. Duncan*, 93 Ky. 37; 40 Am. St. Rep. 159; *Carter v. Fleener*, 92 Ky. 400, 405. In a Virginia case the English doctrine was adopted to the extent of decreeing a sale at the instance of a surviving partner of the real property of the partnership, though such sale was not necessary for the discharge of the firm obligations, and was asked for only on the ground that it was for the best interests of all concerned: *Pierces v. Trigg*, 10 Leigh, 423.

The American theory is that the legal title of the partnership realty is held by the copartners as tenants in common, subject in equity to be applied to the payment of the debts of the firm; and that when such debts are paid all "the incidents and qualities of real estate revive"; that the trust in favor of the partnership exists only in behalf of partnership objects and liabilities, and these being fully discharged, the legal title is released from all trusts, and will descend to the heir as in the case of any other tenancy in common: *Piper v. Smith*, 1 Head, 93; *McAllister v. Montgomery*, 3 Hayw. (Tenn.) 94; *Yeatman v. Wood*, 6 Yerg. 21; 27 Am. Dec. 452; *Scruggs v. Blair*, 44 Miss. 406; *Goodburn v. Stevens*, 5 Gill, 1; *Rice v. Barnard*, 20 Vt. 479; 50 Am. Dec. 54; *Holland v. Fuller*, 13 Ind. 195; *Tillinghast v. Champlin*, 4 R. I. 173; 67 Am. Dec. 510; *Sumner v. Hampson*, 8 Ohio, 328; 32 Am. Dec. 722; *Hunff v. Howard*, 3 Jones Eq. 440; *Collins v. Warren*, 29 Mo. 236; *Wilcox v. Wilcox*, 13 Allen, 252; *Williamson v. Fontain*, 7 Baxt. 212; *Brewer v. Browne*, 68 Ala. 210; *Martin v. Morris*, 62 Wis. 418; *Strong v. Lord*, 107 Ill. 25; *Hewitt v. Rankin*, 41 Iowa, 35; *Gallraith v. Tracy*, 153 Ill. 54; 46 Am. St. Rep. 867. In a very recent decision denying the application of an administrator made

to a court of equity, asking that certain realty might be converted into personality, the American rule, and the reasons on which it rests, were stated by the court as follows: "Neither the ground of interposition nor the mode of its exercise is changed by the decease of the party in whose behalf it is required. His representatives are substituted in his place. Their rights are derivative merely. Equities between them, if any there be, are subordinate and posterior to those which spring from the relation of copartnership. The conversion of real estate into personality is worked, if at all, for the purpose of adjusting the affairs of the partnership. It would seem, therefore, that the conversion should be made only when and so far as required for that purpose; and that the effect upon the descent or distribution of the share of a deceased partner among his representatives should be regarded as incidental merely, and not an end for which the interference of a court of equity is to be sought. In view of the grounds and purposes of such equitable conversion, even regarding all the partnership real estate, however the legal title may be held, as held in trust for the partnership, this court are disposed to hold, notwithstanding the great weight of authority to the contrary elsewhere, that such real estate is to be converted into personality only when such conversion is required for the payment of claims against the partnership which are in the nature of debt. Balances due to individual partners, for advances to the firm, or for payments made in its behalf, come within this definition. So, also, may capital furnished by one partner, when by the terms upon which it was furnished, or from the nature and necessity of the case, it is to be repaid in specific amounts, in order to reach the net result, or body of the partnership interests, to which the proportional rights or shares of the several partners attach. In short, whatever is required to be paid or measured in precise sums must be so adjusted; and real estate, converted for that purpose, undoubtedly becomes personality, and is entitled to be distributed as such when paid over to the party entitled. But the shares in the body of the partnership property, those interests which are not measured by precise amounts, but consist in a common proprietorship after all special claims are satisfied, stand upon different footing. These interests are determined by the proportions fixed by the articles or organic law of the partnership. When the beneficial interests and the legal title correspond, it has already been decided that the rights of the partners in real estate so held will be left to adjust themselves by descent of the legal title, with its incidents, as real estate of the several partners, held in common. When the legal title is otherwise held, it is held in trust; and the equitable title descends in like manner and with like incidents, except as to dower. The office of equity in such cases is merely to declare the trusts, and compel the legal title to serve the equitable interests. This is accomplished by directing such conveyances as will make the legal title of the several parties conform to their respective beneficial interests. By the rule above indicated, all partnership rights and obligations are secured, and all equities growing out of that relation are met and answered. To require equitable interference to go further, and convert all real estate into personality, for the mere purpose of a division, seems to us to be an unnecessary invasion of the rights of the copartners, and, when undertaken in the interest of one class of the representatives of a deceased partner against another class of representatives of the same partner, it seems to be a departure from the legitimate sphere of equitable jurisdiction. It is not the province of equity to seek to counteract or modify the operation of the laws of descent and distribution": *Shearer v. Shearer*, 98 Mass. 111. But

the partnership realty will, in all cases, be treated as partnership assets so far as may be necessary to do complete equity between the partnership and its creditors, and between the several members of the firm. Hence, each of the partners has a lien on the partnership realty to secure the payment of any balance which may remain due him upon a final adjustment of the partnership accounts: *Arnold v. Wainwright*, 6 Minn. 358; 30 Am. Dec. 448; *Roberts v. McCarty*, 9 Ind. 16; 68 Am. Dec. 604; *Pepper v. Pepper*, 24 Ill. App. 316; *Diggs v. Brown*, 78 Va. 292; *Murrell v. Mandelbaum*, 85 Tex. 22; 34 Am. St. Rep. 777; and neither can avoid this lien by compelling a partition of the property: *Burd v. Burd*, 1 Dev. & B. Eq. 524; 31 Am. Dec. 399; *Flanner v. Moore*, 2 Jones, 128. The right which a partner has of insisting upon the application of firm property to the payment of firm indebtedness in preference to its application to the payment of indebtedness due from the members of the firm has resulted in an equity being declared to exist in favor of the creditors of the copartnership. Hence, the general rule that unless the partners have as between themselves waived the right to have partnership property first applied to the extinction of partnership obligations, the firm creditors are entitled to a preference over the creditors of any member thereof in the disposition of its assets. This rule applies to partnership realty as well as to personalty, and therefore the creditors of the partnership are entitled to pursue such proceedings as may be requisite to prevent the application of the firm realty to the payment of individual debts, and to compel such realty to be applied to the satisfaction of the partnership obligations: *Pepper v. Thomas*, 85 Ky. 539; *Messer v. Messer*, 59 N. H. 375; *Paige v. Paige*, 71 Iowa, 318; 60 Am. Rep. 799; *Dwaine v. Mitchell*, 4 B. Mon. 488; 41 Am. Dec. 241. There is no doubt that a levy upon partnership lands under an execution or attachment against a partner will in equity be treated as subordinate to a subsequent levy under a like writ issued against the partnership: *Willie v. Freeman*, 35 Vt. 44; 82 Am. Dec. 619; *Page v. Thomas*, 43 Ohio St. 38; 54 Am. Rep. 786; *Buchan v. Sumner*, 2 Barb. Ch. 165; 47 Am. Dec. 305; and in some instances this rule has been deemed applicable to proceedings at law: *Meily v. Wood*, 71 Pa. St. 488; 10 Am. Rep. 719; *Jarvis v. Brooks*, 27 N. H. 37; 59 Am. Dec. 359. Subject to the rights of the partners and of partnership creditors to have the partnership realty applied to the extinction of partnership obligations, it is regarded in America as vested in the heirs or devisees of a deceased partner in the same manner as if its owners had been cotenants merely: *Summey v. Patton*, Winst. Eq. 52; 86 Am. Dec. 451; *Foster's Appeal*, 74 Pa. St. 391; 15 Am. Rep. 553; *Yeatman v. Woods*, 6 Yerg. 20; 27 Am. Dec. 452. As to the right to the possession of partnership realty, the decisions are strangely infrequent. As between the surviving partner and the heirs or devisees of a deceased partner, have they the right to be in possession of the property, or is their right of possession postponed until after the partnership business has been settled and it is ascertained that the real property will not be required to satisfy personal obligations? The rational answer would seem to be that if the property is necessary for the firm business while the surviving partner is proceeding in good faith to close it up, or if its rents and profits or the value of the realty must be applied to the satisfaction of firm obligations, then that the surviving partner is entitled to remain in exclusive possession: *Shearer v. Paine*, 12 Allen, 299. In proceedings at law to recover possession against third persons the surviving partner cannot recover unless entitled to do so in his capacity as a tenant in common: *Robinson v. Roberts*, 31 Conn. 145; especially when it does not appear that

the real property is used for firm purposes or required to meet its obligations: *Baker v. Middlebrooks*, 81 Ga. 491. If the legal title has been taken in the name of one partner only, the other cannot compel a conveyance to him of his moiety until the partnership obligations have been satisfied: *Kruschke v. Stefan*, 83 Wis. 373. If the partnership articles provide for the continuance of the partnership, notwithstanding the death of a partner, his heirs are not, while the partnership continues, entitled to the possession of any of the partnership real estate: *Leaf's Appeal*, 105 Pa. St. 505. The right of the widow of a deceased partner to dower in partnership lands is subordinate to the equities of the surviving members of the partnership and of its creditors: *Andrews v. Brown*, 24 Ala. 437; 56 Am. Dec. 252; *Greene v. Greene*, 1 Ohio, 535; 13 Am. Dec. 642; *Sumner v. Hampson*, 8 Ohio, 328; 32 Am. Dec. 722; *Foster's Appeal*, 74 Pa. St. 391; 15 Am. Rep. 553; *Robinson Bank v. Miller*, 153 Ill. 244; 46 Am. St. Rep. 383. Such right may be urged with success whenever the lands are not required to meet obligations against the partnership, whether in favor of the creditors or of the surviving partners: *Brewer v. Browne*, 68 Ala. 210; *Markham v. Merrett*, 7 How. (Miss.) 437; 40 Am. Dec. 76.

Sale and Conveyance by One Partner.—At law, as we have seen, the partners are tenants in common of their realty. Each can therefore convey his undivided interest, and neither can convey any part of the interest of his copartners: *Jackson v. Stanford*, 19 Ga. 15; *Anderson v. Tompkins*, 1 Brook. 463; *Whitman v. Boston etc. R. R.*, 3 Allen, 133; *Turbeville v. Ryan*, 1 Humph. 113; 34 Am. Dec. 622. And during the continuance of the copartnership the rule is, in equity, the same as at law. No matter how absolute the conversion of the realty into personality may be, "each partner is required, both at law and in equity, to join in every conveyance of real estate in order to pass the entirety thereof to the grantee; and if only one partner executes it, whether it be in his own name or in that of the firm, the deed will not ordinarily convey any more than his own share or interest": *Story on Partnership*, sec. 94; *Davis v. Christian*, 15 Gratt. 36; *Ruffner v. McConnell*, 17 Ill. 212; 63 Am. Dec. 362; *Caldwell v. Parmar*, 56 Ala. 405; *Dillon v. Brown*, 11 Gray, 179; 71 Am. Dec. 700; *Coles v. Coles*, 15 Johns. 159; 8 Am. Dec. 231. The deed by one partner of firm realty, in discharge of a firm debt, transfers both the legal and the equitable title to such partner's moiety: *Van Brunt v. Applegate*, 44 N. Y. 544. If, however, the title stands in the firm name, one of the partners may, by the previous authorization or the subsequent ratification of his copartners, in that name convey or mortgage the whole of the property, and the conveyance or mortgage will be respected at law as well as in equity: *Frost v. Wolf*, 77 Tex. 456; 19 Am. St. Rep. 761; *Ferguson v. Hanauer*, 56 Ark. 179; *Siroman v. Varn*, 19 S. C. 307; *Baldwin v. Richardson*, 33 Tex. 16; *Salinas v. Bennett*, 33 S. C. 285; *Wilson v. Hunter*, 14 Wis. 683; 80 Am. Dec. 795. If in the partnership is one for the buying and selling of real property, and in which it is therefore treated as a commodity, each of the partners has a general authority to act in the purchase and sale of the realty contemplated by the firm business, and a contract of sale executed by one of the partners in the firm name is valid, and a conveyance in pursuance thereof may be compelled in equity: *Rovelaky v. Brown*, 92 Ala. 522; 25 Am. St. Rep. 83; *Chester v. Dickerson*, 54 N. Y. 1; 13 Am. Rep. 550; *Thompson v. Bowman*, 6 Wall. 316; *Robinson v. Crowder*, 4 McCord, 519; 17 Am. Dec. 762; *Batty v. Adams County*, 16 Neb. 44. One of the partners may sell all his interest in the firm either to his copartners or to a third person, and such sale will include

the partnership real estate, and whether it conveys the legal title or not, will convey an equity superior to that of any subsequent purchaser from, or grantee of, such partner acquiring his interest with notice of the sale, either express or implied: *Collner v. Greig*, 137 Pa. St. 606; 21 Am. St. Rep. 899; *Murrell v. Mandelbawn*, 85 Tex. 22; 34 Am. St. Rep. 777. In Kentucky it has been held that a division of partnership lands is void unless evidenced by a writing, and if either or both have taken possession under a parol partition, that either may repudiate the agreement and reclaim possession: *Duncan v. Duncan*, 93 Ky. 37; 40 Am. St. Rep. 159. Upon the decease of any of the members of a firm, the survivors are invested with a power which they did not before possess. The realty of the late firm is so far converted into personalty, in equity, as to be subject, like choses in action or any other personal assets, to be sold by the survivors, if such sale is necessary to pay the partnership debts. A deed executed by the survivors in pursuance of such sale does not, except in Tennessee (*Solomon v. Fitzgerald*, 7 Heisk. 552), convey the legal title of the deceased copartner, for that is vested in his heirs by operation of the law of descent; but it does convey the entire equitable title, and the purchaser "may call on the heir for the legal title and compel him to convey": *Andrews v. Brown*, 21 Ala. 443; 56 Am. Dec. 252; *Delmonico v. Guillaume*, 2 Sand. Oh. 366; *Broom v. Broom*, 3 Mylne & K. 313; *Dupuy v. Leavenworth*, 17 Cal. 268; *Barton v. Lovejoy*, 56 Minn. 380; 45 Am. St. Rep. 482; *Hanson v. Metcalf*, 46 Minn. 25; *Shanks v. Klein*, 104 U. S. 18; *Keith v. Keith*, 143 Mass. 262; *Euston v. Cartwright*, 84 Mo. 27; *Buffum v. Buffum*, 49 Me. 108; 77 Am. Dec. 249; though it is executed by the surviving partner in his own name, and does not purport to convey any title other than his: *Dyer v. Morse*, 10 Wash. 492.

Purchasers and Encumbrancers without Notice.—The conveyance of his undivided interest which either partner may make during the continuance of the partnership is, if made to a purchaser with actual or constructive notice, subject to the trusts then existing against the realty conveyed in favor of the partners and the creditors of the firm. In this, as in all other cases, a vendee with notice obtains no rights superior to those held by the vendor; *Kistner v. Sindlinger*, 33 Ind. 117; *Priest v. Choteau*, 85 Mo. 398; 55 Am. Rep. 373; *Cunningham v. Ward*, 30 W. Va. 572; *Edgar v. Donnelly*, 2 Munt. 287; *Hoxie v. Carr*, 1 Sum. 174; *Ross v. Henderson*, 77 N. C. 170; *Williams v. Love*, 2 Head. 80; 73 Am. Dec. 191. And, on the other hand, there seems to be no doubt that a vendee or a mortgagee of a partner will obtain both the legal and the equitable title to the moiety purchased by him, and will hold the same free from all trusts of which he had no notice, actual or constructive, at the date of his purchase: *McNeil v. Congregational Society*, 66 Cal. 110; *Arnold v. Wainwright*, 6 Minn. 358; 80 Am. Dec. 448; and, further, that the fact of which he must have notice is not merely that his vendor was a partner as well as a cotenant, but that, on account of such partnership, the realty was in equity liable to certain liabilities then existing: *Buchan v. Sumner*, 2 Barb. Oh. 198; 47 Am. Dec. 305; *Buck v. Winn*, 11 B. Mon. 320; *Frink v. Branch*, 16 Conn. 270; *Forde v. Herron*, 4 Munt. 316; *McDermot v. Laurence*, 7 Serg. & R. 441; 10 Am. Dec. 486; *Hale v. Henrie*, 2 Watts, 143; 27 Am. Dec. 289; *Hale v. Plummer*, 6 Ind. 121; *Abbott's Appeal*, 50 Pa. St. 238; *Robinson Bank v. Miller*, 153 Ill. 244; 46 Am. St. Rep. 883. But notice "will be implied whenever the circumstances are such as to justify the presumption that the purchaser either knew or remained willfully ignorant"; 1 Lead. Cas. Eq. 241; *Tillinghast v. Ohamplyn*, 4 R. I. 173; 67 Am.

Dec. 510. As between the partners and creditors of one of the partners, it cannot be shown, according to the decisions in Pennsylvania, that a deed which is apparently made to the partners as tenants in common was, in fact, a conveyance to them to hold as partnership assets. "Partners who take a deed in their individual right as tenants in common stand in a different relation to the public" from that in which they stand toward each other. "Their acts tend to mislead both purchasers and creditors trusting to the apparent state of the title. Partners, being the owners of the money which pays for the title, have the power of directing its application to suit their own purposes, and can, if they choose, always secure the identity of its character in the kind of title they take for it. If, therefore, they take title for themselves as tenants in common, instead of as partners, they, by their own election, stamp the character of the title as to those who afterward deal with them. . . . It is contended by the appellant that a creditor is not within the recording acts, and not entitled to notice of the true character of the title. It is true that the recording acts extend only to purchasers and mortgagees, and their effect is to defeat an unrecorded deed as to subsequent purchasers and mortgagees without notice of it, while a creditor is not protected against the unrecorded deed, but must stand on the title as it was in fact when his lien attached. This is very different, however, from the use of parol evidence to alter the effect of a deed which itself displays the title. To alter a deed so as to make it of different import offends against the spirit of all those laws made to protect the public against fraud and secret titles, and prevent a change of right to the prejudice of those who deal upon the apparent legal operation of the instrument. . . . It is very clear that honest creditors who are led to give credit to the individual partners on the apparent state of the title in them individually ought not to be met afterward by a change of the face in the deed, by which it takes a partnership aspect contrary to its terms": *Abbott's Appeal*, 70 Pa. St. 81; *Abbott's Appeal*, 50 Pa. St. 238; *Collner v. Greig*, 137 Pa. St. 606; 21 Am. St. Rep. 899. In this case the contest was between a creditor of one of the partners and another partner, the latter claiming that the real estate should be held as partnership assets, and its proceeds applied to the payment of a sum found to be due to him from the firm. If, however, the contest had arisen between the creditors of one partner and the creditors of the firm, the decision would have been the same, for the courts of this state seem to have uniformly decided that parol evidence is not admissible to show that lands apparently held by a tenancy in common are, in fact, held in partnership, and therefore pledged to partnership creditors: *Lefevre's Appeal*, 69 Pa. St. 125; 8 Am. Rep. 229; *Hale v. Henrie*, 2 Watts, 144; 27 Am. Dec. 289; *Ridgway's Appeal*, 15 Pa. St. 181; 53 Am. Dec. 586; *Brown's Appeal*, 39 Pa. St. 537; 80 Am. Dec. 542; *Overholt's Appeal*, 12 Pa. St. 222; 51 Am. Dec. 598; *Cummings' Appeal*, 25 Pa. St. 269; 64 Am. Dec. 695; *Appeal of Second Nat. Bank*, 83 Pa. St. 203; *Holt's Appeal*, 98 Pa. St. 257; but for the purpose of establishing the rights of the partners in a litigation between themselves such evidence is admissible: *Abbott's Appeal*, 50 Pa. St. 257.

The very recent English decisions have determined that the possession of lands for partnership purposes by the cotenants thereof is such a notice to third persons that they may be partnership assets, as to place them upon inquiry in reference to the true nature of the title, and that either partner may insist upon the partnership character of the realty as against all per-

sons dealing with his copartner and having notice of the use of the lands for partnership purposes: *Cavander v. Bulteel*, 29 L. T., N. S., 710; L. R. 9 Ch. App. 79. This appears to us to be a reasonable application of the rule that "if a person is in possession of property, notice of the title under which he is in possession must be attributed to every one who deals with that property."

DRAKE v. LADY ENSLEY COAL, IRON AND RAILWAY COMPANY.

[102 ALABAMA, 501.]

WATERCOURSE—DEPOSIT FROM MINES.—The owner of lands through which a watercourse runs and who therewith washes ores mined on his land and returns the water to the stream polluted so as to be unfit for watering stock, and other domestic uses, is answerable in damages to the riparian proprietors of the land thus injured by its pollution.

PRACTICE.—AN ACTION ON THE CASE is the proper remedy to recover compensation for injuries by a riparian proprietor from the pollution of the waters of a stream running through his land.

WATERS—MEASURE OF DAMAGES FOR POLLUTING.—In an action by an executor for the pollution of waters running through the land of his testator, where there is some evidence showing injuries of a permanent character, the court has no right to restrict the amount of recovery to the diminution of the rental value for one year. The difference between the value with and without the permanent injury is recoverable.

ACTION by the executor of J. M. Kirk against the defendant railway company to recover damages to the testator's estate from the pollution of a stream which ran through his land. In the original and in the amended complaint trespass and an action on the case were joined. A demurrer to the amended complaint on the ground that it "joins separate and distinct injuries and trespasses and embodies a claim for separate and distinct trespasses and injuries in the same count" was sustained. To the complaint, as further amended the defendant pleaded the general issue and special pleas, among which was included the statute of limitations for one year. A demurrer interposed to this plea of the statutes of limitation was overruled. The defendant sought to exlude himself from liability by proving that the ore had to be washed in order to prepare it for marketable use. Plaintiff in response to this evidence proved, on his part, that the defendant by the use of proper dams could have held the water until it was almost entirely rid of the refuse from the ores, and could thereby have prevented damages to the land described in the complaint. The court

charged the jury that the plaintiff could not recover in this case damages to the realty by reason of any trespass, and that his right of recovery was limited to the depreciation of the rental value of the farm for the year next preceding the commencement of the suit. The plaintiff excepted to the refusal of the court to charge that if the defendant knowingly used the water of the creek in such a manner that it naturally resulted in injury to the plaintiff's land, then that the defendant is guilty of trespass, and the plaintiff entitled to recover all the damages he sustained from the injury, not exceeding the amount named in the complaint, and also that the plaintiff could recover in this suit for permanent injuries caused to the land during the year next preceding the commencement of the suit, and further that if the defendant by the washing of ores caused refuse matter to be carried down stream and deposited on the plaintiff's land and on the banks and bed of the creek, and such deposit was injurious to the land, then that the plaintiff is entitled to recover such amount of damages as is required to remove the deposit, if this amount is less than the depreciation in value of the whole farm, but if this amount is greater than the depreciation, then that the plaintiff is entitled to recover the difference in the value of the farm before the deposits were put there and its value at the time the suit was instituted. The court, as requested by defendant, instructed the jury that the plaintiff was not entitled to recover anything in this action for the trespass by the defendant. Judgment for the defendant; plaintiff appealed.

Kirk & Almon, for the appellant.

W. I. Bullock, contra.

⁵⁰⁴ COLEMAN, J. This action was instituted to recover damages for an alleged injury to realty. The complaint consists of several counts, some of which were framed in trespass and others in case. The important questions for consideration and the decision of which will determine ⁵⁰⁵ the several assignments of error, are: 1. Whether the facts will support the complaint in either of its aspects? and if so, 2. Whether the proper action is trespass or case? and 3. If the action is maintainable, what is the proper measure of damages?

The trial court held that the action should be in case, that

the statute of limitations for one year applied, and that the proper measure of damages was the diminution of the rental value for one year preceding the bringing of the action. The undisputed facts show that for many years prior and up to the time of his death, which occurred in the year 1890, plaintiff's testator had owned and been in possession of the lands claimed to have been damaged, cultivating them as a farm, and since his death the plaintiff, as executor, had been in possession of the lands. That through the lands there flowed a creek of clear, healthy water, useful for and used for watering stock, and at times for drinking purposes; that defendant owned a tract of land above the land of plaintiff on the same creek, from which for five or six years previous to the bringing of the suit defendant had been engaged in mining iron ore, and washing its ore with the waters of the creek. That for this purpose the water was pumped into large reservoirs, and, after utilizing the water in washing the iron ore, it was allowed to escape in a way so as to return to its natural channel above plaintiff's land. There was evidence also tending to show that when the water reached plaintiff's farm it was laden with red clay, refuse ore, and debris, rendering it unfit for stock and drinking purposes, and that in some places a thick sediment or "slush" was deposited upon portions of the farm impairing its fertility, and in some places it was so deep as to destroy its usefulness for cultivation. The evidence conflicted as to the extent of the damage sustained. The evidence also conflicted as to whether by the construction of proper basins to receive and hold the water after having been used by defendant it could not have been retained until all the objectionable matter or substance contained in it had settled in the basins, so as to restore the water to its natural purity.

Appellee contends, that if there are errors in the record, they are errors without injury, inasmuch as plaintiff was not entitled to recover in any event, and in support ⁵⁰⁶ of his contention cites the case of *Clifton Iron Co. v. Dye*, 87 Ala. 468, in which the court uses this language: "The court will take notice that in the development of the mineral interests of this state, recently made, very large sums of money have been invested. The utilization of these ores, which must be washed before using, necessitates, in some measure, the placing of sediment where it may flow into streams which constitute the natural drainage of the section where the ore banks

are situated. This must cause a deposit of sediment on the lands below; and while this invasion of the rights of the lower riparian owner may produce injury, entitling him to redress, the great public interests and benefits to flow from the conversion of these ores into pig metal should not be lost sight of. As said by the vice-chancellor, in *Wood v. Sutcliffe*, 2 Sim., N. S., 162: 'Whenever a court of equity is asked for an injunction in cases of such nature as this [a bill to enjoin the pollution of a stream], it must have regard, not only to the dry, strict rights of the plaintiff and defendant, but also to the surrounding circumstances.' He cites, also, the case of *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147, in which the court uses the following language: "*Sic utere tuo, ut alienum non lædas*, is the maxim, the rule in such case: See *Stein v. Burden*, 29 Ala. 127; 65 Am. Dec. 394. So, as a rule, every one must so enjoy his own property as not to offend his neighbor's equal right to enjoy his own unmolested. But this rule cannot be enforced in its strict letter without impeding rightful progress, and without hindering industrial enterprise. Hence, minor individual interest is sometimes made to yield to a larger and paramount good. To deny this principle would be to withhold from the world the inestimable benefits of discovery and progress in all the great enterprises of life. The rough outline of natural right or natural liberty must submit to the chisel of the mason, that it may enter symmetrically into the social structure." Notwithstanding the enunciation of this principle in favor of the public interest, the court was careful to declare: "Under these rules, defendant had no right, by ditches or otherwise, to cause water to flow on the lands of the plaintiff, which, in the absence of such ditches, would have flowed in a different direction," and it adopts the principle declared in *Kauffman v. Griesemer*, 26 Pa. St. 407, 67 Am. Dec. 437, in which it was declared ⁵⁰⁷ that the obligation of the inferior heritage to the superior "applies only to waters which flow naturally, without any act of man. . . . It is not more agreeable to the laws of nature that water should descend than it is that lands should be farmed and mined. The plaintiffs had no right to insist upon his receiving waters which nature never appointed to flow there."

The principle of law declared in *Clifton Iron Co. v. Dye*, 87 Ala. 468, does not sustain the proposition to which it was cited. That was a bill for an injunction to restrain the use

of the washers. Considerations arise in applications for injunctions, which do not exert a controlling influence upon a right of action for damages, and in that very case, it is said, "the plaintiff should have been remitted to a court of law for the recovery of his damages."

The case of *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445, cited by counsel, goes far to sustain the contention of appellee. In this case it is held that "the use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners . . . must *ex necessitate* give way to the interest of the community, in order to permit the development of the natural resources of the country, and to make possible the prosecution of the lawful business of mining coal." The conclusion reached is not in harmony with the prior decisions of the same court. The same principle announced in *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445, to some extent has been applied in cases of irrigation: *Schilling v. Rominger*, 4 Col. 100; *Yunker v. Nichols*, 1 Col. 551.

Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 57 Am. Rep. 445, is an authority we think very much weakened by the subsequent cases in the same state of *Robb v. Carnegie*, 145 Pa. St. 324, 27 Am. St. Rep. 694, and *Lents v. Carnegie*, 145 Pa. St. 612, 27 Am. St. Rep. 717. In the latter cases it was held that "a manufacturer of coke from coal not mined on his own land is liable in actual damages to a lower proprietor for the pollution of a stream as a necessary incident to his business, and also for actual damages done to crops and the soil." *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445, is not overruled, but is commented on, and the distinction is drawn that in the latter case (*Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445) the ore was being mined by the owner of the soil, and in the two later cases, the coke was not mined on the land upon which it was manufactured. It seems to us that if, in the case where the ⁵⁰⁸ coal was mined on the land of the owner, he was exempt from damages upon the ground that the individual or minor interest must yield to the greater and paramount interest of the public, it would make but little difference where the coke was mined. The manufacturing of the coke from the ore was that which contributed to the paramount and public interest. On the other hand, if the owner is to be exempted from liability, because the ore

was mined on his own land, and not because of public benefit, then the doctrine of "*sic utere tuo, ut alienum non lædas*" would be abolished, and the rights of lower riparian proprietors, almost universally recognized and protected, would be destroyed. A lower proprietor purchases under the protection of the rule that "*aqua currit, et debet currere, ut solebat*," at least to the extent that the servitude of his land shall not be added to by artificial means or the industry of man: *Boyn-ton v. Longley*, 19 Nev. 69; 3 Am. St. Rep. 781, and note.

Under the provisions of the constitution, private property cannot be taken for public uses, or for corporations, without just compensation being first made to the owner, except by his consent. The courts, and it was never intended to be understood otherwise, are not the "masons" to "chisel" away vested rights of property of private individuals, however humble and obscure the owner, for the benefit of the public or great corporations. It is the pride of this republic that no man can be deprived of his property without due process of law, and that the poorest citizen can find redress for an unlawful injury caused by his wealthy neighbor by appealing to the courts of his country.

We are satisfied that plaintiff's complaint showed a good cause of action, and there was evidence tending to sustain it: *Tennessee Coal etc. Co. v. Hamilton*, 100 Ala. 252; 46 Am. St. Rep. 48; *Hughes v. Anderson*, 68 Ala. 280; 44 Am. Rep. 147; *Clifton Iron Co. v. Dye*, 87 Ala. 468; *Boyn-ton v. Longley*, 19 Nev. 69; 3 Am. St. Rep. 781; *Robb v. Carnegie*, 145 Pa. St. 324; 27 Am. St. Rep. 694; *Lentz v. Carnegie*, 145 Pa. St. 612; 27 Am. St. Rep. 717; *Crabtree v. Baker*, 75 Ala. 91; 51 Am. Rep. 424; *Farris v. Dudley*, 78 Ala. 124; 56 Am. Rep. 24; *Stein v. Burden*, 29 Ala. 127; 65 Am. Dec. 394; *Pettigrew v. Evansville*, 25 Wis. 223; 3 Am. Rep. 50; 6 Am. & Eng. Ency. of Law, 149.

We are of opinion the trial court ruled properly in holding that, under the facts of the case, the plaintiff could recover only on the counts in case. The boundary ⁵⁰⁰ line between where trespass ends and case begins is not always easily determined. Under the law the defendant had the right to divert the water from its channel and utilize it in washing the ore. His duty was to return the water to its proper channel. This was done. The tort to plaintiff was neither in the diversion of the water from its channel, nor that plaintiff used it for his own purposes, but that the use to which it was ap-

plied rendered it impure, filled it with clay and objectionable ore and debris, and in this condition it was carried by the flow of the water to plaintiff's farm. The damage inflicted was neither intentional nor direct nor immediate, but was consequential. The evidence of plaintiff which tended to show that the injury was the result of negligence in failing to provide proper basins to contain the water after use, until the sediment settled and the water became pure, the negligence, if actionable was remediable only by an action on the case: *Polly v. McCall*, 37 Ala. 21; *Pruitt v. Ellington*, 59 Ala. 454; *Bell v. Troy*, 35 Ala. 184; *Roundtree v. Brantley*, 34 Ala. 544; 73 Am. Dec. 470; *Williams v. Hay*, 120 Pa. St. 485; 6 Am. St. Rep. 719; 2 Wait's Action and Defenses, 110.

We are of opinion the court erred in restricting the damages recoverable to the diminution of the rental value for one year. The lands had belonged to plaintiff's testator, and plaintiff was the executor. The legal title was not in him, but the record states that plaintiff had held possession as executor of the land "since the death of testator." Lands of a decedent are subject to administration and liable for the payment of his debts. For purposes of administration and for the payment of debts, the executor had authority to take possession of the land, and he had asserted his authority. There was some evidence tending to show permanent injury to some portions of the land. Under the facts, no one could sue for permanent injury sustained, except the executor, at the time of the institution of this suit: *Calhoun v. Fletcher*, 63 Ala. 574; *Nelson v. Murfee*, 69 Ala. 603. The heirs may never succeed to legal possession and ownership of the land. It was proper to consider the diminution of the rental value, but it was not the exclusive rule for measuring the damages. The difference between the value of the land with and without the permanent injury is recoverable.

Reversed and remanded.

WATERS—POLLUTION—DEBRIS FROM MINES.—An upper riparian proprietor has the right to use the water of a natural stream for mining purposes, although he thereby impairs its purity to a limited extent; but he has no right to so pollute the stream as to render it unfit for domestic purposes to the lower owner: *Tennessee Coal R. R. Co. v. Hamilton*, 100 Ala. 252; 46 Am. St. Rep. 48, and note. See, also, the extended note to *Mississippi Mills Co. v. Smith*, 30 Am. St. Rep. 551.

MINING DEBRIS—MEASURE OF DAMAGES.—In an action by a lower riparian proprietor to recover for injury caused by the deposit of mining refuse

upon his land, and caused by the negligence of an upper proprietor and mine owner, the measure of damages is the cost of removing the debris, or, if that is impracticable, then the difference in the rental value of the land caused by the descent of the refuse matter upon it; *Elder v. Lykens Valley Coal Co.*, 157 Pa. St. 490; 37 Am. St. Rep. 743.

GARDNER v. MOBILE AND NORTHWESTERN R. R. Co.

[102 ALABAMA, 635.]

JUDGMENTS.—IF A STATUTORY MODE OF ASSIGNMENT IS PROVIDED, it is cumulative, in the absence of express words inhibiting other modes of assignment.

JUDGMENTS.—THE ASSIGNMENT OF A JUDGMENT may be by parol or in writing, and however made passes an equity which the courts will recognize.

EXECUTION.—AN ERROR IN THE MANDATE OF AN EXECUTION is at most a mere irregularity, and cannot justify a court of equity in vacating a sale made under it.

JUDGMENTS—ASSIGNMENT.—AN ATTORNEY AT LAW CANNOT ASSIGN A JUDGMENT without special authority from his client, but the authority or a ratification may be inferred from circumstances.

JUDGMENT—ASSIGNMENT.—THE AUTHORITY OF AN ATTORNEY AT LAW TO ASSIGN A JUDGMENT MAY BE INFERRED from the silent acquiescence of his client extending over many years.

EXECUTION ISSUED UPON A DORMANT JUDGMENT WITHOUT REVIVAL, though irregular, is not void. While it may be quashed on an application made with reasonable diligence, unexplained laches are fatal to the application.

EXECUTIONS—EQUITABLE JURISDICTION.—A court of equity will not interfere to vacate a sale made under a lawful process on account of irregularity in its issue or its execution if the party might have sought redress in the court wherein the writ issued.

EXECUTION SALE WILL NOT BE VACATED IN EQUITY unless there is accident, surprise, mistake, or fraud in some fact or circumstance affecting the sale itself, and not resting on an irregularity of process or irregularity in its execution.

EXECUTIONS AGAINST CORPORATIONS.—As a general rule the property of a private corporation is subject to execution. An exception obtains, however, when the corporation is charged with public duties and is in the exercise of its franchise and in the performance of its duties, in which event such property as is necessary to enable it to discharge its duties to the public and effect the objects of its incorporation is not subject to execution at law, and the only remedy of the judgment creditor is the appointment of a receiver and the sequestration of its income and earnings.

EXECUTIONS AGAINST CORPORATIONS.—IF A RAILWAY CORPORATION HAS CEASED to discharge its duties and has for a long time not used its franchise and right of way for any purpose, and has abandoned all further work, the land procured for a right of way and all the title of the corporation therein are subject to sale under execution.

SUIT in equity to cancel and remove certain conveyances as clouds on the title to property of the complainant, and also to obtain an injunction to prevent the commission of trespass by the defendant. The complainant had been incorporated under the general laws of Alabama in 1870, and it was authorized to build a railroad from Mobile, and for that purpose had secured for its uses and for its right of way the real property described in the bill, and had constructed thereon its roadbed and built bridges. The objections to the executions and also the claim that the property sold was not subject to execution sale are sufficiently disclosed in the opinion of the court. The decree was in favor of the complainant for the relief prayed, and the defendant thereupon appealed.

Overall, Bestor & Gray, F. G. Bromberg, and McCarron & Lewis, for the appellants.

H. Austill, and Pillans, Torrey & Hanaw, contra.

¶⁶⁴¹ STONE, C. J. The bill was filed to vacate a sale of lands made by the sheriff of Mobile county, under executions which were issued from the circuit court of that county, founded on judgments rendered against the appellee. It seeks a cancellation of the conveyance made by the sheriff to the purchaser, and of subsequent conveyances dependent on it, and prays an injunction to prevent alleged trespasses on the lands. The validity of the sale by the sheriff is impeached on the ground of alleged ¶⁶⁴² irregularities in the issue of the executions, the payment of one of the judgments, and because the lands were the right of way of the appellee, and, as is asserted, not the subject of levy and sale under executions at law.

Prior to the issue of the executions under which the sales were made, the judgments had been assigned. The assignments were not made in the mode prescribed by the statute (Code, sec. 2927); and the mandate of the executions was, that the moneys made should be accounted for to the assignee of the judgments. In all other respects the executions corresponded to the judgments. Judgments have the assignable qualities of choses in action, and may be transferred by parol or in writing. If a statutory mode of assignment is provided, it is cumulative, in the absence of express words inhibiting other modes of assignment: 2 Freeman on Judgments, sec. 422. The assignment, however made, passes an

equity which courts will recognize and protect. It entitles the assignee to sue on the judgment or to issue execution thereon in the name of the assignor, and is beyond his control or interference: 2 Brickell's Digest, secs. 308, 317, p. 153. The statute to which we have referred does not lessen the assignable quality of judgments, nor limit the mode of assignment. It is cumulative, entitling the assignee, if the assignment is made in the mode provided, to sue on the judgment, or to the issue of execution thereon for his use, in the name of the plaintiff, whether living or dead. It in this way dispenses with the necessity of revivor in the event of the death of the plaintiff; and, under the operation of section 2595 of the code, he may make himself the sole party on the record. The error in the mandate of the executions is, at most, a mere irregularity, incapable of injury to the appellee, and because of such irregularity a court of equity will not interfere to vacate a sale made by the sheriff: 2 Freeman on Executions, sec. 310; *Ray v. Womble*, 56 Ala. 32; *Lockett v. Hurt*, 57 Ala. 198.

One of the judgments, the one, it is asserted, that was paid prior to the issue of execution thereon, seems to have been assigned by the attorney of the plaintiff therein. Without special authority, an attorney at law cannot assign a judgment he may have obtained for his client. The authority, or a ratification by the client, ⁶⁴³ may be inferred from circumstances. The assignment was made many years before the issue of the last execution, and so far as is now shown its validity has never been questioned by the client. The silent acquiescence for years by the client is evidence that the attorney had authority to make it, or of a subsequent ratification. The contention of payment of this judgment was not ascertained by the chancellor to be true, and we find no reason to doubt the correctness of his conclusion.

The other judgment, rendered in favor of Burgess, prior to the issue of the execution under which the levy and sale were made, had become dormant, more than ten years having elapsed after the test of the last preceding execution. The execution was irregularly issued and was voidable, but it was not void: 1 Freeman on Executions, sec. 2830; *Sandlin v. Anderson*, 76 Ala. 405; *Steele v. Tutwiler*, 68 Ala. 107. On a proper application, seasonably made, the court of law would have quashed it: *McCall v. Rickarby*, 85 Ala. 152. Such an application must have been made with reasonable diligence;

unexplained laches would have been fatal to it: *Bank of Gene- see v. Spencer*, 18 N. Y. 150; *Cowan v. Sapp*, 74 Ala. 44; *Ponder v. Cheeves*, 90 Ala. 117.

More than two years elapsed after the issue of the execution and the levy and sale, before the filing of the present bill. Whether the court of law would at that day have entertained an application to vacate the sale, because of the irregularity in the issue of the execution, it is not necessary to consider. Conceding that court would have intervened, the jurisdiction was exclusive. The rule is very general that a court of equity will not interfere to vacate a sale under legal process on account of irregularity in the issue of process, or in its execution; but, as is properly said, "the application ought to be made to the court issuing the writ, and if made elsewhere ought not to be entertained." There must be accident, surprise, mistake, or fraud, or some fact or circumstance affecting the sale itself, and not resting on the irregularity of the process, or irregularity in its execution, before a court of equity will take jurisdiction to vacate it. There is not in this case averment or evidence of either of these conditions: 2 Freeman on Executions, sec. 310; *Ray v. Womble*, 56 Ala. 32; *Lockett v. Hurt*, 57 Ala. 198; *Cowan v. Sapp*, 74 Ala. 44.

644 The more important question is, whether the lands were the subject of levy and sale under the executions, and this depends materially upon the quality of the estate residing in the appellee. The allegation of the original bill is that they were acquired for a right of way, under the charter of the appellee, "by purchase, condemnation, and otherwise."

The general law providing for the creation and regulation of railroad corporations, approved December 29, 1868, under which the appellee was incorporated and organized, contains the grant from the state of the franchises and powers it claims to have acquired. It did not confer the power of acquiring lands by proceedings in condemnation, or otherwise than by gift or purchase, and did not limit the estate or interest which could be acquired. The act of March 1, 1871, passed after the creation and organization of the appellee, conferred the power to resort to compulsory proceedings in condemnation for the taking of lands: Acts 1870-71, pp. 55-60.

There is no written evidence of the title of the appellee introduced; no other than vague and indefinite parol evidence, which seems to have been received without objection, indicating that parts of the lands were acquired by con-

demnation, and other parts by gift or purchase, not distinguishing between them. The grant of power to acquire, hold, and convey lands for a right of way, or other uses, by the law of 1868, is general and extensive. The third section confers power to "acquire and convey at pleasure all such real and personal estate as may be necessary and convenient to carry into effect the objects for which it was created"; and the fifteenth section provides for the acquisition, by purchase or gift, of any lands in the vicinity of the road, or through which it may pass, so far as may be deemed convenient or necessary to secure the right of way, or such as may be granted to aid in the construction of the road, and to hold and convey the same in such manner as the board of directors may prescribe: Acts 1868, pp. 462-466.

It is an incidental power of every corporation, unless restrained by statute, to purchase and alien lands necessary for the exercise of its corporate powers, and this, "independent of positive law" conferring such power. Says Chancellor Kent: "All corporations have an absolute *jus disponendi* of lands and chattels, neither limited as to ⁶⁴⁵ objects or circumscribed as to quantity": 2 Kent's Commentaries, 281. And railroad corporations may take a fee in lands, although corporate existence is limited to a term of years: 1 Morawetz on Corporations, sec. 330; *Davis v. Memphis etc. R. R. Co.*, 87 Ala. 633; *Nicoll v. New York etc. R. R. Co.*, 12 N. Y. 121.

What was the quantity and quality of the estate the appellee had in the lands? The power to acquire an estate in fee, by purchase or gift, for a right of way or for other uses, was very broad and general, and, according to the allegations of the bill and the scant evidence introduced, the lands were acquired, certainly in part, by the exercise of this power. If an easement only—the right to construct, maintain, and operate a railroad in and upon them—was acquired, it is not possible to ascertain the parts subject to the easement, distinguished from the parts in which a fee was acquired. As the case is presented, the more probable inference is that the appellee had an estate in fee in the lands, and not a mere easement. If the latter is the nature or character of its estate or interest, entitling it to hold in exemption from levy and sale, the fact should have been shown by certainty of pleading and satisfactory evidence.

As a general rule the property of all private corporations is as subject to legal process for the satisfaction of debt as is

the property of natural persons. An exception obtains, however, when the corporation is created to serve public purposes charged with public duties, and is in the exercise of its franchise and in the performance of its duties. Then, on considerations of public policy, without regard to the nature or quality of the estate or interest of the corporation, according to the weight of authority, such property as is necessary to enable it to discharge its duties to the public and effectuate the objects of its incorporation is not subject to execution at law. The only remedy of a judgment creditor is to obtain the appointment of a receiver, and the sequestration of its income or earnings: 1 Freeman on Executions, sec. 179, and authorities collected in notes; 2 Morawetz on Corporations, sec. 1125; *Gus v. Tidewater Canal Co.*, 24 How. 257; *Overton Bridge Co. v. Means*, 33 Neb. 857; 29 Am. St. Rep. 514, and authorities cited.

The exemption from levy is maintainable, however, only upon the theory that the corporation is created for ^{the} the furtherance of public purposes of such importance to the public that there must not be private interference with such of the corporate property as is essential to effectuate these purposes; and presupposes that to these purposes the property is being applied. Property not necessary to effectuate these purposes, if acquired by gift or purchase, may be taken by legal process for the satisfaction of debts: 2 Morawetz on Corporations, sec. 1125. And so may personal property employed, and necessarily employed, in the exercise of corporate franchises: 1 Freeman on Executions, sec. 179. When the lands were levied and sold, the appellee as a corporation had become inert, and had life in a name only. By nonuser it had subjected itself to the penalty of forfeiture by a direct proceeding at instance of the state, while only in the absence of such forfeiture it could retain the capacity to exist as a corporation. It was an existence in name only. It was not, and had not been for a period of thirteen or fourteen years, in the exercise of its corporate franchises. The line of railroad had been graded, embankments, bridges, and trestles had been erected and constructed on the lands in controversy. The work was incomplete, and for more than sixteen years prior to the levy and sale had been abandoned. From the only part of the road which was completed more than fourteen years before the levy and sale the rails and cross-ties were removed and sold to a street railway company; and the

locomotive and flat cars, the only rolling stock it seems to have ever possessed, and which had been utilized solely to aid in construction, were sold and carried away. Now, conceding that the property of the appellee, essential to the exercise of its franchises, and to effect the public purposes contemplated in its creation, may be exempt from levy and sale under legal process, can the exemption continue after the franchises have been abandoned? Can it exist when the necessity for its existence has terminated? We think it is coextensive with the performance of the public purposes the corporation was intended to promote, and when these purposes are abandoned the exemption ceases, and the property stands in the condition of property not necessary to enable the corporation to perform its duties to the public: 1 Freeman on Executions, sec. 179.

In *Benedict v. Heineberg*, 43 Vt. 231, a railroad company ⁶⁴⁷ had ceased to use a portion of its road, and was removing the rails necessary to its operation. The company owning in fee the part of the road so abandoned, it was held such part was subject to levy and sale under execution at law. The decision rests upon the proposition that the land so abandoned was not being held for public uses, or for use as a railroad. In that case there was an abandonment in fact and intent of the public uses. Here there was an abandonment in fact. There may have been a lingering hope that, at some indefinite time in the future the corporation might resume activity and apply the lands to the uses for which they were acquired. Or that they could be sold to some other company having the means or credit to complete the construction of a line of railroad. However this may be, the fact remains that there was not an exercise of corporate franchises for years, and the lands were not applied to public uses. Practically, there was no pretense that they were held to enable the company to discharge its public duties. We are of opinion they were subject to levy and sale under the executions; that the sale was valid, passing to the purchaser the fee vested in the appellee. If the lands were not subject to execution, what remedy could the judgment creditors have? There was no income or earnings to be sequestered. The result of the contention would be that the lands were placed beyond the reach of creditors, and yet the appellee held the fee, having power and capacity to sell and convey it, but applying it to no public uses, and earning no income.

The question we have considered, the right to levy an execution at law on lands owned and held in fee, as the right of way of a railroad corporation, the corporation having become inert and having ceased all user of its franchises and all performance of its public duties, was not considered in *East Alabama Ry. Co. v. Doe*, 114 U. S. 340. All that was considered and decided in that case was, whether the mere right of way of a railroad company, "a mere easement in the land to enable it to discharge its functions of making and maintaining a public highway, the fee of the soil remaining in the grantor," was the subject of levy and sale under execution at law. The court expressly declared that it was "not necessary to discuss the general question as to the right to levy an execution at law on property ⁶⁴⁹ owned by a railroad company in fee." Nor is it now necessary to express an opinion whether under any circumstances the easement of a railroad company may or may not be the subject of levy and sale under execution at law.

The assignments of error are numerous, presenting many questions which have been discussed by the respective counsel. The conclusion we have reached renders it unnecessary to consider them in detail. The result is, the decree of the chancellor must be reversed, the injunction dissolved, and the bill dismissed at the cost of the appellee in this court and in the court of chancery.

Reversed and rendered. _____

JUDGMENTS—ASSIGNMENT BY PAROL.—A judgment may be transferred by parol: *Extended note to Dugas v. Mathews*, 54 Am. Dec. 363.

JUDGMENTS—POWER OF ATTORNEY TO ASSIGN.—An attorney has no authority as such to assign a judgment recovered in favor of his client: *Note to Head v. Gervais*, 12 Am. Dec. 582.

EXECUTION—EFFECT OF CLERICAL ERRORS.—Mere clerical errors and failure to recite the judgment with strictness do not avoid the execution: *De Loach v. Robbins*, 102 Ala. 288; *ante*, p. 46, and note.

EXECUTION ISSUED ON A DORMANT JUDGMENT BEFORE REVIVOR is not void, and if not set aside a sale under it must be sustained: *De Loach v. Robbins*, 102 Ala. 288; *ante*, p. 46, and note.

EXECUTION SALES.—VACATING IN EQUITY FOR FRAUD, ACCIDENT, OR MISTAKE: *Note to Voorhis v. Terhune*, 7 Am. St. Rep. 786.

EXECUTION AGAINST CORPORATIONS.—The property of purely private corporations, though useful and necessary to the conduct of their business, is subject to sale under execution, but the property of public corporations reasonably necessary to the exercise of their franchises is exempt from levy and sale by an execution creditor: *Reynolds v. Reynolds Lumber Co.*, 169 Pa. St. 626; 47 Am. St. Rep. 935, and note.

NICROSI v. IRVINE.

[102 ALABAMA, 648.]

GARNISHMENT, WHAT SUBJECT TO.—In the absence of fraud on the part of the debtor, or of fraudulent collusion between him and the garnishee, only such money demands can be subject to garnishment as the defendant in the judgment could in his own name and right recover in an appropriate action.

CORPORATIONS—GARNISHMENT—SUBSCRIPTION TO STOCK PAID FOR IN PROPERTY.—Though a subscription to the stock of a corporation is paid for in property of much less value than the amount of the stock, no action at law can be sustained by the corporation to recover the difference. Therefore such difference cannot be subjected to garnishment by a judgment creditor of the corporation.

Thomas H. Watts, for the appellant.

Brickell, Semple & Gunter, contra.

⁶⁵⁰ **MCCLELLAN, J.** Nicrosi, having a judgment against the Calera Land Company, sued out process of garnishment against W. M. Irvine, alleging that said Irvine was indebted to the defendant in judgment. To put the case in the light most favorable to the plaintiff, the answer of the garnishee disclosed the following facts: Irvine and others, on August 1, 1885, entered into a contract among themselves to jointly buy certain lands with a view to the organization of a land corporation for the purpose of establishing and building a town on said lands through the sale of lots therein by the corporation ⁶⁵¹ to third persons, etc. It was agreed between Irvine and his said associates that each of them should subscribe for the stock of said corporation to the extent of five times the amount each had contributed toward the purchase of the land, and pay in full for such stock by a conveyance of the land to the proposed corporation at a price five times the amount paid for it by them. This agreement was in all respects executed and carried out. The land was purchased, the corporation was organized, each of the purchasers of the land subscribed for shares in the capital stock equal at their face or par value to five times the sum contributed by each to the purchase of the land, and each and all of these subscriptions were nominally fully paid by a conveyance of the land to the corporation at a valuation equaling the face value of the stock, and five times greater than the price paid for the land; and each of said parties had issued to him and received the shares thus subscribed for, fully paid in the manner stated according to the terms of said agreement, and also

fully paid, as between the subscribers and the corporation, so far as they and the corporation were capable of affecting such a result. Irvine contributed five hundred dollars to the purchase of the land. He accordingly subscribed for twenty-five shares of the capital stock of the par value of one hundred dollars per share, or two thousand five hundred dollars. He, with the others associated with him, paid his subscription by uniting with them in the conveyance of the land to the corporation. He has never paid nor been called on by the corporation to pay anything further for this stock. The land at the time of the subscription to and issuance of these shares of stock was worth only the price paid for it by Irvine and associates. That was its value when it was conveyed to the corporation, and, it may be conceded, has been its value ever since that time. So that, in point of fact, Irvine paid only five hundred dollars, or property worth only five hundred dollars, for two thousand five hundred dollars in the capital stock of the corporation. The corporation thus formed, and whose stock Irvine thus subscribed for and received in the sum of two thousand five hundred dollars in consideration or on payment of five hundred dollars only, was the Calera Land Company, the defendant in the judgment upon which this garnishment is pending. ⁶⁵² On the theory that these facts showed that Irvine, the garnishee, was indebted to the defendant corporation for unpaid subscription to its capital in a sum equal to the difference between the money paid or the value of the property delivered by him on his subscription and the amount of the stock subscribed by, issued to, and received by him, and upon the further theory that this was a demand of the defendant against the garnishee which could be subjected in this proceeding, the plaintiff moved for judgment against the garnishee on his answer. The court denied the motion, declined to enter judgment, and discharged the garnishee. The present appeal presents this action of the trial court for review.

It is thoroughly well-established law that, in the absence of fraud on the part of the debtor, or fraudulent collusion between him and the garnishee, only such money demands can be subjected by process of garnishment to the satisfaction of the plaintiff's judgment as the defendant in judgment could in his own name and right recover in an action of debt or indebitatus assumpsit: 1 Brickell's Digest, secs. 313, 314, p. 175; 3 Brickell's Digest, secs. 6-9, p. 524; *National Com.*

Bank v. Miller, 77 Ala. 163; 54 Am. Rep. 50; *Tengue v. Le Grand*, 85 Ala. 493; 7 Am. St. Rep. 64; *Archer v. People's Savings Bank*, 88 Ala. 249; *Craft v. Summersell*, 93 Ala. 430.

The only exception to this rule is that referred to above as resting on the fraud and collusion of the defendant and garnishee. Fraud, within the meaning of this exception, is that conduct on the part of a judgment debtor which is actuated by an intent, actual or constructive, to hinder, delay, and defraud creditors, and whereby he disables himself to sue his debtor, though the debt is not in fact satisfied. A familiar illustration is shown in an assignment by the debtor of a chose in action for his own benefit to a third person with a covinous purpose. In such case the judgment debtor could not maintain an action of debt or indebitatus assumpsit against the garnishee, for he has estopped himself by the assignment, yet the chose being fraudulently held by the assignee for his benefit, and the debt being in reality due to him, though he cannot recover it in his own name, his creditor may subject it by garnishment to the payment of a judgment against him: *Prite v. Masterson*, 35 Ala. 483; *Alexander v. Pollock*, 72 Ala. 137.

653 This exception to the general rule has no place in the case at bar, for there is no ground for the insistence that the corporation failed in the first instance to secure a right of action against Irvine through any covinous purpose with respect to creditors, or any other character of fraud, and it is clear that if the defendant corporation ever had a right of recovery in debt or indebitatus assumpsit against Irvine in respect of the difference between the face value of the stock subscribed by and issued to him and the value of the property he conveyed in consideration thereof, it has that right of action now, and its demand thus enforceable may in this proceeding be subjected to plaintiff's judgment. So that the sole question is, whether on the facts we have conceded to exist Irvine could be coerced by an action *ex contractu* at law, in the name of the Calera Land Company and in its right, to pay to said company said difference in values amounting to two thousand dollars. We think not. With full knowledge by all the parties of all the facts, the corporation agreed to issue and deliver twenty-five shares of its capital stock of the nominal value of two thousand five hundred dollars. Irvine agreed to take and did take said twenty-five shares. The company agreed to receive as full payment for

these shares a conveyance by Irvine of specific property. Irvine agreed to convey said property and nothing else, nor to pay aught else in full payment. He did convey it. The corporation received it. Each party yielded and received all and precisely what each had agreed to yield and receive. Every obligation imported by the contract as between the contracting parties themselves has been discharged. The contract as between them has been fully executed and performed. If it is to be treated as valid at law the corporation could no more insist upon additional payment by Irvine than Irvine could compel the issuance and delivery to him of additional shares of its stock. If by reason of constitutional and statutory provisions the contract is to be considered as void at law, the case would stand upon the naked fact that the parties, not constrained thereto by any binding obligation, had exchanged certain property, shares of stock on the one hand and land on the other, and while the stock might be void in the hands of Irvine and his conveyance voidable for the want of a consideration, it is not possible to conceive that he would yet be ⁶⁵¹ under a legal contractual obligation to deliver other property or pay money which was not even contemplated by the void contract—the only contract ever attempted or intended to be made between the parties.

The capital of a corporation is regarded as a trust fund for its creditors; and upon the theory that the difference between the face value of shares in such capital and the value of property which has been conveyed to the corporation for such shares at an overvaluation belongs to and constitutes in part such trust fund, a court of chancery will, at the instance of creditors, conserve the integrity of the fund by decreeing the payment of such difference by the subscriber: *Elyton Land Co. v. Birmingham etc. Co.*, 92 Ala. 407; 25 Am. St. Rep. 65. But this right in the creditors is purely an equitable one and not enforceable at all at law, and enforceable in equity on the independent standing of creditors in relation to the capital stock, and not through any supposed legal or equitable right the corporation itself has to demand payment of such difference for its own benefit in any forum, for it has no such right.

There are some intimations and expressions in two or three cases decided by this court which are not in harmony with the foregoing views and our conclusions that garnishment is not plaintiff's remedy in this case because the judgment

debtor could not have maintained debt or indebitatus assumpsit against the garnishee. Thus, in the case of *Parsons v. Joseph*, 92 Ala. 403, 407, it is said: "It may be, that stockholders, who knowingly and intentionally have subscribed and paid for stock with property upon a fictitious valuation, are liable as stockholders who have not paid up in full for their stock, within the meaning of the statute, to creditors who have not precluded themselves from maintaining the suit"; and in *Davis v. Montgomery etc. Co.*, 101 Ala. 127, it is said: "This court . . . has recently decided that a subscription for stock payable in property at a fictitious valuation, and which could not be enforced against the subscriber by the corporation in its own interest, because violative of article 14, section 6 of the constitution and section 1662 of the code, is not void as against a creditor of the corporation: *Elyton Land Co. v. Birmingham etc. Co.*, 92 Ala. 407; 25 Am. St. Rep. 65; *Parsons v. Joseph*, 92 Ala. 403." These expressions in ^{§53} the first place were dicta in each of the cases in which they were employed. Moreover, in *Parsons v. Joseph*, 92 Ala. 403, the expression was not affirmative at all, but a mere suggestion or query; and in *Davis v. Montgomery etc. Co.*, 101 Ala. 127, it was only intended by the language we have quoted to show that such subscriptions to stock were not void, and not that they imported a legal liability enforceable in respect of the overvaluation of property at the suit of the corporation against the subscriber; and this is demonstrated by the fact that the court cited *Elyton Land Co. v. Birmingham etc. Co.*, 92 Ala. 407, 25 Am. St. Rep. 65, as fully sustaining the proposition intended to be announced, and that case goes only in support of the doctrine that creditors of the corporation, on the theory that the subscribed capital is a trust fund, may proceed in equity against stockholders who have attempted payment of their subscriptions in property at a fictitious valuation.

The trial court properly discharged the garnishee, and its judgment is affirmed.

BRICKELL, C. J., not sitting.

GARNISHMENT—WHAT SUBJECT TO.—A plaintiff in garnishment can obtain no greater beneficial relief against the garnishee than the judgment debtor is entitled to: *Marx v. Parker*, 9 Wash. 473; 43 Am. St. Rep. 849; extended note to *Lathrop v. Clapp*, 100 Am. Dec. 511; note to *Hanna v. Lauring*, 13 Am. Dec. 341.

CORPORATION—STOCK—PAYMENT FOR IN OVERVALUED STOCK.—If property paid for the capital stock of a corporation is not valued in good faith a stockholder may be compelled to respond to the creditors of the corporation for the par value of the stock less the actual value of the property taken in exchange for it: *Coleman v. Hoss*, 154 Ill. 458; 45 Am. St. Rep. 133, and note.

AM. ST. REP., VOL. XLVIII.—?

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

PAULY v. PAULY.

[107 CALIFORNIA, 8.]

CORPORATIONS—NOTES EXECUTED BY SECRETARY—EVIDENCE.—Notes executed in the name of a corporation by its secretary, to whom no general or special authority to so execute them has been delegated, do not bind the corporation.

CORPORATIONS—SPECIAL MEETING—RATIFICATION OF UNAUTHORIZED ACTS. If corporation notes executed by its secretary without authority are ratified at a special meeting of the board of directors of which they are not all notified, the ratification is not made at a meeting duly assembled, and does not bind the corporation as a corporate act.

CORPORATIONS—RECOVERY OF MONEY ADVANCED TO.—If a bank furnishes money to a corporation, whether as loans upon unauthorized notes or upon account or for legitimate business, or in discharge of its legal liability, such money, so far as it is in fact applied to the benefit of the corporation, may be recovered to the extent to which it has not been repaid.

CORPORATIONS MUST ACCOUNT FOR BENEFITS RECEIVED UNDER ULTRA VIRES CONTRACTS, with interest on the amount found due.

CORPORATIONS—CONTRACTS BETWEEN.—ALTHOUGH SOME DIRECTORS IN ONE CORPORATION ARE ALSO DIRECTORS in another corporation, this does not prevent the corporations from contracting with each other. If in so contracting there is no abuse of trust relations, it is no bar to a recovery by one of the corporations for money advanced to and used by the other.

CORPORATIONS—EVIDENCE.—RESOLUTIONS of a corporation passed at an irregular and unlawful special meeting of its directors are not admissible in evidence against the corporation in support of notes which they attempt to authorize.

CORPORATIONS—IMPLIED PROMISE TO REPAY MONEY RECEIVED.—If money is obtained by, and disbursed through, the proper financial officer of a corporation through the agency of another corporation, and is applied to a proper use, there arises an implied promise from the corporation so receiving and using such money to repay it to the other corporation.

EVIDENCE.—BANK-BOOKS, VOUCHERS, AND STATEMENTS OF ACCOUNT returned by a bank to the book-keeper of a corporation with which it is doing business are admissible and prima facie evidence of the way the accounts stood at the time of the last balance.

EVIDENCE.—VOUCHERS AND STATEMENTS OF ACCOUNT delivered by a bank to a corporation doing business with it are prima facie evidence of the payment by the bank of the sum of money named therein, and, when the payments are made on bills certified by the general manager of the corporation, are satisfactory evidence that the money was applied to the use and benefit of the corporation.

EVIDENCE.—BANK-BOOKS ARE ADMISSIBLE in evidence to show the state of accounts between the bank and a corporation with which it has done business, and such books are not rendered inadmissible by the fact that the corporation has no pass-book, and that payments to it by the bank have been made upon bills instead of checks.

EVIDENCE.—BANK-BOOKS—INTEREST OF PARTIES.—Although officers of a corporation are also directors in a bank furnishing it money, this fact does not render the bank-books of account inadmissible against the corporation. Such fact may invite scrutiny of the account, but goes only to the weight of the testimony and not to its admissibility.

EVIDENCE.—STATEMENTS OF ACCOUNT furnished by a bank to a corporation doing business with it, and to which no objection is made, are prima facie evidence that the account is correct.

EVIDENCE.—CORPORATION NOTES NOT EXECUTED BY PROPER AUTHORITY are not evidence of a liability upon the express contract appearing upon their face, but if the money represented by and named in them has been actually furnished to, received by, and applied to the proper use and benefit of the corporation, the notes are admissible to show that the money represented by them was actually furnished to the corporation, and the fact that officers in such corporation are also officers in the corporation furnishing the money does not render the notes inadmissible.

AGENCY FOR TWO PARTIES—PRESUMPTION.—It is not presumed that the agent of two parties deals unfairly with either. It is only when an agent has personal interests conflicting with those of his principal that such presumption can arise.

EVIDENCE.—DOUBLE AGENCY.—Acts and admissions of corporation officers are admissible in evidence against it, in relation to matters intrusted to them, although they are also officers in another corporation in whose interest the evidence is offered.

M. A. Luce, for the appellant.

J. E. Wadham, for the respondents.

¹⁵ HAYNES, C. The complaint contains several causes of action, the first four being upon promissory notes alleged to have been executed by the San Diego Cable Railway Company to the California National Bank of San Diego, aggregating \$57,330. Another cause of action is for attorneys' fees and expenses in a certain action brought by the bank against the cable company in the United States circuit court; and

the last cause of action is for the sum of \$359,000, for moneys alleged to have been paid by the bank to various persons at the request of the cable company for its use and benefit and upon its order. The \$359,000 includes the moneys evidenced by the promissory notes sued upon in the antecedent counts.

The answer consists of specific denials of the allegations of the complaint, and a counterclaim to recover the sum of \$50,000, the alleged value of certain shares of the capital stock of the cable company, and the further sum of \$119,000 for moneys alleged to have been had and received by the bank to and for the use of the cable company.

The cause was tried by the court without a jury, and ¹⁶ the court found against the plaintiff upon each of its causes of action, and also against the defendants upon their counterclaim, and judgment was entered accordingly. This appeal is taken by the plaintiff from the judgment against him and from an order denying his motion for a new trial. There is no appeal from the judgment upon the counterclaim.

The bank became insolvent and suspended business November 12, 1891, and the cable company was adjudged insolvent March 15, 1892.

Appellant specifies certain particulars in which the findings are claimed to be not justified by the evidence, but the principal questions arise upon rulings made upon questions of evidence; and the more important of these hinge upon the relations existing between these corporations through their respective boards of directors.

The board of directors of the cable company consisted of Dare, Collins, Havermale, Palmerston, and Fisher. Of these Dare, Collins, and Havermale were officers and directors of the bank, Havermale being president and Collins cashier, while Dare was president of the cable company, Havermale vice-president, and Collins treasurer.

The promissory notes in question were executed in the name of the cable company by O'Brien, secretary, but he does not appear to have been authorized to do so by any previous resolution or formal direction of the board, nor does there appear to have been any general power conferred by the board upon the secretary to execute promissory notes or other obligations of that character on its behalf.

It is claimed by appellant, however, that these notes were ratified by the cable company: 1. By a failure of that com-

pany to dissent; and 2. By express action of the board of directors of the cable company, at a special meeting held November 28, 1891, at the house of vice-president Havermale, at which meeting there were present Havermale, Collins, and Palmerston, of whom ¹⁷ Palmerston only was not interested in the bank; Dare being absent in Europe, and Fisher not having been notified. As evidence of such ratification plaintiff offered in evidence the minutes of said special meeting, as follows:

On motion of Mr. Palmerston, seconded by Mr. Collins, the following resolution was unanimously adopted:

"*Resolved*, That the San Diego Cable Railway, a corporation, by and through its board of directors, regularly assembled, does hereby acknowledge and agree to pay the sum of \$84,330, being due the California National Bank of San Diego, and evidenced as follows: One note of \$20,000, dated September 3, 1891, due December 3, 1891; one note of \$10,000, dated September 3, 1891, and due December 3, 1891; one note of \$10,130, dated September 3, 1891, and due December 3, 1891; one note, \$17,200, dated June 30, 1891, and due on demand. The sum of \$27,000 placed to the credit of the S. D. Cable Railway Co. in their account with the California National Bank, on February 12, 1891, being carried in the form of a note as a cash item signed by Dare & Collins for \$28,500; also, an overdraft for the sum of \$9,444.27. The total principal sum being \$93,774.27."

Counsel for plaintiff also stated that he expected to follow with further evidence going to show that the cable company received the money, and that it went into the construction of the road; that the business had been transacted at the bank; that the cable company obtained its money there, and that these notes were given for the debt.

Several objections were made to the introduction of said minutes, to the effect that the meeting was not called by competent authority; that it was not held at the office of the company; that the minutes do not show that notice was given to Fisher; that Fisher was in fact not notified, and that two of the three directors present were directors of the bank, and could not bind the cable company by an acknowledgment of an indebtedness to the bank.

¹⁸ Appellant does not rely upon the authority of the secretary to execute these notes to sustain their validity. No such authority was shown; and as to the attempted express

ratification, it appearing affirmatively that the meeting was special, and that the directors were not all notified, the meeting was not duly assembled, and its action did not bind the corporation as a valid corporate act. The other objections to the admission of the minutes as an express ratification of the execution of the notes need not be considered. The court, therefore, did not err in the exclusion of the resolution as evidence of express ratification, nor in refusing to receive the promissory notes in evidence in support of the causes of action based thereon. Whether they could be received in connection with other evidence, for any purpose, need not be considered in this connection.

This, however, is not conclusive of the right of the plaintiff to recover for money loaned or advanced by the bank so far as it was applied to the proper uses of the cable company. The liability of defendant does not rest upon the express contract appearing upon the face of these notes, but upon the right of the lender to recover money which has gone to swell the assets of the cable company. If the bank in fact furnished to the cable company moneys, whether as loans upon unauthorized promissory notes, or upon account, or paid money for construction of its road, or in discharge of its legal liabilities, so far as the same were in fact applied to the proper use and benefit of the cable company, such moneys may be recovered by the plaintiff to the extent to which they have not been repaid. Plaintiff in the last count of his complaint pleaded facts which, if proved, would entitle him to such a recovery. In support of this proposition see the following authorities: *Morawetz on Private Corporations*, secs. 526, 616, 715; *Gardner v. Butler*, 30 N. J. Eq. 702, 721, 724; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Santa Cruz R. R. Co. v. Spreckles*, 65 Cal. 193; *Seeley v. San Jose etc. Co.*, 59 Cal. 22. In *New Castle Northern Ry. Co. v. Simpson*, 19 23 Fed. Rep. 214, it was held that the corporation must account to the contractor for benefits received under an ultra vires contract, with interest on the amount found to have been due when the work was stopped.

In *Leavenworth v. Chicago etc. Ry. Co.*, 134 U. S. 688, 707, Mr. Justice Blatchford, speaking for the court, said: "I am unable to see anything in the fact that some of the same men were found to be trustees in this deed and directors in the Rock Island Company, and that directors in the Southwestern Company were also directors in the Rock Island Com-

pany, which should block the course of justice, paralyze the power of the court, and deprive the creditor corporation of all remedy for the enforcement of its lien. If it could show that the Southwestern Company did not owe this interest, or that the Rock Island Company had in its hands the means of the Southwestern Company to meet this obligation, and that by reason of collusion between those who controlled both companies this fact was suppressed or concealed, it would present a strong case for relief. But this would be actual fraud, and one not necessarily growing out of the influence of the Rock Island directory over that of the Southwestern. Notwithstanding this commingling of officers the corporations were distinct corporations. They had a right to make contracts with each other in their corporate capacities, and they could sue and be sued by each other in regard to these contracts; and the question is not could they do these things, but have the relations of the parties—the trust relations, if indeed such existed—been abused to the serious injury of the Southwestern Company.”

The money that was paid, from whomsoever it was obtained, was obtained by and disbursed through the proper financial officer of the cable company, viz., its treasurer, through the agency of the bank, and if applied to the proper uses of that company there at once arose an implied promise to repay it.

The remaining controversies, so far as they involve the rulings of the court upon questions of evidence, ²⁰ require a general statement of the facts disclosed by the record.

The bank was in existence before the cable company was organized. Who the stockholders of the cable company were, aside from the directors, is not disclosed. It is shown that on February 15, 1890, certificate No. 2, 500 shares was issued to Collins, and certificate No. 3 to Dare for 500 shares, and to Palmerston July 8, 1890, 100 shares; that Fisher originally held 500 shares, but on March 17, 1890, he sold all but one share to Dare and Collins.

During part of the time covered by these transactions Collins was cashier of the bank, and part of the time president, and all of the time treasurer of the cable company. Dare and Havermale were also directors of the bank, and were also president and vice-president, respectively, of the cable company, and Palmerston and Fisher, who were not connected

with the bank, were the remaining directors, Fisher being the general manager.

An account was opened by the bank with the cable company, and all moneys, whether acquired by loans or otherwise, were credited to the company's account by the bank as deposits. Fisher had charge of the construction and general business, and bills and accounts of labor and materials were presented to him; he would O. K. them, signing his name thereto, and direct the holder to go to the bank for payment; and these bills, accounts, time warrants of the laborers, etc., were paid by the teller of the bank as though they were checks, stamped paid, and charged to the company's account.

From the organization of the cable company through all these transactions J. E. O'Brien was book-keeper of that company, and during the latter part of the time was also its secretary. The company had no pass-book as a depositor, but generally twice a week the bank would deliver to O'Brien a statement of the company's account and surrender the paid vouchers, and from these statements and vouchers O'Brien kept a ledger account with the bank in the books of the company, which was ²¹ thus practically a rescript of the bank's books. Some of the machinery was purchased by Dare, and the bills for such did not pass through Fisher's hands, but would be audited and settled for at the bank; and part of the time, instead of giving time checks to laborers, a pay-roll would be made out and money to pay the same would be drawn from the bank in bulk, and a check would be the voucher in such case, but by whom drawn does not appear. At the time of the trial Dare had long been absent in Europe, Collins was dead, and two of the three book-keepers of the bank who made entries in the company's account in the books of the bank were absent from the state. The cashier of the bank and the book-keeper who had charge of the general books of the bank testified as to the manner in which the accounts were kept, and Brimhall, one of the three who kept the books in which this account appeared, testified to the handwriting of the absent book-keepers as well as his own, that the entries were made in the usual course of business on the day of the several transactions as they occurred, and that he believed the account to be correct. Some testimony was also given by one or more other parties who had settled their private accounts with the bank and found the bank's accounts to be correct.

The court eventually received in evidence, first, the statements of account furnished to the book-keeper of the cable company by the bank, and afterward the ledger of the cable company showing the account with the bank made up from said statements, but refused to receive in evidence the books of the bank and the vouchers returned to the cable company's book-keeper with the statements.

Plaintiff again offered in evidence each of the notes set out in the complaint, and these were again excluded. Plaintiff then offered in evidence the note of \$17,200, dated June 30, 1891, as explanatory of an item of the same date and amount appearing in the statement admitted in evidence, said item being, "Note for \$17,200," for the purpose of showing that that entry was of the ²³ note offered, and that note was thereupon received in evidence. The ledger account of the cable company which was received in evidence showed that said credit, "note for \$17,200," was carried through the stated accounts to the final balance as a credit to that amount, and these statements also showed a final balance or overdraft against the cable company of \$9,444.27. This balance added to the credit, "note for \$17,200," makes \$26,644.27, and for this amount appellant insists he should have had judgment, and that the finding that the cable company was not indebted to the bank in any sum whatever is not justified by the evidence, and this contention, I think, must be sustained.

The evidence was meager in regard to the financial resources of the cable company. Mr. Fisher testified, when called by defendants, that "Collins and Dare looked after the financial part of the road entirely, and I never saw any of the accounts after I passed on the bills, as I have stated here before; I would O. K. them, and that is the last I would ever see of them"; that he did not examine the books; that he had implicit confidence in Mr. Dare and Mr. Collins; that after the failure of the bank he only knew of any balance being due the bank through reports in the newspapers, but he never said anything to the officers of the bank about it; that prior to the failure of the bank he heard rumors that the bank was carrying the cable company, and the officers of the bank denied it, and said the cable company had a balance in the bank. When these conversations occurred does not appear, but it does appear that after March 17, 1890, he held but one share of stock, having sold 499 shares to Collins and Dare, and admitted that after that time, though

he remained a director, he had no financial interest in the corporation, and gave that as the reason why he made no inquiries as to the truth of the newspapers' reports after the bank's failure, to the effect that the cable company owed the bank "ninety odd thousand dollars." It would, therefore, appear probable, at least, that the former inquiries ²³ were made in the early stages of the work. All the notes mentioned in the record were made after Fisher parted with his interest in the corporation. It further appeared that though Mr. Fisher had procured the books for the book-keeper in which to keep the company's accounts, he had never looked into them or sought to inform himself of the state of the company's accounts.

In Morse on Banks and Banking, third edition, section 295, page 513, it is said: "The sound rule would seem to be that the depositor's bank-book, if it has been returned to him, and he has not within a reasonable time objected to it, should be regarded as prima facie evidence of the way the account stood between him and the bank at the date of the last balancing. It settles the presumption in the case, and leaves the onus on the party disputing it."

This prima facie evidence was not rebutted, and judgment for the sum stated should have been for the plaintiff.

There are other grounds justifying a reversal, and, as they involve questions which will doubtless arise upon another trial, they should be noticed.

The vouchers delivered with the statements to the cable company are not only prima facie evidence of the payment by the bank of the several sums named in them, but these payments, having been made principally upon bills certified by the general manager, to that extent, at least, furnished satisfactory evidence that the money paid thereon was in fact applied to the proper use and benefit of the cable company; and, as we have already held that the plaintiff could not recover upon the notes alone, because of their unauthorized execution, such evidence was material and important to the plaintiff, and he was prejudiced by the exclusion of these vouchers.

The court also erred in excluding the books of the bank.

The first objection to this evidence argued by counsel for respondents in his brief is that these books were not "kept in the regular and usual order of business," ²⁴ because the cable company had no pass-book, and because the money

was not paid out upon checks, but upon bills, etc. Whether or not there was a pass-book in nowise affected or changed the mode of keeping the bank's accounts. The statements rendered to the cable company's book-keeper showed the deposits as well as the payments, in the same manner as if written up in the pass-book. That payments were made upon bills instead of checks could not affect the correctness of the accounts, the bills being treated as checks.

I think the preliminary evidence was sufficient to authorize the admission of the books of the bank, especially in view of the fact that statements of the bank's account had been regularly furnished to the cable company, thus giving it the opportunity to examine it and investigate its correctness. These statements being in evidence, and no objection having at any time been made to them, furnished at least prima facie evidence that the account of the bank was correct. The interest of Dare and Collins as officers of the bank does not seriously, if at all, affect this question. Their interest on behalf of the bank was not greater than in transactions with any other customer, and it is well settled that books of account kept by banks are admissible in evidence: See *McLennan v. Bank of California*, 87 Cal. 569, 575, and cases there cited. The interest of parties to a transaction invites scrutiny just as the interest of a witness invites scrutiny; but such interest goes only to the weight of the testimony, not to its admissibility; even when a party was disqualified as a witness, because of his interest, he was permitted to testify to the correctness of his account and put that in evidence.

It has been seen that the notes upon which the first four counts are based, not having been executed by proper authority, are not evidence of a liability upon the express contract appearing upon their face; but, as it is also true that if the money represented by or named in the notes was furnished by the bank, and was received by and applied to the proper use and benefit of ²⁵ the cable company, plaintiff is entitled to recover the same, the question arises whether the notes are admissible in evidence for the purpose of showing that the money represented by them was furnished by the bank?

The record does not disclose the circumstances under which nor by whose direction the secretary executed the notes. It does appear, however, that Collins and Dare were intrusted with the management of the finances of the cable

company, and the only evidence in the record showing that money was received from any other source than the bank was given by Mr. Fisher, to the effect that he understood that the money was borrowed in the east; that he, Collins, and Dare, each made notes individually, the other two becoming indorsers, and he thought that in this way about \$100,000 was raised, and that he did not know of the cable company borrowing in its own name.

The stumbling-block in this case, however, seems to have been the double relation or agency of Collins, Dare, and Havermale, being at the same time officers and directors in both corporations. In *Adams Min. Co. v. Senter*, 26 Mich. 73, Captain Frue was the agent of the Adams Company, and also of the South Pewabic Company. Frue sold to Senter certain timber belonging to the Adams company in payment of a bill which the Pewabic company owed to Senter, in order that the latter company should be given additional credit, and this action was brought by the plaintiff against the defendant for taking said timber. After discussing other questions, Mr. Justice Campbell said:

"The question next arises, How far the double agency of Captain Frue affected his relations to his employers and to third persons. It was claimed that, upon the principle that a man cannot contract with himself, and cannot occupy positions involving a conflict of duties, all of his dealings whereby the property of one company was transferred to or used for the other should be held unlawful. There is no validity in such a proposition. The authority of agents may, where no law is violated, ³⁶ be as large as their employers choose to make it. There are multitudes of cases where the same person acts under power from different principals in their mutual transactions. Every partnership involves such double relations. Every survey of boundaries, by a surveyor jointly agreed upon, would come within similar difficulties. It is only where the agent has personal interests conflicting with those of his principal that the law requires peculiar safeguards against his acts. There can be no presumption that the agent of two parties will deal unfairly with either. And when both deliberately put him in charge of their separate concerns, and there is any likelihood that he may have to deal with the rights of both in the same transactions, instead of lessening his powers it may become necessary to enlarge them far enough to dispense with such formalities as one man

would use with another, but which could not be possible for a single person to go through with alone."

Collins and Dare were not the bank, though they were its agents; and in an action by the bank, or its receiver, it is not perceived why their acts and admissions as the agents of the cable company, in charge of its financial affairs, are not admissible in evidence against it in relation to those matters that were intrusted to their management by the latter company. If they had procured the money from another bank with which they were not connected, assuming that the notes were executed by the secretary by their direction, I think it would not be contended that the notes were inadmissible in evidence, in connection with the other facts, for the purpose of showing that the payee was the party lending the money.

I think the judgment and order should be reversed and a new trial granted.

SEARLS, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and a new trial granted.

HENSHAW, J., TEMPLE, J., McFARLAND, J.

CORPORATIONS—NEGOTIABLE INSTRUMENTS EXECUTED BY OFFICERS OF.—Notes signed by an agent of a corporation authorized generally to give notes on its behalf are enforceable by a bona fide holder thereof, though the officer or agent exceeded his authority in executing the note in question: *Merchants' Nat. Bank v. Citizens' Gas etc. Co.*, 159 Mass. 505; 38 Am. St. Rep. 453, and note with the cases collected.

CORPORATIONS—MEETINGS OF DIRECTORS—NOTICE.—Notice to all the directors of a corporation of a business meeting thereof is generally necessary to its validity, and can only be dispensed with when it is impracticable to give such notice to the minority in case of an emergency, and when the act done in the absence of one or more of them not served with notice appears to be reasonably necessary to the welfare of the corporation: *Bank v. McCarthy*, 55 Ark. 473; 29 Am. St. Rep. 60, and note. It is indispensable to a legal meeting of the directors of a corporation for the transaction of business that all the directors have notice, either actual or constructive, of the time and place of the meeting, unless they are actually present thereat. The transactions at any meeting not so held are void: *Doernbecher v. Columbia City Lumber Co.*, 21 Or. 573; 28 Am. St. Rep. 766, and note.

CORPORATIONS—CONTRACTS ULTRA VIRES—DEFENSE.—A corporation having received benefits under a contract made by and with it cannot set up as a defense thereto that it had no power to transact the business: *Williams v. Bank*, 71 Miss. 856; 42 Am. St. Rep. 508, and note; *Kadiak v. Garden City etc. Building Assn.*, 151 Ill. 531; 42 Am. St. Rep. 256, and note.

CORPORATIONS—SAME DIRECTORS ACTING FOR TWO COMPANIES—EFFECT OF.—Dealings between corporations represented by the same persons as

directors may be accepted as binding by each corporation and the stockholders thereof. Such dealings are not absolutely void, but are voidable at the election of the respective corporations or the stockholders thereof, and they become binding if acquiesced in by the corporation and their stockholders: *O'Conner Min. etc. Co. v. Coosa Furnace Co.*, 95 Ala. 614; 38 Am. St. Rep. 251, and note. See, also, the extended note to *Beach v. Miller*, 17 Am. St. Rep. 302, 306.

EVIDENCE—BANK-BOOKS AS.—Bank-books of accounts and original entries shown to have been accurately kept and written up each day are admissible in evidence in favor of the bank: *Robinson v. Smith*, 111 Mo. 205; 33 Am. St. Rep. 510, and note.

EICHHOFF v. EICHHOFF.

[107 CALIFORNIA, 42.]

JUDGMENTS—SERVICE OF PROCESS—PRESUMPTION.—It is presumed in favor of the jurisdiction of the court and in support of the judgment that service of process was duly made, although no evidence thereof appears from the record.

JUDGMENTS—SERVICE OF PROCESS—PRESUMPTION—BURDEN OF PROOF.—In an action to set aside a judgment on the ground that the defendant therein was not served with summons, had no notice, and never appeared in the action, and that the judgment was obtained by fraud, the production of the judgment-roll showing that summons was issued but containing no proof of service, no memorandum of default, no appearance by defendant except by guardian ad litem, and no recital that summons was served, does not overcome the presumption that the defendant was duly served, and that the court had jurisdiction of his person. The burden of proof is still on the party attacking the judgment to show by other evidence that the summons was not served in fact.

JUDGMENTS BY DEFAULT—DIRECT ATTACK—PRESUMPTIONS.—In a direct attack by appeal from a judgment by default there is no presumption in favor of the existence of any fact essential to the jurisdiction of the court over the defendant, but in all matters of which the judgment contains a record its verity is presumed as fully as upon a collateral attack.

JUDGMENTS—ATTACK IN EQUITY.—A suit in equity to set aside a judgment at law, although not a collateral, is always an indirect attack, and does not question or dispute the effect of the judgment as an adjudication, but seeks relief from its operation upon equitable grounds.

J. J. Paulsell, and Kile & Plummer, for the appellant.

Nicol & Orr, and J. H. & J. E. Budd, for the respondents.

⁴⁵ **TEMPLE, J.** This action was brought to set aside a judgment and decree rendered by the superior court of Marin county in 1882, annulling the marriage between Gustave Eichhoff and Melocene Eichhoff.

The complaint shows as a cause of action that in the suit

for the annulment of the marriage this plaintiff, defendant in that action, was not served with summons, ⁴⁶ had no notice of the suit, and never appeared therein, and that said judgment was procured by the fraudulent practices of said Gustave Eichhoff.

At the trial the plaintiff to sustain her allegations put in evidence the judgment-roll in the action for the annulment of the marriage, the petition for the appointment of a guardian ad litem, and the order appointing the guardian ad litem, and rested. The defendant put in no evidence, and the court thereupon rendered judgment for defendant, and the plaintiff appeals from the judgment. The appeal was taken within sixty days after the rendition of judgment.

The judgment-roll put in evidence shows that a summons was issued, but there was no proof of service. There was no memorandum that the default of the defendant had been entered as required by the code.

There was no appearance for the defendant in the case by answer or demurrer. There is no recital in the judgment to the effect that summons had been served; but it is stated that a guardian ad litem had been duly appointed for the defendant, and that such guardian appeared in open court and consented that the action be tried.

Neither in the petition for the appointment of a guardian ad litem, nor in the order appointing the guardian, is there a recital to the effect that the summons had been served on the defendant.

The only question presented on this appeal is whether, under these circumstances, the burden was cast on the plaintiff of proving that summons had not in fact been served on the defendant in the former action, or whether the defendant had the laboring oar.

The question as to the validity of this judgment was once before considered by this court: *In re Eichhoff*, 101 Cal. 600. There the attack upon the judgment was collateral. It was held by this court that the judgment was not void. It was said: "The fact that the court has rendered a judgment implies a determination by it before it assumed to hear the controversy that it had ⁴⁷ jurisdiction over the subject matter of the action, and of the defendant against whom the complaint was directed. . . . The judgment-roll in the present case is consistent with the fact that proper service was made upon the defendant before the hearing upon the complaint, and as

any condition of facts consistent with the validity of the judgment will be presumed to have existed, rather than one which will defeat the judgment, it must be presumed, in support of the action of the court, that such service was shown to it, although it has not preserved any record thereof."

This conclusion is determinative of the question here submitted.

The presumption that the court did have jurisdiction of the person of the defendant must be overcome by proof. Plaintiff's action is based upon the well-established grounds of the jurisdiction of courts of equity to grant relief in cases of fraud, accident, or mistake. She set forth her equities in her complaint, but it is incumbent upon her, as plaintiff, not only to aver the facts constituting her case, but, if they are denied, to prove them. The judgment-roll did not prove want of service of summons, but the contrary. Under the decision the fact presumed is a fact adjudged. She was in this action allowed to prove that this adjudication was procured through fraud, or was a mistake; that she never was in fact served, and had no opportunity to be heard in the action.

The mere bringing of this suit does not change the presumptions arising from the fact of the rendition of the judgment. Apparently counsel have been misled by some cases in which judgments have been reversed on appeal. In *McKinlay v. Tuttle*, 42 Cal. 570, and in some other cases in which that case has been followed, it was held, in effect, that on an appeal the judgment would be reversed for irregularities which would not render the judgment void if attacked collaterally. In *Sichler v. Look*, 93 Cal. 600, it is said: "That upon a direct appeal it is essential for the party seeking to sustain ⁴⁸ the judgment to show by the record itself that the court had jurisdiction of the defendant, whereas, in a collateral attack, the entry of the judgment is itself conclusive of such jurisdiction. Upon a direct attack there is no presumption in favor of the existence of any fact essential to the jurisdiction of the court over the defendant, but, in all matters of which the judgment contains a record, its verity, in the absence of any contradictory evidence, will be presumed as fully as upon a collateral attack."

The phrase "direct attack" in the above quotation evidently refers to appeals from the judgment.

In fact, when an action is brought in a court of equity to set aside a judgment at law, the attack, although not collat-

eral, is always indirect: Freeman on Judgments, sec. 485. The judgment is not under review, but an issue is being tried as to whether the plaintiff is entitled to have a court of equity interpose in his behalf. The judgment is not conclusive in such a case. The question to be determined is whether the adjudication was not procured by fraud or mistake. It may be said that in such a case the legal validity of the judgment is admitted, and it is because of its validity, or apparent validity, that the plaintiff requires to be relieved from it. Says Freeman, at section 495, speaking of judgments entered without notice to defendant: "But proceedings in equity are peculiarly appropriate for the exposure of this infirmity. They permit of the formation of issues upon the question of service of process, and of the trial of those issues after full opportunity has been given to those who seek to sustain, as well as those who seek to avoid the judgment. If at such trial it satisfactorily appears that the defendant was not summoned, and had no notice of the suit, a sufficient excuse is shown for his neglect to defend, and equity will not allow the judgment, if unjust, to be used against him, no matter what jurisdictional recitals it contains."

It will be seen that the burden is on the plaintiff, in such an action, to excuse himself for not defending when ⁴⁹ the judgment shows that he was in default for not doing so. By such an attack upon a judgment the plaintiff does not question or dispute its effect as an adjudication, but he seeks to be relieved from its operation upon equitable grounds.

The judgment is affirmed.

McFARLAND, J., and HENSHAW, J., concurred.

JUDGMENTS—ATTACK IN EQUITY.—A suit in equity to obtain relief from a judgment is a collateral attack within the definition given in the principal case, because it is not within the power of a court of equity to annul, vacate, or modify a judgment at law: Extended note to *Morrill v. Morrill*, 23 Am. St. Rep. 117.

JUDGMENT BY DEFAULT—PRESUMPTION IN FAVOR OF JURISDICTION.—Judgments by default are presumed to have been regularly obtained where the record fails to show the contrary: *Evans v. Young*, 10 Col. 216; 3 Am. St. Rep. 583; note to *Hersey v. Walsh*, 8 Am. St. Rep. 691.

AM. ST. REP., VOL. XLVIII.—8

GIRAUDI v. ELECTRIC IMPROVEMENT COMPANY.

[107 CALIFORNIA, 120.]

NEGLECT—ELECTRIC WIRES.—A company or person using wires to convey electricity is required to use very great care to prevent injury to person or property. A failure to raise such wires so high above a roof that those having occasion to go there will not come in contact with them is negligence.

NEGLECT—ELECTRIC WIRES—INJURY TO SERVANT.—A person whose employment does not require or give him opportunity to know that electric wires are stretched above the roof of the building in which he is employed, or if he had ever known might reasonably have forgotten about such wires, and who is injured by coming in contact with such wires while performing a service required by his master, is not guilty of contributory negligence as a matter of law, on the ground that he ought to have known the location and have taken care to avoid such wires.

NEGLECT—FORGETFULNESS.—To forget a danger is not negligence unless it shows want of ordinary care, and that is a question for the jury.

NEGLECT—INJURY FROM ELECTRIC WIRES.—One who has no knowledge of the fact that an electric wire being wet destroys the insulation for the time is not guilty of contributory negligence in grasping such wire with his hands when he comes in contact with it.

NEGLECT—EXPERT EVIDENCE—FORM OF QUESTION.—An expert witness cannot be asked to determine a question of negligence, whether a certain structure is safe, or whether certain methods are prudent, but facts may be elicited from such witness from which the conclusion inevitably follows, and if negligence is fully proven by other evidence, the defendant is not prejudiced by the form of the question put to the expert.

NEGLECT—USE OF DANGEROUS AGENCY—ELECTRICITY—PRESUMPTION—DUTY TO PROTECT PUBLIC.—The fact that a dangerous agency, such as electricity, is used as a commodity, raises no presumption that the public know enough of its nature to avoid the danger arising from its use, and the public, aside from consumers, owe no duty to those introducing it. On the other hand, it is the duty of those making a profit from the use of such a dangerous element to use the utmost care to prevent injury to all classes of persons, and they must protect those possessing less than ordinary knowledge of the character of the commodity.

NEGLECT—USE OF DANGEROUS ELEMENT—CARE REQUIRED.—A person brought in contact with electric wires or other dangerous commodity is not required to exercise more care to avoid injury than is usual under similar circumstances among careful and prudent persons of the class to which he belongs. A common laborer is not required to use as much care and prudence as is exacted of a better educated person.

NEGLECT—ELECTRIC WIRES—CARE REQUIRED TO AVOID.—Of one ignorant of the danger that may result from contact with electric wires a less degree of care is demanded to avoid injury than is required if he had been informed of such danger. What is reasonable care under the circumstances is for the jury to determine.

J. E. Richards, and Richards & Welch, for the appellant.

D. W. Herrington and C. Clark, for the respondent.

123 **TEMPLE, J.** This action is for damages for injuries received through an electric shock caused by the negligence of defendant.

Plaintiff was employed as dishwasher in a hotel and restaurant at San Jose kept by one Lamolle. The house was lighted by incandescent lights furnished by defendant. The wires passed over the house from the southeast corner, where they descended from the Hensley house to the apex on the roof. At the southeast corner it was twelve feet above the roof. At the ridge of the roof the wires were eighteen inches high, and ran thence diagonally over the northern slope of the roof for sixty feet, at an average height of two feet, to a point on the north firewall, where they descended on the outside of the wall to the transformer. Those wires were part of a circuit of one thousand lights and carried one thousand volts, which was reduced at the transformer to fifty.

The wires were erected while plaintiff was employed at the Lamolle house. Plaintiff did not see the workmen place them over the roof, but saw them where they came down the north wall.

After the wires had been erected plaintiff was on the roof for a few minutes to assist in placing Lamolle's signs. One was at the southeast corner of the building and one at the southwest corner. This was in the daytime and was the only occasion on which plaintiff had been upon the roof before the accident. At that time the wires were dead, and the plaintiff had no reason for taking note of them, and there is no evidence which tends to show that he did so. He got upon the roof then at the same point as upon the night of the accident, about three feet west of the place from which the wires passed down from the roof to the transformer. He reached the roof by stepladders temporarily placed there for the purpose.

When the wires were erected Lamolle was told by the **124** workmen of defendant that they were harmless, and he was not consulted as to their location, nor was he asked what use, if any, was made of the roof.

The accident occurred in the night of February 23, 1891. It was dark, stormy, and there was a heavy fall of rain. The signs seemed to be endangered, and Lamolle went upon the

roof to secure them, and requested plaintiff to accompany him. Lamolle reached the roof first, having, as he thinks, a lantern, though plaintiff testified that he did not. They desired to reach the southeast corner of the building, to do which they must necessarily go over the wires, or passing to the west over the roof, pass under them at the southeast corner. Plaintiff, not knowing, or forgetting the location of the wires, came at once in contact with them. The first contact was with his leg. By the shock he was thrown down, and when Lamolle ran to him he found him grasping one wire with his hand. He was badly burned both in his hand and leg.

Plaintiff had judgment, and this appeal is from the judgment and from an order refusing a new trial.

The first question is, Was there evidence which tends to show negligence on the part of defendant which contributed proximately to the injury? I think there is. Indeed, this point is not much insisted upon on this appeal. The question is, simply, Was there any evidence which it can be reasonably contended showed such neglect? If the question is open to debate, it must be left to the jury, even though there is no conflict in the evidence. The jury thought such negligence shown by a preponderance of evidence, and I think they correctly found.

Defendant was using a dangerous force, and one not generally understood. It was required to use very great care to prevent injury to person or property. It would have been comparatively inexpensive to raise the wires so high above the roof that those having occasion to go there would not come in contact with them. Not to do so was sufficient proof of negligence to justify the verdict.

¹²³ If there was any excuse for not so locating the wires, it is on the claim that they were so covered that there was no danger in coming in contact with them. The accident itself proves that this was not sufficient, *res ipsa loquitur*. The point most insisted upon here is that plaintiff was guilty of contributory negligence; that he knew, or ought to have known, of the location of the wires, and should have taken care to avoid them.

It is not a case where the doctrine of negligent ignorance can apply. Plaintiff owed defendant no duty, and no part of his employment required him to know, or gave him opportunity to know. Unless it can be held that he did in fact

know, there was no evidence which even tended to show negligence on his part. He testified that he had never seen the wires before the accident, and did not know of their location. This probably means that he had no recollection of seeing them. There was no testimony as to where he went on the roof when he was there to assist in placing the signs, except that he was over the firewall at the southeast corner, and the other at the southwest corner. He might have passed from one to the other without going near the wires. At all events, he had no occasion to take note of them. He had no interest in the matter, and no reason to suppose he would ever be upon the roof again. It would be a hard measure to hold one responsible for knowing everything he might observe if he would only take notice, when he had no interest in taking heed. Can we say then, as matter of law, and against his positive testimony, that he had notice and did know?

Even had he observed the wires during his short visit to the roof it would be a question for the jury to say whether it was the want of ordinary care for him not to have it in mind on that occasion. It is said that, if one was aware of a fact which should have put him upon his guard, he cannot rebut the presumption of contributory negligence by showing that he momentarily forgot it. This is true as a general proposition, ¹²⁶ but, like all other rules upon this subject, it must have a reasonable construction. To forget is not negligence, unless it shows the want of ordinary care, and it is a question for the jury. Illustrations of this proposition are found in the cases of brakemen who are injured by obstructions over or near the track of the road. They have been allowed to recover, although it is shown that they knew of the obstruction, on the ground that they cannot be expected to retain, at all times, a complete outline of the track, and because, in the hurry of their work, they would not be likely to keep these things in mind. That is, to forget, under the circumstances, did not prove absence of ordinary care: See *Dorsey v. Phillips etc. Co.*, 42 Wis. 583.

And, again, the wires over the roof were covered with insulating material precisely as the wires in the house were. It is claimed that this was of the very best quality known, and that if it had been perfect it would ordinarily have rendered the wires harmless. If it was not in good condition it was the fault of defendant, and plaintiff cannot be held to have had knowledge of its dilapidated condition. It is

claimed that the fact that the wire was wet destroyed the insulation for the time. But we cannot presume that the effect of moisture upon the insulation is a fact generally known, and there was no evidence tending to show that plaintiff had such knowledge.

It is also suggested that plaintiff grasped the wire with such force that in its wet condition the insulation was destroyed. If so, this would not prove contributory negligence, but there is no proof of this except that when he was found he had hold of the wire. His testimony is that he first felt the shock in his leg, and was by such shock thrown down upon the wire. His case must here be judged by the testimony most favorable to him.

2. Plaintiff was allowed, over the objection of the defendant, to ask certain questions of an expert electrician as to what matters should be taken into consideration in ¹²⁷ locating electric wires carrying such currents as these in question, and whether it was proper or prudent management to put them so low over a metallic roof. The objection was, that it was the province of the jury to determine such matters and not a proper subject for expert testimony.

The cases do undoubtedly hold that an expert cannot be asked whether a structure is a safe one or whether certain methods are prudent, but all hold that facts may be elicited from the witness from which the conclusion inevitably follows. To illustrate: In *Bemis v. Central Vt. R. R. Co.*, 58 Vt. 636, an expert was held not allowed to testify "that it was not prudent to use a certain hoisting apparatus with less than three men, on a stone of two tons heft." Yet the court said there might have been shown "the number of men required, danger in its use by a less number, its safety and adequacy when properly used," and added that then the jurors could as well decide for themselves. Of course the point had been as effectively decided by the expert as though the first question had been answered. The difference is largely one as to the form of the question, and, while I do not mean to say that it is immaterial, or that such an error may never be cause for reversal, I do not think it should be so held here. The answer of the witness gave the facts in full, and explained what methods would have been safe. All this information might have been obtained by proper questions. And then it was not very material here. The negligence of defendant was fully proven by other evidence. In fact, the defense chiefly

relied upon the plea of contributory negligence. I think we may safely conclude that the defendant was not injured by the form of the question.

3. Appellant also claims error in refusing two instructions asked by him, and in giving one at the request of plaintiff.

Instruction 4, which was refused, is as follows:

"With reference to the use of the agencies of nature, such as fire, steam, gas, or electricity, the court instructs ¹²⁸ you that persons employing such agencies and introducing them into cities in the form of commodities for the public use, while held to a considerable degree of care in the service of these dangerous elements, are not required to use such extraordinary care as, while it would render the element absolutely harmless under all conditions, would also render its supply impracticable. The public, who receive the benefits of convenience and comfort from the supply of the commodity, are presumed to know enough of the nature of the element to avoid the dangers which must arise out of its practical use. The duties of the person supplying the community [commodity?] and of the public using it are reciprocal; each may depend upon the exercise by the other of such ordinary knowledge of the character of the community [commodity?] and such common prudence in its presence as the circumstances of the time and place require."

I think this instruction was properly refused. The mere fact that some persons use a dangerous agency raises no presumption that the public know enough of its nature to avoid the danger which must arise from its use, and the public—aside from the consumers using the commodity—owe no duty to those introducing it; but, on the other hand, it is the duty of those making a profit from the use of so dangerous an element as electricity to use the utmost care to prevent injury to any class of people composing the public which exists in any considerable numbers. They must protect those possessing less than ordinary knowledge of the character of the commodity.

If ordinary knowledge means that of the person of average intelligence, the rule contended for would leave one-half the community partially unprotected. It is true, when the question is as to the negligence of the defendant, he is entitled to be judged in view of the knowledge generally, that is almost universally, possessed by the community. The instruction asked had reference only to the alleged contributory negli-

gence of plaintiff. ¹²⁹ As to that it has been said: "As there are different classes in society, with widely different degrees of intelligence, the plaintiff was not required to exercise more care than is usual under similar circumstances among careful and prudent persons of the class to which he belongs": Shearman and Redfield on Negligence, sec. 87.

In *Mackay v. New York Cent. R. R. Co.*, 35 N. Y. 75, the court said: "You would never expect the same care and caution from the mass of ignorant laborers that is exercised by educated grave philosophers. The mass of men would not expect it, and the law that requires it is absurd. He should be called upon for such care only as a man in his condition in life would ordinarily exert under the circumstances. Does not a juror know what that is as well as a judge? The ignorant and the unwary are entitled to the protection of the law as well as the wise and educated. There is little justice in depriving a man of his life for not exercising more care than his capacity will allow him to exert."

The same rule is applied to the case of children, lunatics, and the blind. Contributory negligence implies fault on the part of the person injured. Sometimes it is negligence to be ignorant. Such was not the case here.

The fifth instruction asked by defendant ought to have been entirely rejected. A portion was given; of this the defendant cannot complain.

At the request of plaintiff the court gave the following instruction:

"What constitutes reasonable care must be judged by the circumstances of this case, of which you are the judge. If he is ignorant of the danger that might result from contact with these wires, a less degree of care was demanded of him than would have been required if he had been informed of such danger." This is also complained of by appellant. As applied to the facts of this case I think it correct.

The judgment and order are affirmed.

¹³⁰ MCFARLAND, J., HARRISON, J., GAROUTTE, J., HENSHAW, J., BEATTY, C. J., and VAN FLEET, J., concurred.

Rehearing denied.

BEATTY, C. J., dissented from the order denying a rehearing.

ELECTRIC CORPORATIONS.—LIABILITY FOR NOT KEEPING WIRES IN SAFE CONDITION is discussed in *Haynes v. Raleigh Gas Co.*, 114 N. C. 203; 41 Am. St. Rep. 786, and note with the cases collected.

NEGLIGENCE—FORGETFULNESS AS EVIDENCE OF.—Momentary forgetfulness is not necessarily conclusive evidence of negligence: *McQuillan v. Seattle*, 10 Wash. 464; 45 Am. St. Rep. 799.

WITNESSES—EXPERTS.—FORM OF QUESTIONS: See the extended note to *Quinn v. Higgins*, 53 Am. Rep. 307.

PEOPLE v. ELK RIVER MILL AND LUMBER CO.

[107 CALIFORNIA, 214.]

WATERCOURSES—POLLUTION OF.—A complaint alleging that defendant maintains on the banks of a river a sawmill and also a cookhouse, outhouses, barn, and stables, and other fixtures usually accompanying a sawmill, and that he causes and permits sewage, offal, waste, and fetid matter from the sawmill, cookhouse, and stables to be drained and deposited in the stream, thereby polluting and rendering it unwholesome and unfit for domestic purposes and use, is sufficient to support findings that defendant has allowed a large manure-pile to accumulate from the stables upon the bank of the stream, thereby polluting its waters, and that he has also maintained near such stream a corral or hogpen, thereby further polluting such waters, and that as matter of law such manure-pile and hogpen are nuisances, thus suppressing the use of the stable rather than the stable itself.

WATERCOURSES—POLLUTION OF—PUBLIC NUISANCE.—If the waters of a non-navigable river, at and below a certain point, are used for domestic purposes by a considerable number of persons residing along its banks, such use is a public use making the pollution of the water at that particular point by an unreasonable use a public nuisance.

WATERCOURSES—POLLUTION—RIPARIAN RIGHTS.—An upper riparian owner is entitled to a reasonable use of the waters of a stream flowing by or through his land, but he is not entitled, as against lower riparian owners, to pollute the stream by putting filthy matter directly into it, thus rendering it unfit for domestic use.

WATERCOURSES—POLLUTION—NUISANCE.—The maintenance of stables and hogpens directly upon the banks of a stream, thus polluting its waters and rendering them unfit for domestic use, is an unreasonable use and a nuisance as against lower riparian proprietors.

WATERCOURSES—POLLUTION—REASONABLE USE.—Depasturing stock upon land forming the watershed drained by a stream, or maintaining stables or hogpens at a reasonable distance from the stream, is not an unreasonable use of which the lower riparian owner can complain, although winter rains wash impurities therefrom into the stream, thus injuring its use for domestic purposes.

WATERCOURSES—POLLUTION—USE OF LAND.—If the conformation of an upper riparian owner's land is such that he cannot carry on a dairy without putting filth directly into the water of a stream used by lower riparian owners for domestic purposes, he must find some other use for his land, or answer for the maintenance of a nuisance.

F. A. Cutler and J. M. Buck, for the appellant.

J. F. Puter, B. Henley, J. N. Gillett, and W. H. H. Hart, attorney general, for the respondent.

218 TEMPLE, J. This appeal is by the defendant from the judgment upon the judgment-roll.

The action was brought on relation of the Ricks Water Company to abate certain structures as nuisances. Among other things it was charged that the defendant had constructed and was maintaining on the banks of the south fork of Elk river "a large sawmill, and also a cookhouse, outhouses, barn, and stables, and other fixtures which usually accompany a sawmill."

It was averred "that said defendant has caused and permitted, and does cause and permit, all sewage, offal, waste, and fetid matter from said sawmill, cookhouse, and stables to be drained and deposited in the waters of said stream, and continues to do so, thereby contaminating, polluting, and rendering the same unwholesome and unfit for culinary and other generally domestic purposes, and offensive to the senses."

As to most of the structures mentioned, the court found that they did not constitute nuisances, but it was found as follows: "That on the banks of said stream, just above the milldam, defendant had erected a large stable in which it houses from twenty-five to thirty head of cows. That the droppings from these cattle are deposited upon the banks of said stream, and near thereto, where the land gradually slopes to the same.

"That there now exists at said point a pile of manure **219** about seventy feet in length, eight feet deep, and sixteen to eighteen feet in width, and which has been accumulating there for years. That the defendant allows and permits this large pile of manure to lie there and rot on the bank of said stream, and the drainage therefrom flows directly into the waters of said stream and pollutes the same, and renders the waters thereof offensive to the senses, and unwholesome and unfit for domestic uses. That defendant also maintains near said stream a corral or pen in which it keeps about twenty-five hogs. That the said stream forms one side of said pen, and the urine and droppings and filth from said hogs find their way into said stream, thereby polluting

the waters thereof, and rendering the same offensive to the senses, and unwholesome and unfit for domestic uses."

And as matter of law it was found that the hogpen and manure-pile constitute nuisances, and defendant was enjoined from maintaining them.

From this part of the decree defendant appeals, and his first point is that this finding is not within the issues.

The hogpen and manure-pile are not mentioned in the complaint, and it is not found that they are such fixtures as usually accompany a sawmill. The complaint, however, speaks of outhouses and stables, and I think the findings sufficiently show that the cow-stable and hogpen are maintained in connection with the mill plant; and, notwithstanding appellant's criticism, that the manure-pile is caused by the cow-stable. Beyond this the complaint seems to be that the court did not suppress the stable itself rather than the use of it, which renders it a nuisance. I do not think there was any error here of which the defendant can complain.

2. The court found that Elk river is not a navigable stream. It is contended that it follows from that fact that fouling its waters cannot constitute a public nuisance. But it is found that "the waters of Elk river at and below the defendant's dam were, and have been, and now are, used by a considerable number of persons, who reside along the banks of said stream below the defendant's ²²⁰ mill and dam." This constitutes such a public use as would make a pollution of the water by any unreasonable use a public nuisance.

We may leave out of view, therefore, the claims of the Ricks Water Company and the inhabitants of the city of Eureka altogether. While, as to lower riparian owners, the defendant is entitled to a reasonable use of the water, he has no right to pollute the stream by putting such matter directly into it.

The decision does not go to the extent that appellant apprehends. It does not determine that one may not depasture stock upon the lands comprising the watershed drained by the river, because they would necessarily pollute the water, nor that he cannot maintain stables and hogpens upon the land, but only that they must not be in, or directly upon, the banks of the stream. It holds that this is an unreasonable use of such streams by a riparian owner as against lower riparian owners. But if stock, not confined upon the river-banks, following their natural instincts cause such pollution

it would be a different matter. So, if the hogpen and the cow-stable were at a reasonable distance from the river, the fact that the winter rains washed some impurities into the stream would be something of which lower riparian proprietors could not complain. The acts enjoined are equivalent to actually putting the polluting material directly into the water. If the conformation of defendant's land is such that he cannot carry on a dairy without putting such filth directly into the water, then he must find some other use for the land. This seems to be the effect of the rule laid down in *People v. Gold Run*, 66 Cal. 138; 56 Am. Rep. 80.

The judgment is affirmed.

McFARLAND, J., and HENSHAW, J., concurred.

Hearing in Bank denied.

WATERS—RIGHT TO POLLUTE.—The natural right of a lower owner to have the water of a natural stream descend in its pure state must yield to the equal right of the owner above to use the water for useful and lawful purposes tending to make it more or less impure. It is not under all circumstances an unlawful or unreasonable use of a stream to throw or discharge into it waste or impure matter, and the question whether or not in any particular case such use is unlawful, is for the jury: *Barnard v. Sherley*, 135 Ind. 547; 41 Am. St. Rep. 454, and note. Any use of water which defiles or corrupts it to such a degree as to essentially impair its purity and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied is an infringement of the right of other owners of land through which the watercourse runs, and creates a nuisance for which those thereby injured are entitled to a remedy: *Tennessee Coal etc. Co. v. Hamilton*, 100 Ala. 252; 46 Am. St. Rep. 48, and note.

WATERS—POLLUTION—DEPASTURAGE OF STOCK.—A water company owning land adjacent to a stream of water cannot deprive an upper riparian owner, through whose land a pure natural stream of fresh water flows, of his right to use the land in a reasonable manner for the purpose of pasturing his cattle, without making him due compensation for his water right, though such use causes the serious pollution of the stream: *Helfrick v. Catonsville Water Co.*, 74 Md. 269; 28 Am. St. Rep. 245, and note.

WATERS—POLLUTION—HOGPENS.—An owner of a large tract of land on a small stream, who erects and maintains thereon a large feeding barn, in which he keeps several thousand cattle, and washes into the stream manure and urine and other foul substances from the cattle, thereby fouling the stream and impregnating it with noxious exhalations destructive to husbandry and dangerous to health, will, at the suit of an adjoining proprietor below him, be restrained from continuing the nuisance: *Barton v. Union Cuttle Co.*, 28 Neb. 350; 26 Am. St. Rep. 340, and note; but see *Hazeltine v. Case*, 46 Wis. 391; 32 Am. Rep. 715.

PEOPLE v. ELK RIVER MILL AND LUMBER CO.

[107 CALIFORNIA, 21.]

WATERCOURSES—NAVIGABILITY.—Under a statute declaring navigable all streams emptying into Elk river, "which are now, or at any time have been, used for the purpose of floating logs or lumber," the south fork of that river being a small stream insufficient to float single sawlogs, except during extreme winter freshets and with the aid of dams, which use has been abandoned as impracticable, is not a navigable stream.

WATERCOURSES—NAVIGABILITY.—A stream to be floatable and navigable must be capable of being used as a highway to float logs during some considerable portion of the year, and the fact that it can be so used for a few days during the rainy season, with the aid of dams, does not make it navigable.

WATERCOURSES—NAVIGABILITY—POWER OF LEGISLATURE.—If a stream is in fact non-navigable it is not a public way, and the legislature cannot make it such by enacting a law declaring it to be navigable and thus take private property for public use without compensation.

WATERCOURSES—DAMS—NAVIGABILITY—PURPRESTURE.—A dam across the bed of a non-navigable stream is not a purpresture.

WATERCOURSES—POLLUTION—RIPARIAN RIGHTS.—A person owning land and a sawmill on a non-navigable stream, who conducts the business of his mill in a reasonable manner and so as not to pollute the water of the stream to such a degree as to render it unfit or unwholesome for domestic use, cannot be enjoined from continuing the mill business.

WATERCOURSES—POLLUTION OF—RIGHTS OF EMPLOYEES AT SAWMILL.—People employed at a sawmill on a non-navigable stream have a right to live there and to maintain privies, taking all reasonable precautions against unnecessarily polluting the water of the stream, and, if they exercise due care, they cannot be compelled to remove from the stream or be expropriated for the benefit of urban communities further down the stream.

WATERCOURSES—PUBLIC USE—COMPENSATION.—CONSTITUTIONAL PROVISIONS making water for sale, rental, or distribution a public use do not grant power to appropriate water for the use of the public without compensation.

WATERCOURSES—RIPARIAN RIGHTS—CONSTRUCTION OF STATUTE.—A statute making criminal acts therein specified, when the direct effect of such acts is to pollute the waters of a stream from which the residents of a city or town are supplied, does not necessarily deprive riparian owners of property rights, and such intent is not presumed when the language of the statute leaves it doubtful.

WATERCOURSES—RIPARIAN RIGHTS—PRIORITY OF USE—POLLUTION.—If a riparian owner has expended large sums of money in the erection of a mill on a stream, and in other property connected with his business, and has made a reasonable use of the water as against lower proprietors for many years before water is taken from the stream to supply a town, the water company cannot, instead of taking pure water from another source, seek to purify such stream for the supply of the town, by destroying the property of the millowner without compensation.

EMINENT DOMAIN—POLICE POWER.—The legislature cannot in the exercise of the police power take private property for a public use without compensation when such property can be condemned and paid for under the power of eminent domain.

B. Henley, Henley & Costello, J. N. Gillett, L. F. Puter, E. W. Wilson, and W. H. H. Hart, attorney general, for the appellant.

Buck & Cutler, for the respondent.

223 TEMPLE, J. This action was brought to restrain the defendant from polluting the waters of Elk river, from which the Ricks Water Company obtains water to sell to the inhabitants of the city of Eureka.

223 The complaint charges defendant with polluting Elk river: 1. By maintaining its barn, slaughterhouse, corral, and stables so near the stream that the water becomes polluted thereby; 2. By maintaining water-closets so that the drainage from them flows into the stream; 3. By allowing sawdust to find its way into the stream; 4. By discharging into the stream slops from its kitchen; and 5. By impounding a large number of redwood logs in the stream, from which logs a dark, juicy liquid escapes, and which logs are covered with dust and other deleterious substances; by all of which the water is polluted and discolored, so as to be unfit for domestic use.

The court declined to enjoin the defendant from impounding logs in the stream, or from dumping sawdust upon the banks, or from allowing the kitchen drainage to flow into the stream, or to abate the privies as nuisances.

From that portion of the decree and from a refusal to award a new trial plaintiff takes this appeal.

The court did enjoin the defendant from allowing the accumulation of manure and filth on the banks of the stream above its dam, and allowing the washings from the same and from the hogpen to escape into the stream. From that portion of the decree awarding the plaintiff this relief the defendant has appealed.

In a separate count the plaintiff also averred that Elk river is a navigable stream, and was made so by section 2349 of the Political Code; that in 1886 defendant wrongfully constructed, and has ever since maintained, a dam across said stream, whereby said stream has been and is wholly obstructed.

Upon this issue the court found, in effect, that the south fork of Elk river is a small stream insufficient to float single sawlogs, except during extreme winter freshets, and with the aid of dams to increase the flow of the stream; that it is not navigable, and was not made so by section 2349 of the Political Code.

By that section all streams emptying into Elk river are declared navigable, "which are now, or at any time ²²⁴ have been, used for the purpose of floating logs or timber." It is found that the south fork of Elk river had been so used in former years during extensive floods and with the aid of dams, but that its use for that purpose was found impracticable, and had been abandoned.

It is contended that the legislative declaration makes the river a navigable stream. I do not think so.

In the first place, it will not be presumed that the language of the act refers to such a use as would not bring the river within the definition of a navigable stream. Conceding that the definition includes all streams floatable for logs, still it must be capable of being used to an extent that would make it of some value as a highway; or at least a stream that would be so used for some portions of the year. That it could be so used for a few days in the rainy season, and by the aid of dams would not make the river navigable.

The court also found that the bed of the stream is private property. Perhaps this is only another finding that the river is non-navigable. If the stream is in fact non-navigable it is not a public way, and the legislature cannot make it such by merely enacting a law declaring it navigable. Private property cannot be taken for a public use without compensation. The fact that a small stream trickles through land which the public proposes to take for a highway does not authorize its being taken without compensation. On this point see Gould on Waters, section 111, and authorities cited in the note.

The finding upon the subject is fully supported by the law and the evidence. The dam is therefore not a purpresture. The charge in the complaint in regard to putting sawdust into the stream is found untrue. It is found that the sawdust is burned, and that such care is taken that very little gets into the water, and that which does reach the stream has no appreciable effect upon the water.

It was also found that the water is not essentially impaired by the waste water from the kitchen, or by the ²²⁵ escape of oily substances or waste matter from the mill, or by the erection of privies or the escape of offal from the slaughterhouse.

It cannot be denied that there was evidence tending to sustain all these findings.

There was evidence which tended to show that the water was not polluted to such a degree by any or all the matters complained of as to render it unfit for use or unwholesome. Even the expert witnesses did not agree upon this proposition. But when the sources of pollution are suppressed which are enjoined by the decree it cannot be said that, aside from the coloring matter which comes from the impounding of the logs, there is evidence that the water is materially polluted.

The evidence shows that the offal from the slaughterhouse is not thrown into the stream and does not get into the water; that only a portion of the drainage from the kitchen reaches the stream; that the privies are not over or immediately upon the banks of the stream.

The people who are employed at defendant's mill themselves comprise a portion of the public. They have as much right to live on the south fork of Elk river as the inhabitants of Eureka have to live at Eureka. The one community cannot be suppressed for the benefit of the other.

Since they have the right to live there, they have a right to maintain privies, taking all reasonable precautions against unnecessarily polluting the water. All natural streams, to some extent, operate as sewers. The surface of the land is drained by them, and all industries, as well as mere inhabitaney, tend to add to the impurities of the natural streams.

The inhabitants and property owners upon these streams cannot be compelled to remove from them or be expropriated for the benefit of urban communities.

It is contended that the law of the case is changed by section 1, article 14, of the state constitution, which makes the use of water for sale, rental, or distribution ²²⁶ a public use. Certainly it was not intended by that provision to appropriate such water for the use of the public without compensation. The section recognizes the use as one in behalf of which the right of eminent domain may be invoked, and asserts the right of the state to regulate and control the sale, rental, and distribution of the same: *People v. Stephens*, 62 Cal. 209; *McCrary v. Beaudry*, 67 Cal. 120.

Nor do I see how the plaintiff's case is helped by section 374 of the Penal Code. I do not doubt the power of the legislature to make criminal the acts therein specified, when the direct effect of such acts is to pollute such waters. But there is nothing in the language of the section which makes it necessary to suppose that it was intended thereby to deprive

riparian owners of property rights. It is not necessary to say that in the interest of public health the legislature cannot so restrict the rights of such owners as to materially interfere with the value of such rights. Such intent will not be presumed when the language leaves it doubtful.

The section, if it can be construed as limiting riparian rights at all, only has that effect as to certain riparian owners. In this case the defendant had expended, as it is found, ninety thousand dollars in his mill and other property connected with his business many years before water was taken from the stream for the supply of Eureka. The use it is making of the stream, as between itself and inferior riparian owners, may be a reasonable one. It was so found. After he had built his mill, and had been for years engaged in manufacturing lumber, the relator built its works, and, in defiance of law, which provides that it shall only supply the city with pure water, commenced taking the water from the stream, four and one-half miles below the mill, to sell to the inhabitants of Eureka. The water had been condemned by the board of health of the city of Eureka before it was taken by the relator. Apparently the relator is attempting through this proceeding to enable itself to perform its duty to sell pure fresh ²²⁷ water. Instead of taking pure water, as the court found it could have done, it will make this stream pure by destroying the property of the defendant. On the supposition made, the industry and the mode of conducting it were perfectly lawful before the relator constructed its works, and would have continued to be so but for the unlawful selection of this stream as the source from which relator would take its supply.

It is not the law nor the act of the defendant alone which constitutes the nuisance. The selection of this stream by the relator renders the act unlawful which before was not.

Perhaps such a thing may be done when it is absolutely necessary. The power of the legislature in this regard is very broad. But I do not think the legislature can, under the undefined and undefinable power called the police power, take private property for public use without compensation when such property can be condemned and paid for.

I have called attention to the fact that the law is not uniform in its operation, not only because it does not afford the same protection to rural and urban populations, but because it authorizes private persons in charge of a public use to

select certain riparian owners, and, if the construction contended for by appellant be correct, take without compensation, for the pecuniary advantage of private speculators, a valuable portion of their property. Conceding that the plant of defendant and its mode of conducting its work is lawful and proper as against inferior riparian owners, the relator had no right under the law to take water for the purpose of selling it to the inhabitants of Eureka without first removing the causes of pollution. This it could do, so far as defendant's mill is concerned, by condemning and paying for it. It cannot in this proceeding, nor could the legislature in the exercise of the police power, authorize it to take the property without compensation. As was said by the supreme court of Massachusetts: "The law will not allow rights of property ²²⁰ to be invaded under the guise of a police regulation for the preservation of the health, or protection against a threatened nuisance; and when it appears that such is not the real object and purpose of the legislation, the courts will interfere to protect the rights of citizens": *Watertown v. Mayo*, 109 Mass. 315; 12 Am. Rep. 694.

If this law, therefore, has any force, as applied to this case, its sole effect must be to render criminal the specific acts mentioned in the statute. These were already unlawful, for they constitute nuisances. To declare them criminal is not to limit riparian rights.

The court found also that a considerable number of people reside upon the borders of the stream below the mill of defendant, who use the waters of said stream. They are inferior riparian owners, and the attorney general may present their grievances in this case.

The court found: "That during the greater part of the year defendant keeps in its dam large quantities of redwood, spruce, and pine logs. That a liquid containing some coloring matter is discharged by the redwood logs into the water, which to some extent discolours the water of said stream and gives it a darkish appearance, and in a slight degree this discoloration remains in the water to the intake of the Ricks Water Company; but the quantity of liquid that escapes from said logs is comparatively small, and it does not render the waters of said stream offensive or repulsive to the senses, or greatly discolor, deteriorate, defile, or contaminate them, and it does not injure or essentially impair them for domestic and drinking purposes." Also that the logs are not cov-

ered with foul organic matter, or other substance which contaminates the water; that prior to the erection of defendant's dam the waters of Elk river had a darkish appearance, owing to the falling of leaves into the stream, to juices from the roots of trees and fallen timber, and the condition of the water now, in respect to color, is very much as it has been for many years back.

It was also found that sawdust is not put into the ²³⁰ stream nor allowed to decay on its banks so that water percolating through it discolors or pollutes the stream, that all necessary precautions are taken to prevent the sawdust from getting into the river, that the same is burned upon the banks, and that the little that unavoidably gets into the river does not materially affect or discolor the waters of the stream.

Upon the facts so found I do not think we can interfere with the decree in behalf of lower riparian owners. So far as they have appeared in the case, which is only as witnesses, they seem to be entirely satisfied with existing conditions. Apparently all—or nearly all—depend upon the lumbering industry for their means of subsistence, and most of them upon the business conducted by the defendant. It would be rather hard for them to have the industry suppressed by a proceeding in their behalf by the attorney general.

I must confess that, to my mind, whether the impounding of logs in the river and the consequent discoloration and pollution of the water is not a nuisance of which lower riparian owners may complain is a close question. But, under the circumstances of this case, I do not think the decree should be disturbed.

The judgment and order are affirmed.

HENSHAW, J., and McFARLAND, J., concurred.

WATERCOURSES—NAVIGABILITY.—Navigable streams are such as are floatable, or capable of valuable use in bearing the products of the mines, forests, and tillage of the country to mills or markets: *Commissioners v. Ottawa's Lumber Co.*, 116 N. O. 731; 47 Am. St. Rep. 829, and note.

WATERCOURSES—NAVIGABILITY—POWER OF THE LEGISLATURE.—Whether a stream is navigable is a question of fact that in no manner depends upon whether or not the legislature has declared the river navigable: *Martin v. Bliss*, 5 Blackf. 35; 32 Am. Dec. 52.

WATERCOURSES—DAMS.—The owner of the soil over which a floatable but non-navigable stream passes may build a dam across it and erect a mill thereon, provided he furnishes a convenient passageway for the public by

or through his dam: Note to *Mumpower v. City of Bristol*, 44 Am. St. Rep. 908.

WATERS—RIGHT TO POLLUTE.—An upper riparian owner is entitled to a reasonable use of the waters of a stream flowing by or through his land, but he is not entitled, as against lower riparian owners, to pollute the stream by putting filthy matter directly into it, thus rendering it unfit for domestic use: *People v. Elk River Mill etc. Co.*, 107 Cal. 214; *ante*, p. 125, and note.

EMINENT DOMAIN—POWER OF THE LEGISLATURE.—Private property cannot be compulsorily taken for any but public use, and then only upon just compensation being made: *Wellton v. Dickson*, 38 Neb. 767; 41 Am. St. Rep. 771, and note. The legislature has no power to take private property for public uses without providing for paying or securing compensation to the owner: *State v. Graves*, 19 Md. 351; 81 Am. Dec. 639, and note. See, also, the extended note to *Bloodgood v. Mohawk etc. R. R. Co.*, 31 Am. Dec. 373.

REDINGTON v. PACIFIC POSTAL TELEGRAPH CABLE COMPANY.

[107 CALIFORNIA, 87.]

TELEGRAPH COMPANIES—STIPULATION AGAINST LIABILITY—GROSS NEGLIGENCE—BURDEN OF PROOF.—A stipulation in the message blank of a telegraph company that its liability for any mistake or delay in the transmission or delivery of a message shall not extend beyond the sum received for sending it unless the sender orders the message repeated, is a reasonable regulation and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated, for any cause except willful misconduct or gross negligence on its part. In an action to recover beyond the amount stipulated for a mistake in the transmission of a message, such conduct or negligence is not presumed from the mere fact of a mistake, and the burden of proof is on the sender of the message to show such willful misconduct or gross negligence by independent facts, or by circumstances connected with the principal fact.

GROSS NEGLIGENCE IS AN ENTIRE FAILURE TO EXERCISE CARE, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the interest and welfare of others.

NEGLECT—WHEN FOR THE JURY.—Negligence is a question of law and fact, and if there is room for difference of opinion between reasonable men as to the existence of facts from which it is proposed to infer negligence, or as to the inferences which might fairly be drawn from conceded facts, the question of negligence is for the jury to determine, and the court should not grant a nonsuit.

TELEGRAPH COMPANIES—GROSS NEGLIGENCE—FINDINGS—REVIEW OF.—A judgment based on findings of fact that a telegraph company has been guilty of gross negligence in transmitting a message is not subject to reversal on appeal if there is sufficient evidence to show such negligence *prima facie*, although the evidence is conflicting and there may be some doubt as to the correctness of the finding.

TELEGRAPH COMPANIES—NEGLECT—EVIDENCE.—If a telegraph corporation to avoid liability for negligence in transmitting a message presents

evidence to show that the receiving office is unimportant and third class, not calling for an operator of high capacity, and shows the number of dispatches sent and received per day, it cannot be permitted to show the monthly receipts and expenditures of such office by an account not showing the amounts collected upon individual messages.

WITNESSES—CROSS-EXAMINATION—IMPEACHMENT AS TO COLLATERAL MATTER.—If a witness upon cross-examination testifies to a collateral matter, not responsive to any fact brought out on his examination in chief, his answer is not open to contradiction.

Lloyd & Woods, for the appellant.

Chickering, Thomas & Gregory, for the respondent.

319 **SEARLS, C.** This is an action to recover damages for the failure of the defendant (a telegraph company) to correctly transmit an unrepeatable telegraph message.

320 Plaintiff had judgment for \$555 and costs, from which judgment and from an order denying its motion for a new trial defendant appeals.

The case is this:

The defendant is a telegraph company, engaged in transmitting and receiving messages for hire by telegraph over its lines, one of which extends from San Francisco to Visalia, in the county of Tulare, state of California.

On the twenty-eighth day of March, 1890, plaintiff caused a message to be delivered to defendant at San Francisco for transmission to Visalia, directed to D. G. Overall, sheriff of the county of Tulare, directing said sheriff to attach the property of Woodruff and Dobson under a writ of attachment issued out of the superior court of the city and county of San Francisco, in an action in which the plaintiff herein was plaintiff, and Woodruff and Dobson were defendants, which said writ was set out in the message, and commanded the sheriff to attach sufficient property of the defendants therein to satisfy plaintiff's demand for \$1,903, etc. The writ was in the usual form.

The said message was transmitted to Visalia and delivered to said sheriff, but when delivered the word "nineteen" in said writ was changed and altered so that it read "nine," thus causing the writ to read \$903 instead of \$1,903.

The writ was duly levied for \$903, and before the mistake was discovered other writs of attachment were levied upon the same property. The total receipts upon the sale of the property of the attachment debtors over and above the sum of \$903 and costs was the sum of \$555, which plaintiff would

have received in addition to \$903 had the message been correctly transmitted.

The said message was not repeated. Plaintiff, within thirty days after sending, duly notified defendant of his loss, and demanded satisfaction therefor. The message was upon the usual blank of defendant, and was preceded by the following printed agreement or notice:

321 "All messages taken by this company subject to the following terms:

"To guard against mistakes the sender of a message should order it repeated; that is, telegraphed back to the originating office. For repeating one-half the regular rate is charged in addition. And it is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruptions in the working of their lines, or for errors in cipher or obscure messages. And this company is hereby made the agents of the sender, without liability, to forward any message over the lines of other company, when necessary, to reach its destination.

"Correctness of the transmission of messages to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risks, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz.: One per cent for any distance not exceeding 1,000 miles, and two per cent for any greater distance. No employee of company is authorized to vary the foregoing.

"The company will not be liable for damages in any case where the claim is not presented in writing within fifty days after sending the message.

"JOHN W. MACKAY,
"President.

W. C. VAN HORNE,
Vice-President."

"Send the following message subject to the above terms, which are hereby agreed to."

Plaintiff prepaid to defendant the sum of \$6.70 for 323 sending said message, for which sum defendant offered in its

answer to permit plaintiff to take judgment under and pursuant to section 997 of the Code of Civil Procedure of this state.

The foregoing is a condensed statement of facts stipulated between counsel for the respective parties as existing in the case, and used as evidence on the part of plaintiff.

At the trial plaintiff called a single witness, W. W. Slater, an electrician, who stated that he had had twenty-seven years' experience, twenty-one years as a telegraph operator and six years as an electrician, who explained the Morse alphabetical system, etc., and who, as the substance of his testimony, gave it as his opinion that the word "teen" lost from the message in the course of transmission could not have been lost without the knowledge of the receiving operator, if competent, and that, if it was not known by the sending or receiving operator, it would be because they or one of them was not a competent operator. The witness alluded to the causes which might arrest the electric current, and gave as the central reason why a competent receiving operator should know if there was a cessation of its flow, that the rest or space of time necessary to receive the syllable "teen" (one to three seconds) would indicate to him something wrong, whereupon it would become his duty to call for a repetition.

Upon the close of plaintiff's testimony defendant's counsel moved the court for a judgment of nonsuit, upon the ground, substantially, that the message in question was transmitted over the wires of the defendant under the agreement contained in the agreed statement, and was not repeated, and that "there has been no evidence showing any gross negligence on the part of defendant corporation or its employees, and that in the absence of proof of a repetition of a message, and in the absence of proof of the gross negligence on the part of the defendant or its employees, the plaintiff has failed to make any case."

323 The court overruled the motion, and such ruling is assigned as error.

The message here was in all material respects identical with the one involved in the case of *Hart v. Western Union Tel. Co.*, 66 Cal. 579, 56 Am. Rep. 119, in which this court held that a similar stipulation, that the liability of the company for any mistake or delay in the transmission or delivery of a message shall not extend beyond the sum received for sending it unless the sender orders the message to be re-

peated by sending it back to the office which first received it and pays half the regular rate additional, is a reasonable precaution to be taken by the company and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated for any cause except willful misconduct or gross negligence on the part of the company; and that, in an action to recover damages beyond the amount stipulated, the burden of proof is on the plaintiff to show such willful misconduct or gross negligence.

The onus, then, of proving willful misconduct or gross negligence on the part of the defendant devolved upon the plaintiff, and is not, in the face of the stipulation, to be presumed from the mere fact of a mistake, but must be proven by independent facts, or by circumstances connected with the principal fact, and warranting the conclusion or inference of willful misconduct or gross negligence. There is no claim of willful misconduct.

Did the evidence establish a *prima facie* case of gross negligence on the part of the defendant?

The degrees of negligence are correlative to the degrees of care. Law writers have criticised the practice of dividing negligence into degrees, and have declared that the term "ordinary negligence" involves a solecism, "since, if the negligence were ordinary (that is, in accordance with the usual course of practice among all men of average prudence), it would cease to be negligence at all"; Shearman and Redfield on Negligence, sec. 48. The same authors admit, however, that terms ³²⁴ in use to define negligence are well understood, and any attempt to dispense with them would promote confusion rather than clearness of conception.

The accepted definition of gross negligence is "the want of slight care": Shearman and Redfield on Negligence, sec. 49. Gross negligence is the want of slight diligence: *Kranz v. Thieben*, 15 Ill. App. 482; *First Nat. Bank v. Graham*, 85 Pa. St. 91; 27 Am. Rep. 628; *Wright v. Clark*, 50 Vt. 130; 28 Am. Rep. 496; *Smith v. New York Cent. & R. R. Co.*, 24 N. Y. 222. Gross negligence is an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the interest and welfare of others: *International etc. R. R. Co. v. Cooke*, 64 Tex. 151.

Gross negligence is that entire want of care which would

raise a presumption of a conscious indifference to consequences: *Southern Cotton Press etc. Co. v. Bradley*, 52 Tex. 587.

The question of negligence is a mixed question of law and fact, and is said to involve two questions: 1. Whether a particular act has been performed or omitted; and 2. Whether the performance or omission of this act was a breach of legal duty.

The first of these is purely a question of fact; the second a pure question of law: *Shearman and Redfield on Negligence*, sec. 52.

"The question of negligence must be submitted to the jury as one of fact, not only where there is room for difference of opinion between reasonable men as to the existence of the facts from which it is proposed to infer negligence, but also where there is room for such a difference as to the inferences which might fairly be drawn from conceded facts. Where this is the case the issue must go to the jury, no matter what may be the opinion of the court as to the value of the evidence, or the credibility of the witnesses": *Shearman and Redfield on Negligence*, sec. 54.

Tested by this rule, the evidence on the part of plaintiff ³²⁵ presented such a state of facts that the inference to be drawn therefrom might well lead to a difference of opinion between reasonable men, and hence become a proper question for a jury or for the court sitting in lieu thereof: *Hart v. Hudson R. Bridge Co.*, 80 N. Y. 622; *Dahl v. Milwaukee etc. Ry. Co.*, 62 Wis. 652; *Central etc. R. R. Co. v. Hotham*, 22 Kan. 41; *Schierhold v. North Beach etc. R. R. Co.*, 40 Cal. 447. It follows that the court below did not err in denying defendant's motion for a nonsuit.

The second error assigned relates to the sufficiency of the evidence to justify the finding of the court that "in the transmission of said telegraphic message the defendant was guilty of gross negligence and carelessness, and it was because of such gross negligence and carelessness that the words 'nineteen hundred and three dollars' in the said message contained as written by the sender were changed and altered to the words 'nine hundred and three dollars.'"

The defendant introduced evidence tending to show that the day upon which the message was transmitted from San Francisco to Visalia (March 28, 1890) the weather was cloudy, with light rains from San Francisco south to Los

Angeles, and that in rainy weather the electric current is liable to be momentarily diverted from the wire by contact of such wire with trees, buildings, or crossing-wires, etc., and generally upon all branches of the case the testimony of the defendant was sufficiently convincing that defendant was not guilty of gross negligence to raise a grave doubt as to the propriety of the above-quoted finding.

To state the evidence at length or to discuss it at large can be of no avail, for the reason that a doubt, however grave as to the correctness of the finding, where as here there is a conflict in the evidence, is not, under the settled rule of this court, sufficient to authorize a reversal.

We judge the case upon the facts from the cold record, and it may well be that, had we been in the ³³⁶ place of the trial court, heard the witnesses as they detailed the facts, observed their demeanor and mode of testifying, the doubt which now exists as to the conclusion reached by such court would never have arisen.

The rule of this court, that the verdict of a jury or a finding of fact by a court will not be reversed, where there is a substantial conflict in the evidence upon which such verdict or finding is based, is so firmly established as to amount to a maxim. The order appealed from cannot be reversed because the findings are not supported by the evidence.

It is further urged that the court "erred in refusing to permit defendant to show the receipts and expenses of the Visalia office." The evidence in question consisted of a writing showing the monthly receipts and expenditures of the Visalia office during the year 1890, from which it appeared the receipts were \$1,469.84, and the expenses \$667.24.

The object of the testimony was no doubt to show that the Visalia office was an unimportant one, having but a small volume of business, and hence not calling for the highest capacity in an operator.

As the memorandum presented did not show the amounts collected upon the individual messages received or sent it was too indefinite to be of value in determining the volume of business.

The defendant was permitted to show, and did show, that the office at Visalia was classed as a third-class office, and the number of dispatches sent and received per day was testified to by the operator without objection.

There was no error in the ruling under these circumstances.

The only other error assigned is predicated upon a ruling of the court, upon a question put to the witness F. P. Medina as follows: "Do you know what is the custom in the railroad service as regards the repeating of train orders?"

When the question was objected to, the court remarked: "I don't know myself that the railroad question is important."

327 Thereupon counsel for defendant stated in substance that he wanted to contradict plaintiff's witness (Slater), and show that he knows nothing about it. I want to discredit him. It would be of no consequence only to discredit their only witness, and to show that he does not know what he is talking about.

The witness, Slater, had testified that it was not usual in the railroad office to repeat messages directing the movement of trains, but this was upon cross-examination and not responsive to anything concerning which he had testified in chief, and being upon a collateral matter, the answer was not open to contradiction. There is another answer to alleged error. The witness afterward, and without objection, testified to the very matter objected to, his answer being as follows: "I do know of messages being repeated in the railroad business. All train orders, all orders regarding the movement of trains, are repeated," etc.

The judgment and order appealed from should be affirmed.

BRITT, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

HARRISON, J., GAROUTTE, J., VAN FLEET, J.

TELEGRAPH COMPANIES—UNREPEATED MESSAGES—LIMITING LIABILITY FOR.—A stipulation in the printed blanks used by a telegraph company, exempting it from liability for negligence in the transmission of unrepeatd messages beyond the price of sending the same, is unreasonable and void as against public policy: *Note to Brown v. Postal Tel. Co.*, 32 Am. St. Rep. 798, where the cases are collected.

NEGLIGENCE—GROSS—WHAT IS.—The term "gross negligence" includes all lesser degrees of negligence: *Hays v. Gainesville etc. Ry. Co.*, 70 Tex. 602; 8 Am. St. Rep. 624.

NEGLIGENCE—WHEN A QUESTION FOR THE JURY.—If there is a reasonable doubt as to the facts or the inferences to be drawn from them, the question of negligence is solely for the jury to determine: *Vannatta v. Central R. R. Co.*, 154 Pa. St. 262; 35 Am. St. Rep. 823, and note. To the same effect see *Gibson v. City of Huntington*, 38 W. Va. 177; 45 Am. St. Rep. 853, and note.

WITNESSES—IMPEACHMENT—COLLATERAL MATTERS.—A witness cannot be impeached by showing the falsity of his testimony concerning facts collateral to the issue: *Stevens v. Bearh*, 12 Vt. 585; 36 Am. Dec. 359; *Combs v. Winchester*, 39 N. H. 13; 75 Am. Dec. 203; *Fletcher v. Boston etc. R. R.*, 1 Allen, 9; 79 Am. Dec. 695, and note; *People v. Greenwall*, 108 N. Y. 296; 2 Am. St. Rep. 415; *Great Western etc. Road Co. v. Loomis*, 32 N. Y. 127; 88 Am. Dec. 311, and extended note.

UNION INS. CO. v. AMERICAN FIRE INS. CO.

[107 CALIFORNIA, 327.]

FIRE INSURANCE—REINSURANCE—EFFECT OF PRIOR LOSS.—If a contract for reinsurance is made where a custom exists among insurers to charge and collect premiums as and from the date of reinsurance and to write policies so as to cover the reinsured risk from the date of reinsurance, and there is nothing indicating a mutual intention of the parties to give the contract of reinsurance in suit a retroactive effect, the reinsurer is not liable if the property is destroyed prior to the execution of the contract of reinsurance without the knowledge of either party of the loss at that time.

INSURANCE—REINSURANCE—DATE OF.—A policy of insurance or reinsurance, if delivered, takes effect from its date, unless otherwise stated therein, or unless there is evidence of a contrary intent, and if the premium is paid and the policy is not delivered until afterward, the policy takes effect by relation as to its date, though a loss intervenes.

CUSTOM—USAGE—CONTRACTS MADE UNDER.—If a known usage or custom of trade or business exists, persons carrying on that trade or business are held to have contracted in reference thereto, unless the contrary appears, and such custom or usage forms part of the contract.

C. P. Pomeroy, for the appellant.

Van Ness & Redman, for the respondent.

329 SEARLS, C. This action was brought to enforce a contract of reinsurance entered into by the parties hereto on the sixth day of June, 1889. The cause was tried by the court without a jury upon the amended complaint and answer thereto, and upon an agreed statement of facts. Written findings were filed, and judgment entered thereon in favor of defendant, from which judgment plaintiff, within sixty days next after the rendition thereof, appealed.

The agreed statement of facts upon which the cause was tried, after stating that the plaintiff, on May 24, 1889, insured certain property of the Seattle Lumber & Commercial Company in the sum of four thousand dollars against loss or damage by fire, contains the following:

"3. That subsequent to the said insurance of the said

property, and on, to wit, June 6, 1889, and between 3:15 and 4 P. M., the said property, so insured as aforesaid, was destroyed by fire, by reason of which said destruction of said property the said Seattle Lumber & Commercial Company lost and was damaged in a sum in excess of four thousand dollars.

"4. That on said June 6, 1889, but subsequent to the destruction of said property as aforesaid, the plaintiff notified defendant, at the office of defendant in the city and county of San Francisco, California, of its said insurance upon said property, and requested of and from defendant reinsurance thereon in the sum of one thousand dollars; whereupon defendant agreed to and did reinsure plaintiff thereon in said sum, and did agree to issue to it a policy of reinsurance in the usual form, and for the premium usually chargeable upon risks of the character assumed; that at the time of said application and agreement neither plaintiff nor defendant knew of the prior destruction of said property."

330 The question presented under the pleadings and stipulated facts is simply this: Did the defendant, under its agreement of reinsurance, contract to indemnify plaintiff against loss and liability for and during its original contract of insurance, or was the undertaking of defendant to indemnify plaintiff against such loss as might thereafter occur?

"Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event": Civ. Code, sec. 2527.

"A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance": Civ. Code, sec. 2646.

"A reinsurance is presumed to be a contract of indemnity against liability, and not merely against damage": Civ. Code, sec. 2648.

"When an insurer finds it prudent or convenient to protect himself from loss by reason of any liability he has assumed under a policy, he may contract with another to relieve him from that liability, and take it upon himself. This is to reinsure, and by the contract the reinsurer, except as to the matter of premium, which may be more or less than that paid on the original policy, as the parties may agree, undertakes, with reference to the first insurer, what the first insurer undertakes with reference to the insured, and subject to like rights, duties, and obligations": May on Insurance, 3d ed., sec. 9.

Section 2531 of the Civil Code provides that "Any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against."

Section 2587 provides, among other things, that "A policy of insurance must specify: 1. The parties between whom the contract is made. . . . 5. The risk ³³¹ insured against; and 6. The period during which the insurance is to continue."

In the present case, as will be seen by the agreed statement, no policy in fact issued, and the theory urged by appellant is that the reinsurance was for and during the entire term of the original insurance, and covered any unknown loss which might have occurred within said term, prior to the application for and granting of the reinsurance. Respondent, on the other hand, claims that the undertaking of the defendant was to indemnify plaintiff against such loss and liability as might occur from and after the granting of the reinsurance. The contract, according to the stipulation, was that "defendant agreed to and did reinsure plaintiff in said sum (one thousand dollars), and did agree to issue to it a policy of reinsurance in the usual form, and for the premium usually chargeable upon risks of the character assumed."

The general rule is that a policy, if delivered, takes effect from its date, unless it be otherwise stated, or unless there is evidence of a contrary intent.

If the premium be paid and the policy be not delivered till afterward, the policy takes effect by relation as of its date, even though a loss intervenes: *May on Insurance*, sec. 400; *Ruse v. Mutual Ben. Life Ins. Co.*, 23 N. Y. 516; *Whitaker v. Farmers' Union Ins. Co.*, 29 Barb. 312; *Lightbody v. North American Ins. Co.*, 23 Wend. 18; *City of Davenport v. Peoria etc. Ins. Co.*, 17 Iowa, 276.

It is said: "The circumstances and intent of the parties are to control": *May on Insurance*, sec. 240.

The same author, continuing, adds: "And where the policy was in fact a reinsurance, and was for a year, but specifying no time when the year was to begin, it was held that it began from the date of the prior policy, though that was some months prior to the issue of the latter policy": Citing, as authority, the case of *Philadelphia Life Ins. Co. v. American Life Ins. Co.*, 23 Pa. St. 65.

³³² Referring to the case cited, it appears that on the 24th

of February, 1851, the American Life Insurance Company insured the life of one Maxwell Nusbaum for two thousand five hundred dollars for one year, with the privilege of another year.

On the thirty-first day of May, 1851, the insurers obtained an insurance of one thousand dollars of their risk from the Philadelphia Life Insurance Company for the term of one year; but the time when the year was to begin or end was not stated.

It appeared that Nusbaum had gone to California, and had lost his life at a fire in San Francisco, May 4, 1851, which fact was unknown to the parties in Philadelphia, where the insurance was had, when the second policy issued. The court, in holding the reinsurer liable, placed its decision upon the circumstance that while the policy of reinsurance was for one year, and did not state the date at which the risk was to commence, yet as the reinsurers charged one whole year's premium, while the original policy had then only say nine months remaining, it indicated an intention to reinsure from the date of the original policy.

Lawrie, J., said: "The contract and the circumstances express themselves in seeming contradiction of each other, and our duty is to make them harmonize by construction. We cannot alter the facts to suit an inference drawn from the mere words of the policy, but we must suit the inference to the facts. Without the circumstances we would draw one inference as to the intention of the parties; with them we must draw a different one. The fact that the reinsurance was for one year on a risk running for one year from the 24th of February, and in consideration of a proportional share of the premium as from that date, settles the question, and starts the year of the reinsurance from that date."

In the present case we find no circumstance indicating the mutual intention of the parties to give to their contract a retrospective effect. The stipulated facts show that at all the times mentioned it was the ²²² custom among fire insurance companies doing business upon the Pacific Coast granting reinsurance to other fire insurance companies to charge and collect premiums as and from the date of reinsurance, and to write their policies so as to cover the reinsured company from the date upon which the reinsurance would be granted.

Both plaintiff and defendant were fire insurance companies

doing business in San Francisco, and may be presumed to be familiar with these customs, and, in the absence of a showing to the contrary, to have contracted with reference to them.

Indeed, plaintiff alleges in effect that its contract with defendant was subject to the customs in vogue and understood by insurance men, when it avers that defendant "did agree to and did reinsure plaintiff thereon in said sum, and did agree to issue to it a policy of reinsurance in the usual form and for the premium usually chargeable upon risks of the character assumed."

Where there is a known usage of trade, persons carrying on that trade are held to have contracted in reference to the usage (unless the contrary appears), and the usage forms a part of the contract: *Brown v. Howard*, 1 Cal. 423; *Taylor v. Castle*, 42 Cal. 367; *Auzerais v. Naglee*, 74 Cal. 60.

Without pursuing the authorities further we are of opinion: 1. Where the exact time of the commencement and termination of the risk are specified in the policy, or, if no policy has been written, in the contract, such specification governs; 2. Where no time has been expressly indicated the circumstances of the case will be considered for the purpose of determining it; 3. If there are no circumstances indicating the intention of the parties, and no time is specified in the contract, the risk will be deemed to have commenced at the date of the contract; 4. In the case last mentioned, if, before the contract of insurance is made, the property has ceased to exist, ³³⁴ although unknown to the parties, the risk never attaches.

In consonance with these views of the law we are of opinion the judgment appealed from should be affirmed.

BRITT, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

GAROUTTE, J., HARRISON, J., VAN FLEET, J.

INSURANCE—WHEN POLICY TAKES EFFECT.—Neither the payment of the premium nor the reception of the policy by the insured are prerequisites to a contract of insurance; such contract is completed when there is an assent to the terms of it by the parties upon a valuable consideration: *Blanchard v. Waite*, 28 Me. 51; 48 Am. Dec. 474. If an applicant for insurance delivers his application to the special agent of a foreign insurance company, who transmits it to the office of the company, and the policy is issued and mailed

to the applicant, the contract takes effect when the policy is mailed: *Hartford etc. Ins. Co. v. Lasher Stocking Co.*, 66 Vt. 439; 44 Am. St. Rep. 859.

CUSTOM—WHEN PARTIES DEEMED TO HAVE CONTRACTED WITH REFERENCE TO.—When a custom is general, every person who makes a contract is presumed to know the custom, and it enters into the contract and binds him: *Horan v. Strachan*, 86 Ga. 408; 22 Am. St. Rep. 471, and note; *Bowman v. First Nat. Bank*, 9 Wash. 614; 43 Am. St. Rep. 870, and note.

BROWN v. MERRILL.

[107 CALIFORNIA, 446.]

CORPORATIONS—LIABILITIES OF STOCKHOLDERS AS BETWEEN THEMSELVES.

A creditor stockholder in a corporation may maintain an action against other stockholders in the same corporation for their pro rata share of its debt, under a statute imposing liability on stockholders for their respective proportions of the debts of the corporation.

CORPORATIONS—SEVERAL LIABILITY OF STOCKHOLDERS.—If every stockholder in a corporation has a several liability for its debts, proportionate to the amount of his stock, he is freed of all liability by paying his portion of the corporate debts, and has no cause of action against any other stockholder for the money so paid.

J. W. Craig, for the appellants.

Rolfe & Rolfe, for the respondent.

446 GAROUTTE, J. This action is against the defendant, Southern California Motor Road Company, a corporation, on a promissory note of the company, executed March 4, 1890, and against the other defendants as stockholders, for their respective proportions of the indebtedness on said note, under section 322 of the Civil Code. A several judgment was given against the defendant Merrill, the appellant, for three hundred and thirty-six dollars and thirty-five cents, as his portion of said indebtedness, according to the amount of stock he held in the corporation.

Appellant claims that respondent cannot have the benefit of the statute of this state, imposing liability on stockholders for the corporation's debts, because he is a stockholder himself. This contention is based upon the authority of *Bailey v. Bancker*, 3 Hill, 188, 38 Am. **447** Dec. 625, and other cases to the same effect; but the reason for the rule declared in those cases is entirely wanting in this state, and it has no application here. In states where those decisions have been made the relation of stockholders inter sese is that of partners, and it is thus apparent at a glance that no common-law

action for money owing by the corporation would lie by a creditor stockholder against other stockholders. In jurisdictions where the above doctrine has been declared, stockholders are severally and jointly liable for the debts of the corporation, but in this state there is no such liability. Each stockholder has a several liability and that liability is proportionate to the amount of his stock; and, when he has paid his portion of any debt, or of all the debts of the corporation, he is freed from all liability and has no cause of action against any stockholder for money so paid. In this state we see no reason why a creditor stockholder of a corporation may not sue other stockholders for their pro rata of the debt.

We see nothing in the other questions suggested by appellants' brief demanding discussion.

The order and judgment are affirmed.

VAN FLEET, J., and McFARLAND, J., concurred.

CORPORATIONS.—THE LIABILITY OF STOCKHOLDERS TO CREDITORS IN SEVERAL; hence a creditor of a corporation may maintain a suit against a stockholder who has not paid for his stock in full, and may compel him to pay the balance due, if it does not exceed the amount of the liability of the corporation to the creditor, and the stockholder has no right to have the other stockholders made parties to the suit, nor to restrict a recovery against him to his proportion of the debt due such creditor: *Coleman v. Howe*, 154 Ill. 458; 45 Am. St. Rep. 133, and note with the cases collected.

JUDSON v. GIANT POWDER COMPANY.

[107 CALIFORNIA, 549.]

NEGLECTENCE—EXPLOSION—ASSUMPTION OF RISK BY GRANTOR.—In making a grant of premises for the purpose of a dynamite factory, the grantor has a right to assume that due care is to be exercised in the conduct of the business, and has the right to demand it. He does not, by continuing to do business near that locality, after notice of the danger attending the manufacture of dynamite, assume the risks of explosions thereof caused by the negligent acts of his grantees in conducting his business. The maxim, *Volenti non fit injuria*, does not apply.

NEGLECTENCE—EXPLOSION—PRESUMPTION.—Proof of an explosion raises a presumption of negligence sufficient to establish a prima facie case for a recovery for injury or loss occasioned thereby without the existence of contractual relations between the parties.

NEGLECTENCE—ACCIDENT—PRESUMPTION.—If the cause of an injury to person or property is shown to be under the management of defendant, and the accident is such as in the ordinary course of events does not happen if those having the management use proper care, it affords prima facie evidence, in the absence of explanation, that the accident arose from

negligence, and no question of contractual relation forms an element in such case.

NEGLIGENCE—EXPLOSION—PRESUMPTION—EXPERT EVIDENCE.—An explosion in a dynamite factory raises a presumption of negligence, and, unexplained, makes a prima facie case for recovery for injury to person or property. Such case is strengthened and completed by expert evidence to the effect that, if the correct process of manufacturing and handling dynamite was carefully carried out, an explosion would not occur.

Galpin & Zeigler, and J. F. Cowdery, for the appellant.

Page & Eells, for the respondent.

552 GAROUTTE, J. Respondents recovered judgment for the sum of forty-one thousand one hundred and sixty-four dollars and seventy-five cents, as damages for acts of negligence. This appeal is prosecuted from such judgment and from an order denying a motion for a new trial. The damages to respondents' property were occasioned by an explosion of nitro-glycerine, in process of manufacture into dynamite, in appellant's powder factory, situated upon the shore of the bay of San Francisco. Appellant's factory buildings were arranged around the slope of a hill facing the bay. Nearest to respondents' property was the nitro-glycerine house; next was the washing-house; next were the mixing-houses; then came the packing-houses, and finally the two magazines used for storing dynamite. These various buildings were situated from fifty to one hundred and fifty feet apart, and a tramway ran in front of them. The explosion occurred in the morning during working hours, and originated in the nitro-glycerine house. There followed, within a few moments of time, in regular order, the explosion of the other buildings, the two 553 magazines coming last; but, though last, they were not least, for their explosion caused the entire downfall and destruction of respondents' factory, residences, and stock on hand. There is no question but that the cause of this series of explosions following the first is directly traceable, by reason of fire or concussion, to the nitro-glycerine explosion. Of the many employees of appellant engaged in and about the nitro-glycerine factory at the time of the disaster none were left to tell the tale. Hence, any positive testimony as to the direct cause of the explosion is not to be had. The witnesses who saw and knew, like all things else around, save the earth itself, were scattered to the four winds.

1. Respondents sold the premises to appellant for the manufacture of dynamite, and it is claimed that the maxim,

Volenti non fit injuria, applies, and therefore no recovery can be had. We attach but little importance to this contention. The grant of these premises for the purposes of a dynamite factory in no way carried to appellant the right to conduct its factory, as against the grantors, in any and every way it might see fit. There is no principle of law sustaining such a proposition. Let it be conceded that respondents, by reason of their grant, could not invoke the aid of a court of equity to prevent the appellant from conducting its business; still that concession proves nothing. This action is not based upon the theory that appellant's business is a nuisance per se, but negligence in the manner in which the business was conducted was alleged in the complaint, and is now insisted upon as having been proved at the trial. In making the grant respondents had a right to assume that due care would be exercised in the conduct of the business, and certainly, they have a right to demand that such care be exercised.

It is argued that the explosion of all powder-works is a mere matter of time; that such explosions are necessarily contemplated by every one who builds beside such works, or who brings dynamite into his dooryard. It ⁵⁵⁴ is further contended that appellant gave to respondents actual notice of the dangerous character of its business by a previous explosion, which damaged respondents' property, and that respondents, by still continuing in business after such notice, in a degree assumed and ratified the risk, and cannot now be heard to complain. The only element of strength in this line of argument is its originality. The contention that in the ordinary course of events all powder factories explode, conceding such to be the fact, presents an element foreign to the case. The doctrine of fatalism is not here involved. In the ordinary course of events the time for this explosion had not arrived, and appellant had no legal right to hasten that event by its negligent acts. Neither do we think respondents lost any legal rights by continuing to do business in this locality after being served with notice of the danger that surrounded them. While the notice was in the form of an object lesson, which came to them in no uncertain tones, yet appellant was not justified in serving it, nor were respondents negligent in disregarding it. Respondents were not bound to abandon their property, though negligence of appellant in the conduct of its factory was ever a menace and danger to their lives and property. Conceding that respondents, by their

grant, thereby assumed certain risks and dangers which may be said to always surround the manufacture of dynamite, still they assumed no risks and waived no action for damages which might arise through appellant's negligence. Both reason and authority support this conclusion.

2. It is contended that respondents offered no evidence tending to show that the explosion of the nitro-glycerine factory was occasioned by the negligence of appellant, and this contention brings us to the consideration of a most important principle of law. In addition to the fact of an explosion being established, the respondent offered expert testimony to the effect that if the factory was properly conducted, and the employees careful during the process of manufacturing, an explosion ^{was} would not occur. For the present we lay aside the evidence of the experts, and meet squarely and directly the question presented: Does the proof of the explosion draw with it a presumption of negligence sufficient to establish a prima facie case for a recovery? While the cases are not in entire accord in holding that a presumption of negligence arises from the fact of the explosion, still they largely preponderate upon that side, and we think but few well-considered cases can be found looking the other way. All courts agree that, where contractual relations exist between the parties, as in cases of common carriers, proof of the accident carries with it the presumption of negligence, and makes a prima facie case. This proposition is elementary and uncontradicted; therefore, the citation of authority is unnecessary. Yet we know of no sound reason, and have found none stated in the books, why this principle of presumptions should be applicable to cases involving contractual relations and inapplicable to cases where no contractual relations exist. It is intimated in some Indiana case that the presumption arises, upon proof of the accident, by reason of the carrier's contract to safely deliver the passenger at his destination, but there is no such contract. The carrier is not an insurer of his passengers; if he were, this presumption of negligence arising from the accident, aside from the act of God, would be conclusive and irrebuttable; but such is not the fact, for it is only prima facie and always disputable. As was well said by the court in *Rose v. Stephens etc. Co.*, 11 Fed. Rep. 438: "Undoubtedly the presumption has been more frequently applied in cases against carriers of passengers than in any other class, but there is no foundation in authority or

reason for any such limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relations between the parties." The carrier's contract with his passenger is simply to exercise a certain degree of care in his transportation. It is a duty which the law enjoins upon him; but the law also enjoins the ⁵⁵⁶ duty upon this appellant and all others, in the conduct of their business, to exercise a certain degree of care toward this respondent and all mankind. The duty which the law enjoins in the two cases only differs in the degree of care to be exercised. The principle of law involved is wholly the same; and, as has been said, the reason of the rule is not found in the relations existing between the party injuring and the party injured. The presumption arises from the inherent nature and character of the act causing the injury. Presumptions arise from the doctrine of probabilities. The future is measured and weighed by the past, and presumptions are created from the experience of the past. What has happened in the past, under the same conditions, will probably happen in the future, and ordinary and probable results will be presumed to take place until the contrary is shown.

Based upon the foregoing principles a rule of law has been formulated, bearing upon a certain class of cases, where damages either to person or property form the foundation of the action. This rule is well declared in Shearman and Redfield on Negligence, section 60: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." Tested by this rule, no question of contractual relation could ever form an element in the case. With the same reason it might as well be said that cases of contract were excluded from the effect of the rule as that cases of pure tort were excluded; but, upon the contrary, it is plainly evident that both classes of actions come equally within its provisions. In speaking to this question, it is said in Cooley on Torts, 799: "The rule applied to carriers of passengers is not a special rule to govern only their conduct, but is a general rule which may be applied wherever the circumstances impose ⁵⁵⁷ upon one party alone the obligation of special care." The author then cites the case of

a householder engaged in repairing his roof; a piece of slate falls therefrom and injures a traveler upon the street. He then says: "True, the act of God, or some excusable accident, may have caused the slate to fall, but the explanation should come from the party charged with the special duty of protection."

The important question here involved, and the want of harmony in the decisions of courts bearing upon it, seem to demand a citation somewhat in detail of the many authorities which hold against appellant's views of the law. In England the authorities are in entire accord. Plaintiff was passing along a highway, under a railroad bridge, when a brick used in the construction of the bridge fell and injured him. Negligence in the railroad was presumed: *Kearney v. London Ry. Co.*, L. R. 5 Q. B. 411. A barrel of flour rolled out of the window of a warehouse, injuring a person passing upon the street. Negligence in the warehouseman was presumed: *Byrne v. Boadle*, 2 Hurl. & C. 722. The same rule was declared, upon a similar state of facts, in *Scott v. London Docks Co.*, 3 Hurl. & C. 596; likewise in *Briggs v. Oliver*, 4 Hurl. & C. 403. The explosion of a boiler of a steamboat is prima facie evidence of negligence: *Posey v. Scoville*, 10 Fed. Rep. 140; *Rose v. Stephens etc. Co.*, 11 Fed. Rep. 438; *Grimsley v. Hawkins*, 46 Fed. Rep. 400. In the *Rose* case it is said: "In the present case the boiler which exploded was in the control of the employees of the defendant. As boilers do not usually explode when they are in a safe condition, and are properly managed, the inference that this boiler was not in a safe condition, or was not properly managed, was justifiable." The same general principle is declared in *Cummings v. National Furnace Co.*, 60 Wis. 603; *Mulcairns v. City of Janesville*, 67 Wis. 24; *Kirst v. Milwaukee etc. Ry. Co.*, 46 Wis. 489; *Thomas v. Western Telegraph Co.*, 100 Mass. 156; *Howser v. Cumberland etc. Ry. Co.*, 80 Md. 146; 45 Am. St. Rep. 332. In the case of ⁵⁵⁸ *Dixon v. Pluns*, 98 Cal. 385, 35 Am. St. Rep. 180, a case which, in its facts, is an exact photograph of one of the New York cases hereafter cited, a chisel, used by a workman upon a building, fell upon and injured a girl while passing upon the street below. It was held that a prima facie case of negligence was established, and that the rule as declared in section 60 of *Shearman and Redfield on Negligence* was sound law and controlling.

While there is some discord existing in the New York authorities as to the true doctrine upon this question, still they are largely in line with the cases we have above cited. *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530, is a leading case upon the question, and, while it has been vigorously assaulted at various times during the past twenty years, it still stands as a declaration of law by the courts of that state, not weakened and mutilated by such assaults, but rather strengthened and unscathed. In *Cahalin v. Cochran*, 1 N. Y. St. Rep. 583, negligence was inferred from the fact of a chisel falling from a building where workmen were engaged, and striking plaintiff when walking upon the street. A case to the same effect is *Gall v. Manhattan Ry. Co.*, 5 N. Y. Supp. 185; 24 N. Y. St. Rep. 24. *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530, is expressly approved, and the doctrine for which we are here contending ratified to its full limits in the very recent case of *Volkmar v. Manhattan Ry. Co.*, 134 N. Y. 418; 30 Am. St. Rep. 678.

As supporting a contrary doctrine, one of the leading cases is *Young v. Bransford*, 12 Lea, 232. Yet, in the report of that case, we find the following language: "At the same time the fact that there was an explosion, which is not an ordinary incident of the use of a steam boiler, ought to have some weight, inasmuch as it may be out of the power of the aggrieved party in some instances to prove any more. The reasonable rule would seem to be that laid down by Judge Wallace: 'That from the mere fact of an explosion it is competent for the jury to infer, as a proposition of fact, that there was some negligence in the management of the boiler, or some defect in its condition.'" Another case is *Huff v. Austin*, 46 Ohio St. 386, 15 Am. St. Rep. 613, a case which relies for support in part upon *Losee v. Buchanan*, 51 N. Y. 476; 10 Am. Rep. 623. Yet, in *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530, the *Losee* case was expressly held to be not in point by reason of the presence of other evidence: *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 19 Am. St. Rep. 475, is the latest authority to which our attention had been directed holding these views. It cites the Tennessee and Ohio cases, and also relies, as do other of these cases, upon a general statement found in Thompson on Negligence, page 1227, namely: "But it is believed that it is never true, except in contractual relations, that the proof of the mere fact that the accident happened to the plaintiff, without more,

will amount to evidence of negligence on the part of the defendant." The case cited by Mr. Thompson in no way supports this text, if the text is to be construed as the Cosulich case seems to construe it, and the learned author's illustrations which immediately follow conclusively indicate that, in making the statement quoted, he never contemplated for it any such construction as the New York court seems to give it. This is doubly apparent when we see that upon the same page he indorses the doctrine of *Byrne v. Boadle*, 2 Hurl. & C. 722. Indeed, the author prefaces his whole discussion of the question of *res ipsa loquitur* by a report in full of the celebrated case of *Kearney v. London Ry. Co.*, L. R. 5 Q. B. 411, the doctrine of which he fully indorses, and which in no sense was a case of contractual relation. Beyond all this, the *Volkmar* case, already cited, is a later expression emanating from the New York court, and earlier cases coming from the same source, if opposed to the doctrine there declared, must give way.

There is another class of cases in all essentials fully supporting our views upon this question of negligence. These cases arise in the destruction of property caused by fire escaping from locomotive engines, and, while there is some conflict in the authorities as to the true ~~see~~ rule, it is said in *Shearman and Redfield on Negligence*, section 676: "The decided weight of authority and of reason is in favor of holding that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used all those precautions for confining sparks and cinders (as the case may be) which have been already mentioned as necessary. This is the common law of England, and the same rule has been followed in New York, Maryland," etc: Citing many other states. While we have not deemed it necessary to verify the correctness of the statement of the authors as to all the states mentioned, we do say there are numberless cases supporting the text: See *Pigott v. Eastern Counties Ry. Co.*, 3 Com. B. 228; *Louisville etc. R. R. Co. v. Reese*, 85 Ala. 497; 7 Am. St. Rep. 66; *Spaulding v. Chicago etc. Ry. Co.*, 30 Wis. 110; 11 Am. Rep. 550, citing many cases.

In this state the question has never been directly passed upon as to whether or not negligence will be presumed from the fact of sparks escaping from a locomotive engine, and the destruction of grain fields resulting therefrom. In *Butcher*

v. *Vaca Valley etc. R. R. Co.*, 67 Cal. 518, the doctrine is inferentially favored, although in that case the plaintiff placed an expert witness upon the stand, who testified that "a perfect engine, properly equipped and properly run, will not ordinarily throw out sparks sufficient to start a fire." This line of evidence was also held sufficient to establish a prima facie case of negligence in *Hull v. Sacramento Valley R. R. Co.*, 14 Cal. 387, 73 Am. Dec. 656, and *Henry v. Southern Pac. R. R. Co.*, 50 Cal. 176. For our purpose it is not necessary to enter into a prolonged investigation to determine why this evidence of the expert strengthened plaintiff's case. But, taking the converse of the proposition, let us assume that defendant's engine was a perfect engine, properly equipped and properly run, and that, notwithstanding such conditions, it would ordinarily, when in use, throw out sparks of fire, leaving in its wake, as it passed through the country, property destroyed and possibly lives lost. Certainly this could hardly be tolerated in law. Hence we fail to fully appreciate the importance of this line of evidence. Such conduct upon the part of a railroad company would render it guilty of the commission of a nuisance, and liable in damages for property destroyed. Certainly it is no answer to such a condition of things to say that the legislative grant to the corporation to do business with the aid of steam locomotives carries with it the right to destroy the property of adjoining owners; but rather we must assume that the grant was made only after a prior determination by the same legislative power that a perfect locomotive engine, properly equipped and properly run, will not ordinarily throw out sufficient sparks to destroy adjoining property. It is only upon such a theory that the right to do business by the use of this character of implement was ever granted; and, hence, we again say that it may be considered doubtful if this class of evidence strengthens the plaintiff's case. For it is but proving as a fact something of which the courts, and possibly all the world, take full notice.

In the case at bar, following the lines marked out by the cases last cited, respondents placed before the court expert evidence to the effect that, if the correct process of manufacturing and handling dynamite was carefully carried out, an explosion would not occur. This evidence is stronger than in the smokestack cases, for here it declares as a certainty what there is only stated to be the probable or ordinary result; but, be that as it may, if this character of evidence was

relevant and material in the smokestack cases, it is equally relevant and material here. If it was sufficient there to complete and perfect a *prima facie* case of negligence it is ample here to do the same. Again, if appellant had the right under the laws of the state to manufacture dynamite (which is conceded), and if, by reason of the existence of such right, courts may assume that, if dynamite is properly handled in process of manufacture, explosions will ^{not} probably occur, then respondents' case is doubly proven, for here we have not only the presumption of the existence of certain conditions, but the evidence of witnesses as to the existence of them.

In concluding this branch of the case we can only reiterate that the true rule appears to be found in section 60 of Shearman and Redfield on Negligence, which we have already quoted; and, gauging this case by the test there prescribed, a *prima facie* case of negligence was established by respondents' evidence. This case seems to clearly come within the provisions of the rule there declared. There is nothing to distinguish it in principle from the army of cases that have been held to come directly within its provisions. Appellant was engaged in the manufacture of dynamite. In the ordinary course of things an explosion does not occur in such manufacture if proper care is exercised. An explosion did occur; ergo, the real cause of the explosion being unexplained, it is probable that it was occasioned by a lack of proper care. The logic is unassailable, and the principle of law of presumptions of fact erected thereon is as sound as the logic upon which it is based.

3. Questions of negligence in the storage of the gunpowder become unnecessary to consider, owing to our views upon the main question discussed. Neither do we find anything in the record bearing upon the measure or amount of damages declared and decreed by the court demanding a new trial of the case.

For the foregoing reasons the judgment and order are affirmed.

VAN FLEET, J., and HARRISON, J., concurred.

Hearing in Bank denied.

EXPLOSIONS.—LIABILITY FOR INJURY TO ADJOINING PROPERTY CAUSED BY is discussed in the extended notes to *St. Peter v. Denison*, 17 Am. Rep. 264, and *Hay v. Cohoes Co.*, 51 Am. Dec. 283.

NEGLIGENCE—PRESUMPTION OF FROM HAPPENING OF ACCIDENT.—A presumption of negligence may arise from an accident, and if the circumstances are of such a nature that it may be fairly inferred from them that the reasonable probability is that the accident was caused by the failure of a party to exercise proper caution, a presumption of negligence arises: *Houser v. Cumberland etc. R. R. Co.*, 80 Md. 146; 45 Am. St. Rep. 332, and note.

DAVIS v. PACIFIC POWER COMPANY.

[107 CALIFORNIA, 563.]

NEGLIGENCE—UNPROTECTED MACHINERY.—If a landlord after leasing premises for business purposes enters and erects thereon, without the consent of the tenant, an unclosed and unprotected revolving shaft, for transmitting power to other buildings, and such shaft is operated for the sole use of the landlord under his absolute control, he is liable to an employee of the tenant, who, though knowing of the location of the shaft and of its apparent dangers, has no knowledge of its invisible dangers, and is injured by coming in contact with it while necessarily in its locality and engaged in the line of duty to his employer.

NEGLIGENCE—UNCLOSED AND DANGEROUS MACHINERY ON LEASED PREMISES.—A landlord of a building leased for business purposes is a trespasser or mere licensee in placing in the leased premises without the consent of the tenant a revolving shaft for transmitting power to other buildings, and cannot relieve himself from liability to an employee of the tenant, injured by contact with the shaft, on the ground that such employee was not properly in the vicinity of the shaft at the time the injury was inflicted.

NEGLIGENCE—UNCLOSED MACHINERY ON LEASED PREMISES.—A landlord of a leased building who puts therein, without the consent of the tenant, a revolving shaft for the transmission of power to other buildings is bound to inclose it or use other means to protect the employees of the tenant necessarily in its vicinity. The tenant and his employees do not assume any of the risks incident to its maintenance, and the landlord is liable for injury to them caused by its unprotected condition.

NEGLIGENCE—UNPROTECTED MACHINERY ON LEASED PREMISES—LIABILITY OF LANDLORD.—If a landlord retains or has control of a portion of leased premises, the responsibility rests with him to see that no injury results to those having rights there by reason of the manner in which such portion of the premises is occupied or used, and if he puts dangerous machinery thereon he must fence or use other proper means to protect those rightly in its vicinity.

NEGLIGENCE—WHEN QUESTION FOR JURY.—If in an action to recover for negligence upon the facts disclosed, there is room for a reasonable deduction of proper care on the part of the party injured, the question of negligence is for the jury, and it is only when the undisputed facts are such as to leave but one reasonable inference, and that of contributory negligence on the part of the plaintiff, that the court is justified in taking the question from the jury.

NEGLIGENCE—UNPROTECTED MACHINERY—CONTRIBUTORY NEGLIGENCE.—If a landlord erects an unclosed and dangerous shaft in a leased build-

ing without the consent of his tenant, an employee of the latter who has knowledge of the location of the shaft but not of its invisible dangers is not guilty of contributory negligence in going near to it and standing at what he considers a safe distance from it while performing a necessary act in the line of his duty to his employer.

EVIDENCE—ILLUSTRATION OF TESTIMONY.—A witness may refer, in illustration of his testimony concerning the size and condition of a revolving shaft to a piece of iron of about the same dimensions as such shaft, if he does not pretend that it is a model and the jury is so informed.

C. H. Wilson, for the appellant.

G. A. Rankin, for the respondent.

569 **VAN FLEET, J.** Action to recover damages for personal injuries. Plaintiff recovered a verdict, and from the judgment entered thereon and an order denying a new trial the defendant appeals.

Defendant, a corporation, is engaged in the leasing of buildings for business purposes and furnishing steam power in connection therewith. During the year 1891, William Davis, the father of the plaintiff, occupied, under lease from defendant, the basement and first floor of one of its buildings at No. 28 Jessie street, in the city of San Francisco. These premises were used by William Davis as a factory for the manufacture of horse-collars. The basement was an underground room, fifty-two by twenty-five feet. In one corner of this basement, where it fronts on Jessie street, there was a flight of stairs leading from the basement into Jessie street, 570 and extending into the basement about five feet. Midway of the stairs were two large doors, consisting mostly of glass by means of which the basement was largely lighted. The stairs and doors afforded the only means of entering the basement directly from the street, and without their use the basement was largely useless. There was no machinery in the basement when it was leased to William Davis, and he never used any therein, except some collar-blocking machinery run by hand. He used certain machinery run by steam on the floor above the basement, the power to run this machinery being furnished by the defendant by means of a shaft which was in the second story of the building. The stairway in question was constantly used by William Davis and his employees in carrying goods to and from the basement and the street, and for other purposes. There was an inner stairway leading from the basement to the first floor. In September or October, 1891, the defendant entered upon the leased

premises and erected in this basement an iron shaft, for the purpose of transmitting power from its power-house on the west side of the leased premises to a new building erected by it across Jessie street on the east. This shaft was a little over three inches in diameter, and ran throughout the entire length of the basement and under Jessie street to the new building. It was put up along the west wall of the basement about ten inches out therefrom, being supported by brackets attached to the sleepers of the floor above, and was carried over and along one side of the front basement stairs aforesaid, and through the casing of one of the doors above referred to. Where it ran over the stairway it varied in height from about four or five feet above the lower step to a little over two feet above the step on which the doors rested, where it passed through the casing. When completed and connected the shaft, which was kept running every day except Sundays, revolved at a high rate of speed. The plaintiff, at the time of receiving the injuries which form the basis of the action, was a lad of about sixteen ⁵⁷¹ years of age. Shortly after the erection of the shaft, about November, 1891, he went to work in his father's collar factory as an employee. For a short time he was employed partly in the basement and partly on the floor above. During this time he had occasion to observe the running of the shaft. Subsequently he was set at work on the floor above, running some of the time a steam straw-cutter, and at others a collar-stuffer. On the 31st of December, 1891, plaintiff, while engaged at work on the straw-cutter, got some thorns or thistles in his hand, and it became necessary for him to go to the light to get them out. By reason of obstructions on the floor where plaintiff was working at the time, there was no available light sufficient for his purpose, and the only place to which he could go without leaving the building was to the glass doors in the basement. He accordingly went into the basement and stood on the steps in front of the basement doors, along which ran the shaft, as above stated, and, while engaged in removing the thistles from his hand, his clothing was caught by the revolving shaft in some manner unknown to him, and he was drawn over and around the shaft, all his clothing stripped from him, and his body and limbs very badly broken and injured. When the shaft was stopped to remove plaintiff's clothing it was discovered that that portion of the shaft over the stairway, and where plaintiff was caught, had

upon its surface a great many rough and jagged projections and raised, sharp points, varying from a sixteenth to an eighth of an inch high, and of a character calculated to make the shaft at that point much more likely to catch clothing or other substance of the kind coming in contact with it, and consequently more dangerous in that respect. These projections had the appearance of having been produced by the grinding or scraping of tongs or other instruments used in handling or turning the shaft while placing it in position. They could not be seen when the shaft was revolving, as it then appeared to have a smooth surface, and plaintiff was unaware of this condition of ⁵⁷² the shaft until after the accident. Up to the time of the injury to plaintiff the shaft had been permitted by defendant to remain entirely unfenced and unprotected throughout the length of the basement and along the stairway, and open at all points to approach and contact by any one.

The contention of appellant is that upon the facts disclosed plaintiff is not entitled to recover, for the reasons: 1. That at the time of the accident defendant owed the plaintiff no duty which required it to protect him from the dangers of its shaft; and 2. That the evidence shows that plaintiff was guilty of contributory negligence proximately conducing to his injury. The first proposition is subdivided by counsel into several minor heads, each of which is elaborately presented in the briefs, but they all converge eventually in the general proposition, as stated above, that defendant owed the plaintiff no duty in the premises which can render it liable in damages.

It is argued that at the time of the accident the plaintiff was wandering over the premises of his employer, for his own purposes or convenience, and not in pursuit of his employment, and away from where his duty called him; that while so engaged he was not on the stairway by right, but was a mere licensee, and that as such the defendant was under no obligation to guard him from injury. In the first place, this proposition rests upon the assumption of a right in the defendant itself to maintain its shaft upon the premises. The evidence upon this point is conflicting, that of plaintiff tending to show that defendant went upon the leased premises and erected the shaft without asking or receiving any permission from William Davis, the tenant, while the evidence on the part of the defendant is to the effect that, although defendant originally started in to erect the shaft without per-

mission, William Davis afterward assented thereto. In view of the fact, however, that the court below instructed the jury that, if defendant erected and maintained the shaft with the ⁵⁷³ consent of William Davis, the plaintiff could not recover, the verdict must be regarded as negating such consent. The defendant, was, therefore, a trespasser, or at best was itself a mere licensee, exercising a privilege at bare sufferance. As such it is not in a position to question the plaintiff's right in the premises. But, even if it were, the evidence does not sustain defendant's position. As we view it, the evidence shows a clear right in the plaintiff to be where he was. There is certainly nothing to show that he had been forbidden by his employer to go into the basement, or upon the stairs, or elsewhere, or anything to indicate that he was in any way restricted as to going about the premises for any necessary purpose. But it is said that plaintiff was not on the stairway for a necessary purpose, or in the performance of his duty. We think the jury were justified in saying that he was. It was not an absolute necessity, it is true, which took him there, but it is not necessary that it should have been. He needed a good light to remove the briars or thistles from his hands, and the basement doors afforded the most available place for the purpose without going from the building, which he was not called upon to do. It is true that he did not go there directly in the line of his work, but it cannot be said that it was not in the line of his duty. He was suffering from pain and inconvenience from a cause which interfered with and prevented him from proceeding with his work, and it was his duty to his employer to remove the cause of his disability as speedily and conveniently as possible. In this view his going to the basement and the stairway was as much in the interest of his employer as his own, and cannot therefore be justly characterized as a wandering over the premises solely for his own private ends. To hold, under the circumstances, that plaintiff was in the place where the injury occurred as a mere volunteer, and without right, would be taking an exceedingly narrow view of the rights of an employee. The case is quite distinguishable from the cases relied upon by the ⁵⁷⁴ appellant. The plaintiff having a right to be where he was, the defendant owed him the duty of protection, whether or not the latter was rightfully maintaining its shaft upon the premises: *Donnelly v. Hufschmidt*, 79 Cal. 74.

It is said that William Davis, by failure to object to the erection and maintenance of the shaft, assumed for himself and his employees the risk of injury therefrom. But assuming this to be the law, the evidence shows that William Davis did, in effect, if not in terms, object to the introduction of the shaft. When he was informed that defendant was proceeding to erect the shaft, and was disturbing and interfering with his workmen in the basement, he went to its officers and inquired into their purposes. He was informed substantially that he ought not to object, but if he did, it would make no difference; in other words, that the shaft had to go in. He was assured that he would never know it was there, either from the space it would occupy or the noise it would make; that defendant's servants would go in every day and look after it, and he, Davis, should never be disturbed by it. This evidence, it is true, is denied by defendant, but the jury evidently believed and acted upon it. The shaft was admittedly put in and maintained solely for the use and benefit of defendant, and was in no way connected with the business of, or used by, William Davis. It was, furthermore, wholly under the control and management of defendant, as was likewise the space that it occupied. Under such circumstances, the tenant cannot be held to have assumed any of the risks incident to its maintenance. Where the landlord retains or has control of a portion of leased premises, the responsibility rests with him to see that no injury results to those having rights there by reason of the manner in which such portion of the premises is occupied or used; and, if he puts dangerous machinery thereon, it is his duty to fence it, or use other proper means to protect those rightly in its vicinity. These principles are thoroughly well settled: ⁵⁷⁵ 2 Shearman and Redfield on Negligence, sec. 719; *Stewart v. Harvard College*, 12 Allen, 58; *Glickauf v. Maurer*, 75 Ill. 289; 20 Am. Rep. 238; *Jessen v. Sweigert*, 66 Cal. 182; *Readman v. Conway*, 126 Mass. 374.

On the question of contributory negligence we think the case was a proper one for the jury. It is only where the undisputed facts are such as to leave but one reasonable inference, and that of negligence, that the court is justified in taking the question from the jury. It is not enough that the evidence be without conflict. If, upon the facts disclosed, there is room for a reasonable deduction of proper care on the part of the person injured, the case is one for the jury, and the court is not justified in substituting its judg-

ment for that of the jury, and withdrawing the question from their consideration: *Fernandes v. Sacramento City Ry. Co.*, 52 Cal. 45; Wharton on Negligence, sec. 420. In *Schierhold v. North Beach etc. R. R. Co.*, 40 Cal. 447, it is said: "The fact of negligence is generally an inference from many facts and circumstances, all of which it is the province of the jury to find. It can very seldom happen that the question is so clear from doubt that the court can undertake to say, as matter of law, that the jury could not fairly and honestly find for the plaintiff. It is not the duty of the court in such cases, any more than in any other, to usurp the province of the jury and pass upon the facts; and the nonsuit should only be granted in such cases where the evidence of the misconduct on the part of the injured party is so clear and irresistible as to put the case on a par with those cases where a nonsuit is granted for a failure to introduce evidence sufficient to go to the jury upon some point essential to the plaintiff's case. The fact must be so clear that, looking upon the plaintiff's case in the most favorable light and giving him the benefit of all controverted questions, the court can see that a verdict in his favor must necessarily be set aside": And see *Van Praag v. Gale*, 107 Cal. 438. Tested by these principles, we cannot say the evidence clearly or necessarily discloses negligence on the part ⁵⁷⁶ of the plaintiff. It is true that plaintiff knew of the existence of the shaft along the stairway, and was aware in a general way of its dangerous character, and it was his duty to look out for it. It was his duty to use care, knowing of the danger; but he says that he did. He testifies that he stood at what he considered a safe distance from the shaft, but that the first thing he knew he was caught and jerked over it. Just how the thing occurred cannot be known, but it could be accounted for on many reasonable theories other than that of plaintiff's negligence. A gust of wind may have blown his apron against the shaft, or a momentary dizziness may have seized him. Even if, in a moment of forgetfulness, he moved too near the shaft, and was thereby caught, it would not necessarily be negligence. People are liable to lapses of memory with reference to facts with which they are daily confronted. It would be for the jury to say whether such lapse of memory was negligence, taking into consideration all the circumstances: *Van Praag v. Gale*, 107 Cal. 438. Furthermore, it appears that the danger from the shaft was not wholly visible

or apparent. The rough and jagged surface of the shaft at the point where plaintiff was caught tended, as shown by the evidence, to make the shaft at that point much more likely to seize and hold clothing or other pliant substance than it would otherwise have been. This condition of the shaft was not visible when the shaft was revolving, and was unknown to plaintiff. How far this roughened surface may have aided the natural centripetal tendency of the revolving shaft, and thus contributed to the injury, it is impossible to say. It may well be that the jury considered that, but for this condition of the shaft, the degree of care exercised by plaintiff would have avoided the accident. Plaintiff was only called upon to use such circumspection as would avoid those dangers which were apparent.

There are no other points requiring special consideration. It was not error to permit the witness, Peterson, in illustration of his testimony with reference to the ⁵⁷⁷ size and condition of the shaft, to refer to a piece of iron of about the same dimensions. It was not pretended that it was a model, and the jury were so expressly informed; but it was simply used to illustrate more clearly the testimony of the witness. For this purpose it was proper. The instructions, taken together, fully and fairly laid the case before the jury. If anything they were more favorable to defendant than to the plaintiff.

The judgment and order are affirmed.

GAROUTTE, J., and HARRISON, J., concurred.

Hearing in Bank denied.

LANDLORD AND TENANT—DEFECTIVE PREMISES.—The liability of a landlord to a tenant's servants for injuries to them caused by his maintaining defective appliances on the premises, and what amounts to contributory negligence on the part of the injured servant and the effect of the same, are discussed in *Poor v. Sears*, 154 Mass. 539, 26 Am. St. Rep. 272, and note, where the cases discussing the landlord's liability for defective premises are discussed. See, also, the note to *Lindsey v. Leighton*, 15 Am. St. Rep. 201.

IN RE SALMON.

[107 CALIFORNIA, 614.]

WILLS—PRETERMITTED HEIRS—INTENTION OF TESTATOR.—PAROL EVIDENCE is inadmissible for the purpose of determining whether the omission from a will of one entitled, in the event of intestacy, to take of the estate, was intentional on the part of the testator. This can be determined only from the face of the will.

WILLS—PRETERMITTED HEIR—INTENTION OF TESTATOR.—The fact that a testator mentions in his will one closely related by blood or intimately associated in family relations with an omitted heir does not overcome the presumption that he was unintentionally omitted, nor show as matter of construction that he was in the mind of the testator and intentionally omitted.

W. E. Nutter, M. De Vries, and J. H. & J. E. Budd, for the appellants.

Nicol & Orr, for the respondents.

§15 VAN FLEET, J. Decedent failed to mention or provide in his will for certain grandchildren, the issue of two deceased sons, John and Alexander. He did, however, leave a small legacy to the widow of each of said sons, the mothers of his said grandchildren. On distribution the omitted grandchildren claimed and were given the share of said estate which they would have taken had the decedent died intestate. Certain of the devisees appeal from the decree.

At the hearing in the court below appellants offered evidence to the effect that the testator, in giving directions for the drafting of his will, stated that his son Alexander's estate had cost him six thousand dollars and trouble, and that he would not give that family anything, but would give Alexander's widow five hundred dollars. That as for John's family he would give the widow one thousand dollars, but the boys must look out for themselves. This evidence was excluded, and its exclusion is assigned as error.

The question involved is whether evidence, extrinsic of the language of the will itself, can be resorted to for the purpose of determining whether the omission of one entitled, in the event of intestacy, to take of the estate, was intentional on the part of the testator, the §16 presumption being that it was not. The question is not a new one in this state. Section 1307 of the Civil Code provides: "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child,

must have the same share in the estate of the testator as if he had died intestate," etc. This provision was a part of the statute of wills before the adoption of the codes, and first received a construction at the hands of this court in *Estate of Garraud*, 35 Cal. 336. In that case it was held, after quite an extended review of the authorities and the principles involved, that the statute did not modify the common-law rule upon the subject, which limited the investigation for determining the testator's intention to the face of the will; and that parol evidence was not admissible for such purpose. After referring to this and other provisions of the statute, it is there said: "These provisions exhibit the intention of the legislature, not only to adhere to the safeguards which the common law provided as a protection against fraud, but rather to increase and strengthen them by new enactments. With this view, nothing short of an explicit enactment, leaving no room for construction, would lead us to the conclusion that the legislature intended to substitute for the written will, as the exponent of the testator's intentions, the loose and always uncertain evidence of acts and declarations resting in parol, and which are liable to be perverted by the frail memories, obtuse understandings, or fraudulent motives of persons called to testify after the death of the testator."

The rule there announced has since remained the law of this state, and is distinctly sustained and reaffirmed in the more recent case of *In re Stevens*, 83 Cal. 323, 17 Am. St. Rep. 252, where the question arose under precisely similar circumstances as in the case at bar. There the testator had left his entire estate to his wife, without mentioning his two children. In the contest for a share of the estate made by one of the latter the ⁶¹⁷ widow offered to show, by the declarations of the testator made contemporaneously with the writing and execution of his will, that his children were intentionally omitted, but the evidence was not admitted. In reviewing the action of the lower court it is said: "The decision of this court in *Garraud's* case has stood too long without challenge to be overruled without very strong reasons. It is sustained by very powerful reasoning in the able opinion of Justice Crockett. We think it our duty to follow it, and, in accordance with the rule there declared, we must hold that the court below did not err in excluding the offered declarations of the testator."

It is further contended, however, that the fact that the tes-

tator mentions the widows of his deceased sons, the mothers of the omitted grandchildren, is sufficient, of itself, to show, without resort to extrinsic facts, that the testator had his grandchildren in his mind, and rebuts the presumption that they were forgotten. This position is equally untenable with the first. While the authorities of other states are far from being uniform or harmonious upon the subject, it is well settled in this state that the mere fact that a testator mentions one closely related by blood or intimately associated in family relations with the omitted heir does not show, as matter of construction, that the omitted one was in his mind and that the omission was intentional: *Estate of Utz*, 43 Cal. 200; *Bush v. Lindsey*, 44 Cal. 121; *In re Stevens*, 83 Cal. 323; 17 Am. St. Rep. 252. In *Bush v. Lindsey*, 44 Cal. 121, the testator devised his property to the child of a deceased son, but did not mention children of the testator then living. It was held that this did not show that he had his children in mind and intended to omit them. In *In re Stevens*, 83 Cal. 323, 17 Am. St. Rep. 252, the testator failed to mention or provide for his daughter, but left a legacy to her child, the testator's grandson; and it was held that the fact that he mentioned his daughter's child did not necessarily imply that the daughter was in his mind, and she was permitted to take as a pretermitted heir.

We think the court was correct in its ruling upon the evidence offered and upon the construction of the will, and that the decree should be affirmed.

It is so ordered.

HARRISON, J., and GAROUTTE, J., concurred.

WILLS—PRETERMITTED HEIRS—INTENT TO OMIT—PROOF OF.—Omission to provide for an heir in a will may be shown to be unintentional, either by the terms of the will or by extrinsic parol evidence, and the relation of the testator to the objects of his bounty and to the omitted heir, as well as to his intelligence, his mental and physical condition, and the circumstances connected with the making of the will, are all proper matters for the consideration of the jury: *Estate of Stebbins*, 94 Mich. 304; 34 Am. St. Rep. 345, and note with the cases collected. See, also, the extended note to *Wilson v. Foster*, 39 Am. Dec. 743.

SMITH v. BRODERICK.

[107 CALIFORNIA, 644.]

MUNICIPAL INDEBTEDNESS—CONSTITUTIONAL LAW.—A constitutional provision that "no city or county shall incur any indebtedness or liability exceeding in any year the income and revenue provided for it for such year," means that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year.

MUNICIPAL INDEBTEDNESS.—WHOEVER DEALS WITH MUNICIPALITIES is bound to know of constitutional limitations placed upon their power to incur indebtedness in any particular year.

MUNICIPAL INDEBTEDNESS—CONSTITUTIONAL LAW—JUDGMENTS.—A constitutional provision that "no city or county shall incur any indebtedness or liability exceeding in any year the income and revenue provided for it for such year," cannot be evaded by a consent on the part of the officers of a municipality that a judgment may be entered against it upon an open demand accruing in one year, and paid out of its general fund for the next year.

MUNICIPAL INDEBTEDNESS — REVENUE OF SUBSEQUENT YEAR—EFFECT OF REDUCING CLAIM TO JUDGMENT.—Under a constitutional provision that no city or county shall incur any indebtedness or liability exceeding in any year the income and revenue provided for it for such year, a claim against a city incurred in one year cannot be paid out of its revenue for a subsequent year, although such claim has been reduced to judgment and a special tax levied, collected, and paid into the general fund for that year, with which to pay it.

MUNICIPAL CORPORATIONS—LIMITATION UPON POWER TO CONTRACT.—If, at the time of entering into an obligation with a municipality, there is a constitutional or statutory limitation upon the extent to which it may obligate itself, or upon the extent of taxation for the payment of its liability, or upon the mode in which such payment is to be made, the party dealing with it is bound by the terms of the law as they existed at the time that the obligation was incurred.

MUNICIPAL INDEBTEDNESS—PAYMENT OF JUDGMENT FOR—CONSTITUTIONAL LAW.—A statute empowering a board of supervisors to "order paid any final judgment against said city and county" does not authorize the payment of a judgment for a debt incurred in one year out of the revenue collected for a subsequent year, when the constitution limits the power of the municipality in incurring liability to the income and revenue provided for it in the year in which the liability is incurred.

W. C. Graves, L. D. McKisick, Fox, Kellogg, & Gray, Mul-lany, Grant & Cushing, and E. S. Heller, for the appellant.

Stanly, Hayes, McEnerney & Bradley, for the respondent.

⁶⁴⁵ **HARRISON, J.** The plaintiff is the assignee of the claims of sundry individuals for merchandise sold and delivered by them to the city and county of San Francisco, and for labor performed by them for said municipality prior to

June 9, 1893, and on that day he commenced an action against the city and county to recover a judgment for the amount of said claims. Prior to the commencement of the action the board of supervisors had adopted a resolution authorizing the city and county attorney to allow judgment to be taken and entered against the city and county in all cases in the litigation of claims against it for supplies, material, and labor, "where such claims are or have been examined or corrected by the finance committee of this board through the expert of said committee" for the amounts approved by said committee. After the plaintiff had commenced his action the expert of the finance committee reported to that body that he had examined the claims, and that the amount named in the plaintiff's suit was the correct amount due him. Thereupon the finance committee directed the city and county attorney to allow judgment to be taken against the city and county for the amount ⁶⁴⁶ claimed by the plaintiff. June 16, 1893, after the summons issued upon the complaint in said action had been served upon the city and county, a stipulation entered into between the city and county attorney and the attorney for the plaintiff was filed in said action, in which was recited the foregoing resolution of the supervisors, and allowing judgment to be entered in favor of the plaintiff and against the defendant therein, for the amount of his claim; and, thereupon, judgment was entered in accordance with the stipulation June 19, 1893. July 5, 1893, the plaintiff presented to the board of supervisors his demand for the amount of the judgment, and the same was duly allowed and approved, and an authorization for its payment, in the form of a resolution, was adopted by the board of supervisors, and approved by the mayor July 26th. The authorization is in the following terms: "*Resolved*, That an expenditure of \$3,548.03 be, and the same is hereby, authorized to be made out of the general fund, in payment to A. Smith, assignee, being for goods furnished and services rendered the city and county of San Francisco, as hereinafter stated, as per judgment rendered in the superior court in case No. 41266, and as certified by the city and county attorney, to wit [reciting the claims of the different assignors of the plaintiff]." Thereupon the plaintiff presented this authorization to the defendant herein, who was and still is the auditor of said city and county, for his approval and allowance. The defendant refused to approve and allow the same, and the

plaintiff made application to the superior court for a writ of mandate commanding him to approve and allow the demand. The defendant, in his answer to the application, set forth the foregoing facts, and also alleged that the demands and claims of the plaintiff and of his assigns were for liabilities incurred by the city and county for and during the fiscal year ending June 30, 1893; that only two of the claims of his assignors—amounting to \$117.89—were payable out of the general fund, and that the others were payable out of the street ⁶⁴⁷ department fund; that on the eighth day of June, 1893, there had been allowed and audited, for the debts and liabilities of the city and county incurred during the fiscal year ending June 30, 1893, demands against the general fund, amounting to more than the moneys paid or payable into said fund; that on said eighth day of June, 1893, there was a deficiency in said general fund, which was represented by allowed and registered demands, for the payment of which no money had been provided; that said deficiency still existed, and that there had not been since the eighth day of June, 1893, was not then, and would not at any time be, any money of the income or revenue of said fiscal year in the treasury applicable to the payment of the two demands payable out of the general fund; that on the first day of July, 1893, there was in the treasury, in the street department fund, for the fiscal year ending June 30, 1893, a surplus amounting to \$1,687.08, out of which there had since been paid, upon demands for liabilities incurred in said fiscal year, the sum of \$535.75, leaving unpaid the sum of \$1,156.33; that there has not been since said first day of July, and there never will be, in the street department fund for the fiscal year ending June 30, 1893, any sum of money applicable to the payment of the claims and demands of plaintiff's assignors which are chargeable against, and payable out of, the street department fund any greater sum or amount than said sum of \$1,687.08; that the deficiency in the general fund for the fiscal year ending June 30, 1893, amounts to more than the sum of \$100,000, and that there was not at the end of said fiscal year, nor has there been at any time since, nor will there be, nor has there ever been, sufficient money in the treasury of the said city and county to pay the demands incurred in said fiscal year ending June 30, 1893, and there was not on that day, nor has there at any time since been, nor will there ever be, a surplus fund for said fi-

cal year. The court found that the foregoing matters and facts alleged in the answer of the defendant were true as ⁶⁴⁸ therein alleged, and further found that on June 26, 1893, the board of supervisors made provision for the payment and satisfaction of the judgment recovered by the plaintiff, by levying a tax therefor, and ordering the same to be collected and set apart for the payment and satisfaction of said judgment, and that the money so levied is now in and a part of the general fund of said city and county. Upon these facts the court denied the application of the plaintiff, from which he has appealed.

Section 18 of article XI of the constitution is as follows: "No county, city, town, township, board of education, or school district shall incur any indebtedness or liability in any manner, or for any purpose exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose." In *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641, it was held by this court that the framers of the constitution meant by this section "that no such indebtedness or liability should be incurred [except in the manner stated] exceeding in any year the income and revenue actually received by such county, city, town, township, board of education, or school district. In other words, that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year." The same principle was repeated in *Shaw v. Statler*, 74 Cal. 258, and *Schwartz v. Wilson*, 75 Cal. 504. See, also, *Mayrhofer v. Board of Education*, 89 Cal. 114; 23 Am. St. Rep. 451. To the argument of the appellant that this construction of the section is injurious to the city and county, and a hardship upon those who in good faith contract with it, we may also quote from the language of the court in *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641: "We have neither the right nor the disposition by judicial interpretation to take away the wholesome restriction upon municipalities thus imposed by the ⁶⁴⁹ constitution. Of course, in giving effect to this radical change from the pre-existing condition of things, it will not be strange if some shall be found to suffer, but it must be remembered that all are presumed to know the law, and that whoever deals with a municipality is bound to know the extent of its powers.

Those who contract with it, or furnish it supplies, do so with reference to the law, and must see that that limit is not exceeded. With proper care on their part, and on the part of the representatives of the municipality, there is no danger of loss": See, also, *Sutro v. Pettit*, 74 Cal. 337; 5 Am. St. Rep. 442; *McBean v. San Bernardino*, 96 Cal. 187; *Von Schmidt v. Widber*, 105 Cal. 151.

There is ample power under the statutes which constitute the charter of San Francisco to provide for all the contingencies that are suggested in the arguments on behalf of appellant. By the seventy-first section of the Consolidation Act, as amended in 1866 (Stats. 1865-66, p. 436), the supervisors are authorized to levy a tax that will raise such an amount of money "as the said board may deem sufficient to provide for the payment of all demands upon the treasury authorized by law to be paid out of the same." The limitation upon this power, viz., \$2.35 on the \$100, is conceded to be far beyond any possible necessities of the municipality. The assessment-roll of property subject to taxation is made prior to the levy of this tax, and, in determining the amount of the tax to be levied, the supervisors, aided by the experience of the municipality in former years, and by the estimates of the several departments of the city, are enabled to exercise a judicious consideration of the expenditures likely to be incurred during the year, and to make such provision for unforeseen emergencies as ordinary prudence would suggest. As the amount of expenditures cannot in the nature of things be determined with accuracy, ordinary prudence would dictate, in view of the foregoing provision of the constitution, that the tax levy should be large enough to meet any unforeseen demand, and to enable the municipality ^{§50} to discharge all of its obligations. If the amount of money so provided is not needed for the expenditures of the year it can be carried forward into the next fiscal year; whereas, if the revenue thus provided is not sufficient to meet the expenditures, there is no provision for meeting the deficiency, except by the "assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose."

The right of the appellant to the relief he seeks is not affected by reason of his demand having been reduced to a judgment. The foregoing provision of the constitution cannot be evaded by a consent on the part of the officers of the municipality that a judgment may be entered against the

municipality upon an open demand which constitutes no liability against the city. The effect of the judgment was only to make definite and of record a claim which previously was open to controversy, and rested in parol, and to convert a disputed into an audited claim: *Sharp v. Contra Costa County*, 34 Cal. 291. While a judgment is sometimes said to be the highest evidence of an obligation, it does not, for that reason, in all cases, foreclose an investigation into the nature of the obligation as well as the liability which it imposes. In *Clark v. Rowling*, 3 N. Y. 216, 53 Am. Dec. 290, it was held by the court of appeals of that state that in an action to enforce a judgment it was competent for the defendant to go behind the judgment and show that it was rendered upon a cause of action from which he had been discharged in bankruptcy, although the discharge was not rendered until after the rendition of the judgment, and a suit upon the obligation was pending when the petition in bankruptcy was filed; that the judgment, instead of being a new debt which did not exist at the time the petition was filed, was merely the old debt in a new form, and that, for the purpose of protecting the defendant, the court would look behind the judgment and see upon what it was founded. The same rule was afterward laid down in this state in *Imlay* ⁶⁵¹ *v. Carpentier*, 14 Cal. 173, where the judgment debtor sought in equity to set aside a judgment that had been rendered against him under similar circumstances. In *Betts v. Bagley*, 12 Pick. 580, where the same question was under discussion by the supreme court of Massachusetts, Chief Justice Shaw said: "Although a judgment to some purposes is considered as a merger of the former promise, and as constituting a new cause of action, yet, when essential rights of parties are influenced by the nature of the original contract, the court will look into the judgment for the purpose of ascertaining what the nature of such original cause of action was": See, also, *Wyman v. Mitchell*, 1 Cow. 316; *Evans v. Sprigg*, 2 Md. 457; *McDonald v. Davis*, 105 N. Y. 513; *Commissioners etc. v. Loague*, 129 U. S. 493; *Morley v. Lake Shore Ry. Co.*, 146 U. S. 169. In the *United States v. County of Macon*, 99 U. S. 582, a judgment had been rendered in favor of the relator against the county for the amount of certain coupons upon bonds that had been issued by the county. In a proceeding to compel the county to levy a tax for the purpose of paying this judgment, it was shown that the statute

under which the subscription to the bonds was made contained a limitation upon the amount of tax that might be levied by the county to pay the same, and it was held by the court that, although a judgment had been rendered upon the coupons, the judgment creditor was not entitled to a writ of mandate directing the levy of a tax for the payment of the judgment, saying: "We have not been referred to any statute which gives a judgment creditor any right to a levy of taxes which he did not have before the judgment. The judgment has the effect of a judicial determination of the validity of his demand, and of the amount that is due, but it gives him no new rights in respect to the means of payment." The same principle was again asserted in *Ralls County Court v. United States*, 105 U. S. 733, although it was held inapplicable in that case as it was in *United States v. New Orleans*, 98 U. S. 381, for the reason that at the time ⁶⁵² when the bonds upon whose coupons the judgment had been rendered were issued, there was no limitation upon the power of taxation, and that the payment of the bonds as they matured, or of a judgment obtained thereon, could not be avoided by any subsequent legislation, inasmuch as such legislation would be in contravention of that provision of the constitution forbidding the impairing of the obligation of a contract. This distinction is referred to in *Louisiana v. Mayor of New Orleans*, 109 U. S. 285. In that case the relators had recovered a judgment against the city of New Orleans for damage done to their property by a mob in the year 1873. By a statute of the state which was in force when the damage was done the city was rendered liable therefor, and, at the time when the judgment was rendered, as well as when the damage was done, the city was authorized to levy taxes to an amount which would be sufficient to satisfy the judgment. Subsequently, in the year 1879, a provision was made in the constitution of the state restricting the power of the city in levying taxes, by which the relators were prevented from collecting their judgments, as the funds authorized to be levied were exhausted by the current expenses of the city. Thereupon they applied for a mandamus to compel a levy of taxes by the city to meet their judgments at a rate which was permitted when the damage was done for which the judgments were rendered. The supreme court of the United States held that they were not entitled to the writ; that the judgments held by the relators did not rest upon contract in any respect,

and that the obligation of the city had no further element of contract in it because merged in the judgment than it had previously possessed, and that the limitation in the constitution upon the extent to which the city could exercise the power of taxation did not infringe the provision forbidding the impairment of the obligation of a contract. Commenting upon the inapplicability of this provision of the constitution the court said: "The cases in which we have held that the taxing power of a municipality continues ⁶⁵² notwithstanding a legislative act of limitation or repeal, are founded upon contracts, and decisions in them do not rest upon the principle that the party affected in the enforcement of his contract rights has been thereby deprived of any property, but upon the principle that the remedies for the enforcement of his contracts existing when they were made have been by such legislation impaired. The usual mode in which municipal bodies meet their pecuniary contracts is by taxation, and when, upon the faith that such taxation will be levied, contracts have been made, the constitutional inhibition has been held to restrain the state from repealing or diminishing the power of the corporation, so as to deprive the holder of the contract of all adequate and efficacious remedy." In *United States v. County of Macon*, 99 U. S. 582, the court said: "Thus, while the debt was authorized, the power of taxation for its payment was limited by the act itself and the general statutes in force at the time, to the special tax designated in the act, and such other taxes applicable to the subjects as then were or might thereafter by general or special acts be permitted. No contract has been impaired by taking away a power which was in force when the bonds were issued. The general power of taxation to pay county debts is as ample now as it was when the railroad company was incorporated and the debt incurred. The difficulty lies in the want of original power." Upon these principles the same provision of the constitution has no application here. The contracts forming the basis of the plaintiff's judgment were not entered into upon the faith that any tax would be levied with which to meet them, but with full knowledge that the municipality was prevented from paying them out of any fund other than the revenue that had already been provided for the fiscal year ending June 30, 1893. None of the remedies which then existed for the enforcement of these contracts have been in any respect im-

paired. If, at the time of entering into the obligation, there is a limitation upon the extent to which a ⁶⁵⁴ municipality may enter into such obligation, or upon the extent of taxation for the payment of its liability, or upon the mode in which such payment is to be made, there is no violation of any provision of the constitution, or of any obligation of the municipality, in insisting that the person dealing with it shall be bound by the terms of the law as they existed when he entered into his dealings with the municipality. The same reasons which would justify the refusal of a writ of mandate to enforce the collection of a judgment by the levy of a tax which is forbidden by law require the refusal of the writ when sought to enforce a judgment by applying thereto, in contravention of an express provision in the constitution, moneys that have already been collected, and are in the treasury.

The act of 1858 (Stats. 1858, p. 233), invoked on behalf of the appellant, is not available to him in the present case. That act conferred power upon the board of supervisors to "order paid any final judgment against said city and county out of the surplus fund; whereas the authorization in the present case is that the judgment be paid out of the general fund. The surplus fund is provided for in section 76 of the Consolidation Act, and "consists of any moneys belonging to the general fund, remaining in the treasury after the satisfaction of all demands due and payable, which are specified in the first fourteen subdivisions in section 95."

The collection in the subsequent fiscal year of a tax levied by the board of supervisors for the express purpose of paying this judgment did not give to the plaintiff any additional right to the payment of his claim, or any right to the money thus collected. The provision of the constitution limiting the power of the municipality in incurring a liability to the income and revenue "provided for it for such year," means that only the income and revenue that had been provided for the expenditures of the year prior to incurring the liability can be appropriated for the payment of such expenditures. To hold that any deficiency in ⁶⁵⁵ the revenues of one year can be met from taxes collected in a subsequent year, under the guise that they had been collected for the express purpose of meeting such deficiency, would sweep away the entire restriction which the constitution intended to place upon municipal extravagance.

Unless it was the duty of the auditor to allow the claim of the appellant, the writ of mandate cannot be allowed: *Von Schmidt v. Widber*, 105 Cal. 151. By section 87 of the Consolidation Act that officer is required "to be constantly acquainted with the exact condition of the treasury, and every lawful demand upon it." By section 84 of the same act, whenever a claim against the treasury is presented to him for auditing, he must "satisfy himself whether the money is legally due and remains unpaid, and whether the payment thereof from the treasury of the city and county is authorized by law, and out of what fund." Section 88 declares that, if he allow any demand on the treasury not authorized by the act, he shall be liable to the city and county individually, and on his official bond, for the amount so illegally allowed. Inasmuch, therefore, as it appeared from the facts found by the court that the claim of the appellant was not a legal demand upon the treasury, which he had the right to have paid out of funds therein at the time he presented the same to the auditor, the auditor was justified in refusing its allowance.

The judgment is affirmed.

McFARLAND, J., GAROUTTE, J., VAN FLEET, J., HENSHAW, J., and TEMPLE, J., concurred.

MUNICIPAL CORPORATIONS—INDEBTEDNESS.—This question is fully discussed in the extended note to *Beard v. City of Hopkinsville*, 44 Am. St. Rep. 229-243.

MUNICIPAL CORPORATIONS—INDEBTEDNESS.—Duty of persons contracting with to take notice of the constitutional limitations upon the municipality's power to create is discussed in the extended note to *Orvis v. Park Commrs.*, 45 Am. St. Rep. 257.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

CURTIS v. BRADLEY.

[65 CONNECTICUT, 99.]

NO APPEAL IS AUTHORIZED upon the ground that the evidence introduced on the trial and printed in the record fails to support the facts found, but does support different facts, claimed by the appellant, which the trial court found were not proved.

EVIDENCE—ADMISSIBILITY—REFRESHING MEMORY OF WITNESS.—The admissibility of a paper as competent documentary evidence is not affected by its use in refreshing the memory of a witness. If it utterly fails to refresh his memory its exclusion for that purpose becomes imperative, but it may still be competent, and its use as evidence be imperatively necessary to a fair and just trial. The admissibility of the paper and the right of the witness to refresh his memory may be separate and distinct questions.

EVIDENCE—ADMISSIBILITY OF ORIGINAL MEMORANDUM.—If a memorandum of the details of a transaction relevant to the issue is shown by testimony to be the original unaltered paper, and to have been correct when written, such paper is, in connection with such testimony, admissible as competent, documentary evidence, though the witnesses have no recollection either before or after examining the paper of its details; and the memorandum may properly be marked as an exhibit.

TRIAL—WHEN JURY MAY TAKE OUT EXHIBITS.—If a writing admitted in evidence clearly tends to prove nothing but the fact that it was admitted to prove, it should go to the jury; but if, by reason of peculiar circumstances, it clearly may be treated by the jury as evidence of other facts not admissible, it should not go to the jury. Between the two extremes the question is largely one of discretion in the trial judge.

EVIDENCE—ADMISSIBILITY OF ORIGINAL MEMORANDUM—ILLUSTRATION.—Upon the issue as to whether money paid by the plaintiff was paid for labor and material used in building a house for the defendant, the testimony of witnesses who furnished labor and material for several houses erected by the plaintiff, that certain items in their original bills marked "Bradley house" were for labor and material ordered for that house by the defendant's agent, together with such bills and the written memo-

randa made by them at the time that such agent ordered the materials specified, is clearly admissible.

ESTOPPEL BY JUDGMENT—SAME PARTIES.—If the plaintiff and defendant were such respective parties in a former suit begun by a third person, but in which the plaintiff, as assignee, was substituted sole plaintiff by order of court, and in which action one question material to the present one was apparently adjudicated, the record in the former case is admissible in evidence to support a claim of estoppel by judgment.

ACTION to recover for work and labor and materials furnished; also upon an account stated. The case was tried by the court. There was a judgment for the plaintiff and the defendant appealed.

J. C. Chamberlain and Elbert O. Hull, for the appellant.

Allan W. Paige and George P. Carroll, for the appellee.

101 HAMERSLEY, J. In the summer of 1890 the plaintiff sold the defendant a building lot. In September of that year the defendant decided to have a house erected on the lot. It was then understood that one Simeon E. Plumb, a builder, should build the house, and that the plaintiff, a merchant, should advance the money for the cost of construction. The decision of this case depended on the actual terms of the agreement then made, the defendant subsequently claiming that his only agreement was with the plaintiff, and that by such agreement the plaintiff undertook to have the house built for the agreed price of seventeen hundred dollars. Plumb built the house under the directions of the defendant. The plaintiff paid to Plumb the amount of all bills for labor and materials as they came due. The house was finished in March, 1891, and the defendant accepted and occupied it. At the time the house was completed Plumb and the plaintiff went over **102** the labor and other bills, and the account of money paid for the cost of construction as charged on the plaintiff's ledger, and at the foot of that account Plumb wrote the following: "I have examined the above account, and find it correct. S. Plumb." The 14th of the same month the plaintiff made a copy of this ledger account and gave it to the defendant as the bill due from him to the plaintiff, in pursuance of their agreement. The defendant examined the bill, obtained the labor and material bills, made inquiries among the men who furnished materials whether the prices of the materials were correct, and found that they were correct. The defendant made no objection to the bill rendered

as regards amount or price, except the claim that one item of thirty-two cents was charged twice; but the defendant did object to the total amount of the bill, and refused payment. Subsequently Plumb, as an original contractor, placed a mechanic's lien on the land upon which the house stood, to enforce payment for its construction, and brought an action against the defendant for the foreclosure of said lien. The plaintiff then brought an action against Plumb to recover the money paid for the cost of the house, and garnished the defendant as the debtor of Plumb. Subsequently Plumb assigned to the plaintiff his interest in said mechanic's lien, and in the sum due from the defendant to Plumb for the construction of the house, and the plaintiff then withdrew his action against Plumb, and became substituted as party plaintiff in the action to foreclose said lien. The action of foreclosure was tried, and in December, 1892, judgment was rendered in favor of Bradley, the present defendant. By the record of the judgment it appeared that the court found that the lien had been made and recorded, and had been assigned to the plaintiff, who became sole owner and was the actual and bona fide holder and owner of the chose in action; but that the contract for the building of the house had not been made with Simeon Plumb, as alleged in the complaint, and that neither he nor the plaintiff, as his assignee, was entitled to foreclose the same. After this judgment was rendered the plaintiff brought the present action.

¹⁰³ The complaint follows the form called the "common counts," authorized for the commencement of an action. The counts relied on are those for money paid, goods sold and delivered, goods bargained and sold, and work performed and materials furnished, under which counts a bill of particulars was filed detailing each item that the plaintiff claimed entered into the cost of the house; and also the count for money due on account stated, under which count the bill rendered the defendant in March, 1891, was filed as the bill of particulars. The answer is a general denial.

Upon the trial there appears to have been no contest as to the fact that the plaintiff had paid for the construction of the house, and no serious contest as to the accuracy of his account as rendered. The claim of the defendant appears to have been in the alternative—either the defendant's contract was made with the plaintiff for a fixed price, or the contract was made only with Plumb, and therefore the plaintiff

has no cause of action against the defendant; the position of the defendant under the latter claim—which was the one mainly relied on in argument—being that, having induced the court in the former action to hold that the contract was not with Plumb, he had escaped all liability on that ground; and if he now induced the court to hold that the contract was made with Plumb, he would escape all liability whatever, and secure his house without any payment, obtaining judicial sanction for the practical theft, under two contradictory judgments.

So far as the record shows, the main question at issue was: What agreement, if any, had the defendant made with the plaintiff? It was not claimed on the trial that any question of law was involved in the determination of this issue, and the court found from the evidence that there was an agreement between the plaintiff, Plumb, and the defendant, "that Plumb should perform work in erecting a house for the defendant on this lot. Plumb, as carpenter, was to work by the day under the defendant's directions, at twenty-five cents an hour, and was to employ other carpenters at the same rate. He was also to order materials and work ¹⁰⁴ other than carpenter work for the house, and have the bills for the same charged to the plaintiff. The plaintiff, at the request of the defendant, agreed to be responsible and liable for all such materials and other work as Plumb should order for the house, and advance the money for the payment of them, and also to advance money to Plumb from time to time as he might require to meet his weekly pay-rolls. The defendant agreed that, on the completion of the house, in consideration of the money thus to be advanced by the plaintiff for the building of said house, and in consideration of the building of the same, he would repay the plaintiff the total amount of the moneys so paid out by the plaintiff." Upon these facts the court rendered judgment that the plaintiff recover of the defendant the sum of two thousand nine hundred and seventy-four dollars and fifty-one cents, such sum being, as the court found, the total amount paid by the plaintiff in pursuance of that agreement, with interest. From this judgment the defendant appeals.

The appeal contains two distinct grounds for an appeal from the judgment: 1. Because the evidence introduced on the trial and printed in the record does not support the facts found by the court below, but does support a different

state of facts claimed by the defendant, and which the court below found were not proved by the evidence. The law does not authorize an appeal from the judgment of a trial court for such reasons, and this court will not take jurisdiction of such appeal: *Styles v. Tyler*, 64 Conn. 432. The record discloses no reason for the correction of the appeal on the ground that the finding of facts does not fairly present the questions of law actually raised and decided. 2. Because the defendant is entitled to a new trial on account of errors alleged to have been made in the admission of evidence. Under this ground of appeal four errors are assigned.

1. The plaintiff offered in evidence certain slips of paper, testifying that Plumb came to the store each Saturday during the building of the house, and gave him the names of the men employed by him during the week, and their time; that the plaintiff wrote down at the time in the ¹⁰⁵ presence of Plumb on these slips these names, the hours of time, the amount due each man, the total amount due, and the date; that he paid Plumb the total amount of money called for by each slip, and filed the slip on a spindle; and that he had no personal knowledge of the facts so stated to him by Plumb, and so written by him on the slips, but that he made such memoranda correctly, as Plumb then stated the facts to be. Plumb had already testified that he had employed these men on the Bradley house, and that the slips of paper were correct statements of the facts of each case as far as he could recollect; that he knew them to be correct when made, and that he had given the names, hours of time, and the amounts to the plaintiff, in the manner that the plaintiff subsequently testified, and that after deducting his own wages he paid each man the amount due him. This evidence was offered to prove that the plaintiff had incurred liabilities and paid out moneys upon the order of and as required by Plumb as agent for the defendant, in the manner agreed upon by the parties, and to prove the correctness of the items and prices. The defendant objected to the introduction of these slips, and to the testimony of the plaintiff and of Plumb as shown. The court admitted the slips, not as themselves evidence apart from the oral testimony, but as memoranda made at the time and in the manner shown, and to be used by the witnesses Plumb and Curtis in the manner indicated, the witnesses reading the

contents of the slips, and admitted the testimony of Curtis and Plumb in connection with them as stated. Said slips were marked as exhibits.

2. The plaintiff offered in evidence certain bills, testifying that they were rendered him from time to time, and that he went over the bills with Plumb in the defendant's absence, at various times as they came due, while the house was building or upon its completion; that some of these bills were exclusively for materials and work for the defendant Bradley's house, and some contained other items not for that house, and Plumb picked out the items of material and work that went into the Bradley house, and ¹⁰⁸ stated that the items and prices were correct; that when the designation "Bradley house" was not in the body of the bill when rendered, as it was in many bills, he, the plaintiff, wrote it in at the time in Plumb's presence and correctly as given to him, and that he also made the check marks appearing on the bills when offered in evidence, to indicate Plumb's assent to the correctness of the items and prices; that these check marks were made in Plumb's presence and correctly as then stated by him to the plaintiff, and that he could not recall those items or prices without referring to the bills and memoranda made on them at the time. Plumb had already testified that he had given the orders to the persons thus rendering bills to the plaintiff, and that he had gone over these bills in the manner that the plaintiff testified, and that he had stated to the plaintiff that the items and prices as picked out were correct, and that these items represented materials and labor that had gone into the house, and that he had no recollection of the details of those items independently of the bills and the memoranda upon them, which he had seen at the time and which he then knew to be correct. This evidence was offered to prove that the plaintiff had incurred liabilities and paid out money as required and ordered by Plumb as agent for the defendant, in the manner agreed by the parties, the correctness of the items and prices, and that the materials went into the Bradley house. The defendant objected to the introduction of the bills and to the testimony of the plaintiff and of Plumb as above set forth. The court did not admit the bills marked and designated as stated, as themselves evidence apart from the oral testimony, but admitted them as memoranda made or seen by witnesses who at the time either had knowledge of their truth, or made them upon the statements of one who

had such knowledge at the time, and to be used by witnesses in the manner shown, the witnesses reading their contents as marked, and their value depending upon the oral testimony accompanying them, and admitted the testimony of the plaintiff and Plumb as stated above.

¹⁰⁷ There is no error in the above rulings. The court found that Plumb was authorized by the defendant to perform and to employ the labor on the house, and present his weekly pay-rolls to the plaintiff; also to order other work and materials for the house, and present the bills for such materials and work to the plaintiff; that the plaintiff was authorized by the defendant to pay to Plumb such weekly pay-rolls, and to pay such bills for materials and work so ordered by Plumb, and charge the amounts of the pay-rolls and bills so paid by him against the defendant. The court was bound to admit the testimony of the plaintiff and of Plumb as to the liabilities incurred and the payments made under such authority. The use of the slips and bills made at the time of the transaction and known to the witnesses to have been correctly made, as memoranda to be used by them in connection with their oral testimony, comes within the settled rules of evidence. "A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterward that the judge considers it likely that the transaction was at that time fresh in his memory. The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct": Stephens' Digest of Evidence, art. 136. "How far papers, not evidence per se, but proved to have been true statements of fact, at the time they were made, are admissible in connection with the testimony of a witness who made them, has been a frequent subject of inquiry, and it has many times been decided that they are to be received. And why should they not be? Quantities and values are retained in the memory with great difficulty. If at a time when an entry of aggregate quantities or values was made the witness knew it was correct, it is hard to see why it is not at least as reliable as the memory of the witness": *Insurance Cos. v. Weides*, 14 Wall. 880; *Bridgewater v. Roxbury*, 54 Conn. 213.

The defendant also claims error in marking the slips as ¹⁰⁸ exhibits, on the ground that if they might properly be

read by the witness they are not themselves admissible as evidence.

Courts in other jurisdictions have made different rulings as to the admissibility of such a writing. In England it is excluded. In Massachusetts and some other states it is excluded: *Costello v. Crowell*, 133 Mass. 355; *Morrison v. Chapin*, 97 Mass. 72; *Dugan v. Mahoney*, 11 Allen, 572. In Vermont it seems to be treated as evidence: *Lapham v. Kelly*, 35 Vt. 195. In New York and some other states the writing is admitted as evidence: *Guy v. Mead*, 22 N. Y. 462, 465; *Mayor v. Second Ave. R. R. Co.*, 102 N. Y. 572; 55 Am. Rep. 839; *Haven v. Wendell*, 11 N. H. 112; *Kelsea v. Fletcher*, 48 N. H. 282; *State v. Rawls*, 2 Nott & McC. 331; *Pearson v. Wightman*, 1 Mill Const. 167; *Owens v. State*, 67 Md. 307; *Anchor Milling Co. v. Walsh*, 108 Mo. 277; 32 Am. St. Rep. 600. In the federal jurisdiction the question is still open. In *Insurance Cos. v. Weides*, 14 Wall. 380, the court indicates the admissibility of the evidence, but the opinion in *Bates v. Preble*, 151 U. S. 155, shows that the court is not committed to the general doctrine that such memoranda are admissible for any other purpose than to refresh the memory of the witness. We do not attempt to cite all the cases bearing on the question, or to weigh the conflicting authorities; for we are satisfied on principle that the evidence in question is admissible. The discussion would be endless unless confined to the precise question presented, which may be stated as follows:

The litigated question is, Did the plaintiff pay to the agent of the defendant a certain sum on a certain date, as wages due for labor performed by a certain man employed by the agent? The plaintiff and the agent testify that a sum was paid for such purpose; that at the time of payment the agent gave to the plaintiff the exact amount due, and the name of the employee entitled to the same, and the plaintiff then, in the presence of the agent, wrote on a piece of paper the date, the amount, and the name; that these items as then written by the plaintiff were correct; that the paper produced in court is the identical paper then written upon ¹⁰² by the plaintiff and since unchanged; that they have no recollection either before or after examining the paper of the date, the amount, or the name. Is that paper admissible as evidence?

All courts concur in holding that the witness may read the statement of such paper to the jury, and that the jury

may draw the conclusion that the statement so read to them is a true statement of the facts; but some courts hold that the paper is not evidence.

It seems to us to be pressing the use of a legal fiction too far for a court to permit the statement made by such paper to be read as evidence, while holding that the law forbids the admission as evidence of the paper which is the original and only proof of the statement admitted. In other words, it would seem as if in admitting the paper to be so read the court of necessity admitted the paper as evidence, and therefore, by the concurrent authority of all courts, the paper is itself admissible. But, waiving the question whether in admitting such paper to be read the courts have gone so far as to make the denial of its admissibility no longer tenable, we will deal with the matter as if wholly undecided. Is the paper itself admissible as evidence? Its admissibility in the first instance depends on its relevancy. Of this there can be no doubt. Being relevant, it must be admitted, unless excluded under some legal principle or rule of public policy which forbids the admission of certain classes of evidence, no matter how relevant and material. It cannot be said that the paper is not capable in its nature of being treated as competent evidence. Legal evidence is not confined to the human voice or oral testimony; it includes every tangible object capable of making a truthful statement, such evidence being roughly classified as documentary evidence. In oral evidence the witness is the man who speaks; in documentary evidence the witness is the thing that speaks. In either case the witness must be competent, i. e., must be deemed competent to make a truthful statement; and in either case the competency of the witness must be proved before the evidence is admitted; the difference being that ¹¹⁰ in oral evidence the competency is proved by a legal presumption, and in documentary evidence the competency must be proved by actual testimony; and the further difference, that in oral evidence the credit of the witness is tested by his own cross-examination, while in documentary evidence the credit of the witness is tested by the cross-examination of those who must be called to prove its competency.

The competency of this paper is clearly established by the testimony, and it would seem to follow of necessity that it should be admitted on the same ground that any relevant and material documentary evidence, proved to be competent,

is admitted. The doubt has arisen from the complication of the admissibility of such paper with the right of a witness to refresh his memory. In fact, the two questions may be entirely distinct. The right of a witness to refresh his memory is a settled and necessary rule of evidence. The application of that rule is often difficult, involving delicate distinctions. We are not called upon now to draw the line which limits the right of a witness to the use of such aids as, under the subtle laws of association, serve to refresh his memory. All courts recognize that right, and rightly hold that the thing used to refresh the memory is not by reason of such use itself admissible as evidence. When in the application of the rule a document like the one in question was presented to the witness and absolutely failed to refresh his memory, its exclusion as a means of refreshing his memory became imperative; but the evidence of the document was so clearly essential to a fair and just trial, that its use in some form seemed also imperative. Instead of treating the paper as itself competent documentary evidence, resort was had to a palpable fiction; the paper is read by the witness, and the knowledge the witness once had of the facts stated by the paper is imputed to him as still existing, and the statement of the paper is received as the testimony of the witness, and the paper itself, the only witness capable of making the statement, is excluded. The use of such a fiction in the administration of justice can rarely if ever be ¹¹¹ justified. It is certainly uncalled for in this instance. The principles of law invoked to justify the fiction are amply sufficient to support, indeed to demand, the admission of the document as evidence. There is no occasion to sacrifice truth in order to secure justice. As regards its admissibility as evidence, there is no substantial difference between this paper and any other tangible object capable of making a truthful and relevant statement. It is true that a writing may be a mere declaration and practically equivalent to a spoken declaration, and so be excluded as hearsay evidence. This possibility has played a conspicuous part in the discussions that have finally resulted in the admission as evidence of account-books, whether kept by a clerk or by a party to the suit (a subject closely related to the one in hand but involving too large a field to justify an attempt to define that relation). But it is also true that a writing may, by reason of the circumstances under which it was made, be a documentary witness to the fact the paper itself tends to

prove, and this although the particular writing may also in a certain sense be a declaration. Indeed, nearly all documentary evidence is in a certain sense a declaration; yet it is admitted as a witness, not of a declaration, but of a fact. We think this paper is admissible as a documentary witness. Suppose the litigated question turns on the dimensions of a man's foot. A witness produces a plaster cast of the foot; the testimony conclusively shows that the cast was so taken that it can state accurately the dimensions of the foot. Another witness produces a paper, on which the exact measurements are written; the testimony conclusively shows that the paper also was so made that it can state accurately the dimensions of the foot. Is it not evident that the paper and the cast is each a witness to the fact that each tends to prove? How does the paper now in question differ? Upon this paper was stamped an accurate delineation of existing facts. In the one case the fact stated by the document relates to a physical object, and in the other to a mental object; but in both cases the fact is clearly relevant and accurately stated by the document. It is immaterial whether ¹¹² or not a critical analysis may impute to these documents, to a greater or less degree, some element of a declaration; the controlling principle of law is not based on such refinements. If there is any element of a declaration, it does not make the document in a legal sense a declaration. The conditions required by law to make such documents legal evidence are: the substance offered as a witness must be proved to have been made or found and preserved in such manner that it states directly, accurately, and truly a fact relevant and material to the issue. The paper claimed as evidence in this case fulfills these conditions.

In the discussions on the admissibility of account-books, it has often been assumed that such books are declarations, and are admitted as exceptions to the class of hearsay evidence. Without stopping to consider whether such ground for the admission of account-books is logically accurate, and, if so, whether the same reasoning applies to this paper, we will assume that it may be classed as hearsay evidence. It should then be admitted as an exception to the rule excluding such evidence. The limits of the field covered by the term "hearsay evidence" are so uncertain, and the exceptions are so many and important, that it is often very difficult to draw the distinction between those matters that are admitted as

not subject to the rule, and those that are subject to the rule but excepted from its operation. It is significant that most matters supposed to be covered by the rule, whose relevancy and materiality come to be recognized as so close and clear that their admission seems essential, come to be classed as exceptions to the rule. If this paper must be classed as a declaration and hearsay evidence, it must also be classed as an exception to the operation of the rule. The reasons on which the rule is founded plainly do not apply to such evidence, and the arguments adduced in support of the admissibility of this paper as original evidence are sufficient to demonstrate that it does not come within the reason of the rule excluding hearsay evidence. Whether this paper is not within the scope of hearsay evidence, or being hearsay evidence is excepted from the operation of the rule, as not within ¹¹³ its reason, is immaterial so far as concerns the question of admissibility; though the distinction may be quite material as affecting the symmetry of the law of evidence, and the clear understanding of the underlying principles that must control the development of that law.

It does not, however, necessarily follow from the admissibility of such evidence that the document should be sent to the juryroom. Under the general rule of practice the jury must depend on their memory in the case of oral testimony, but may take documentary evidence to their consultation. But there is a difference in documentary evidence. Some is not given to the jury, either because its possession is agreed to be of no consequence or is inconvenient, or the document is of such a nature that it testifies to facts not relevant, in addition to the relevant facts. It might be claimed in the case of some writings offered in proof of the facts stated by the writing that a jury would confuse the effect to be given such writing with the peculiar effect sometimes given to a record or a deed, and so give an illegal weight to the evidence. Possibly some such consideration may have had influence in keeping such writings from the jury, but whatever force such a consideration may once have had, it is entitled to little weight under the present policy of the law, which tends to submit to the jury all relevant and material evidence, and even trusts them to discriminate the allowance to be made for the interest of a party to the suit, or the character of a convicted felon. If the writing admitted in evidence clearly tends to prove nothing but the fact that it was admitted to

prove, it should go to the jury. If, by reason of peculiar circumstances, it clearly may be treated by the jury as evidence of other facts not admissible, it should not go to the jury. Between the two extremes the question is largely one of discretion in the trial judge.

In the present case it is clear that the writing could only be used for its legitimate purpose, and that the court did not err in marking it as an exhibit. The conditions under which the general question we have discussed may arise are so various, and the different principles that may be involved¹¹⁴ in each case are so related, that there is special need to confine the application of the views expressed strictly to the particular question presented in this case. The only point now decided is:

A memorandum of details which are essential to the full proof of a transaction at issue, proved to have been made substantially at the time of the transaction, and under such circumstances that the memorandum can make a correct statement of such details as they were then known to the person who made the memorandum, or saw it made, and who is himself a witness and testifies to the transaction, but has lost all recollection of such details, is, in connection with the testimony of such witness, admissible as evidence; because such memorandum is in itself evidence of a fact closely relevant, plainly material, and essential to a just trial, and because no principle of the law of evidence or rule of public policy justifies its exclusion; and such memorandum may properly be marked as an exhibit.

3. The persons rendering the bills above mentioned testified that the bills as a whole were correct, as regards amounts and prices, and that when the body of the original bill indicated what items went to the Bradley house, those items of material and labor were ordered for that house by Plumb. The defendant excepted to the admission of the testimony of these persons. The error assigned by the defendant is that the court erred in allowing the evidence of the parties furnishing this material, to the effect "that where the body of the original bill indicated what item went to the Bradley house, these items of materials and labor were ordered for that house by Plumb." The fact that the money paid by the plaintiff was paid for materials used in building the house, and ordered for that purpose by Plumb as the agent of the defendant, was a fact in issue, and the testimony of the per-

sons from whom it was claimed that Plumb had so ordered such materials that he had in fact ordered the same was relevant to that issue. The use by such witnesses in their testimony of the bills made by them at the time, in pursuance of such orders from Plumb, and of ¹¹⁵ the written memoranda made by them at the time to the effect that Plumb, the agent of the defendant, ordered the materials specified, for the defendant's house, is plainly authorized by law.

4. The plaintiff offered the record of the judgment above mentioned, in the case of *Curtis, Assignee of Plumb, v. Bradley*, for the purpose of showing that in this case the defendant was estopped from claiming that the contract for the erection of the house was made with Plumb. The court admitted the record against the objection of the defendant. The fact that the contract for the construction of the house was not made with Plumb was one material fact at issue in this case, and the plaintiff was entitled to show that the defendant was estopped from claiming that the contract was made with Plumb. It is not claimed that the record of a judgment in a case between the same parties, which appears on its face to have adjudicated a matter in issue between them in a subsequent action, is not admissible in the latter suit in support of a claim of estoppel; but the claim is that in this case the parties to the record offered were not the same as the parties to the present suit. This claim has no foundation in fact. The plaintiff in this suit was the actual plaintiff in the former action, and moreover was substituted for the nominal plaintiff, and by such substitution became also the plaintiff of record: Gen. Stats., secs. 887-889, 981; *Buckingham's Appeal*, 60 Conn. 143.

A new trial is denied.

In this opinion the other judges concurred.

WITNESSES—REFRESHING MEMORY—MEMORANDUM.—A witness may always use a memorandum to refresh his memory if, in fact, he testifies from his memory as thus refreshed: Note to *National Ulster County Bank v. Madden*, 11 Am. St. Rep. 637; monographic note to *State v. Bacon*, 98 Am. Dec. 619, on use of memoranda by witness to refresh or assist his memory: *Card v. Foot*, 56 Conn. 369; 7 Am. St. Rep. 311. It is not the memorandum, however, which speaks, but the recollection of the witness. Ordinarily, the memorandum must be produced, but this does not make it evidence, nor need the paper be such a one as would be admissible, for it is not the paper that is evidence, but the recollection of the witness. The writing must have been made at the time of the fact in question, or recently afterwards: Note to *State v. Bacon*, 98 Am. Dec. 620-622; *Spring Garden Mutual Ins. Co.*

v. *Evans*, 15 Md. 54; 74 Am. Dec. 555. Testimony based on a witness' own writing will be received if, knowing the writing to be genuine, his mind is so convinced that he is, on that ground, enabled to swear positively to the fact therein stated; and this, although he may not recognize the instrument as one he had seen before, or remember anything contained in it: *Martin v. Good*, 14 Md. 398; 74 Am. Dec. 545. A witness may refresh his memory by examining a memorandum made by himself, or known and recognized by him as stating the facts truly, when, after such examination, he can testify to the facts as matter of independent recollection; but the memorandum itself is not thereby made evidence. Though the memory of the witness is not refreshed by an examination of the memorandum, so that he can testify to the facts as matter of independent recollection, yet, if he can testify that at or about the time the memorandum was made he knew its contents, and that he knew them to be true, his testimony and the memorandum are both competent evidence; but if he did not know the contents of the memorandum to be true when it was made, although he saw it made, the memorandum is not admissible evidence: *Acklen v. Hickman*, 63 Ala. 494; 35 Am. Rep. 54, and note. An original entry made by a witness is only admissible as auxiliary to his evidence when he is unable to distinctly recollect the fact without the aid of it. The rule which renders such an entry admissible rests upon the principle of necessity for the reception of secondary evidence, and is not applicable where the witness has a distinct recollection of the essential facts to which it relates: *National Ulster County Bank v. Madden*, 114 N. Y. 280; 11 Am. St. Rep. 633.

ESTOPPEL BY JUDGMENT—PARTIES.—The judgment of a court of competent jurisdiction is conclusive upon all matters actually determined, and also upon matters which the parties might have litigated in the case: Note to *Barrick v. Horner*, 44 Am. St. Rep. 287. The principle of estoppel by judgment includes all persons who are substantially parties, although not parties to the record. Parties in the larger legal sense are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if any appeal lies: *Ashton v. City of Rochester*, 133 N. Y. 187; 28 Am. St. Rep. 619; monographic note to *Hill v. Bain*, 2 Am. St. Rep. 877, on whether a judgment creates an estoppel in favor of one who was not a party to, nor bound by, the prior litigation. If the parties are the same the legal effect of a former judgment is not impaired, because the subject matter of the second action is different, provided the former suit involved the same title and depended upon the same question: *Hodge v. Shaw*, 85 Iowa, 137; 39 Am. St. Rep. 290.

TRIAL—RIGHT OF JURY TO TAKE OUT EXHIBITS.—The sending out of papers with the jury is in the discretion of the court, as a general rule, with some exceptions: *Little Schuylkill etc. Co. v. Richards*, 57 Pa. St. 142; 98 Am. Dec. 209, and note.

GIDDINGS v. GIDDINGS.

[65 CONNECTICUT, 149.]

DEVISE—REVOCATION BY MISTAKE.—The revocation of a devise or legacy is altogether a matter of intent, and the general rule that such revocation by mistake will not be permitted to annul the gift has no application if it appears from the instrument of revocation that the testator intended to determine for himself the existence or nonexistence of the grounds of revocation.

WILL, CONSTRUCTION OF—DEVISE, REVOCATION OF, BY MISTAKE.—If a testator having three sons and other heirs gives to each of the sons a specific piece of property, and the residue of his estate, both real and personal, to all of the sons, share and share alike, but subsequently executes a codicil to his will revoking the specific devise to one of the sons, on the ground that he has sold the property, and expressly ratifies and republishes the will except as changed, whereas such property is not sold at the time of his death, but is then still owned by him, the legal effect of the codicil is to eliminate from the will all reference to the property devised to that particular son. The revocation is valid as being intentional, not induced by mistake, and unconditional. The property, therefore, falls into the residuum, and is not liable to distribution among the heirs at law.

SUIT to determine the validity and construction of a will and codicil thereto. The case was reserved for the advice of the appellate court.

Lyman S. Burr, for the executor.

Frank L. Hungerford, for George W. Giddings.

Donald T. Warner and Wellington B. Smith, for William H. Giddings.

Philip J. Markley, for Henry H. Northend.

¹⁵⁵ **FENN, J.** The testator, William W. Giddings, died in 1893, seised and possessed of real estate inventoried at seventeen thousand and fifty dollars, and personal estate inventoried at one hundred and two thousand one hundred and forty-seven dollars and thirty-three cents. He left a last will executed in 1889, and a codicil executed in 1893, both of which were duly admitted to probate. So much of said will as is here material is as follows:

"*Fifth.* I give to my son, William H. Giddings, my block on Glen street, bounded, etc. *Sixth.* I give to my son, Frederick W. Giddings, my house and lot on Cedar street, bounded,
¹⁵⁶ etc. *Seventh.* I give to my son, George W. Giddings, my house and lot Nos. 163 and 165 West Main street, bounded etc. . . . *Ninth.* All the residue of my estate, both real and

personal, I give to my three sons, William H. Giddings, Frederick W. Giddings, and George W. Giddings, share and share alike. *Tenth.* I give to my son, George W. Giddings, after the death of my said wife, the house and lot No. 178 West Main street."

The testator left surviving, his widow, and the three sons named, and a grandson, the child of a deceased daughter, who were his heirs at law.

The codicil, omitting formal parts, is as follows:

"Whereas, since the execution of said will, I have sold the house and lot 163 and 165 West Main street, devised in section 7 of said will to George W. Giddings, I hereby revoke that portion of said will.

"I have also sold house or block and lot on Glen street, devised in section 5th of said will to William H. Giddings. I therefore give to him the proceeds—five thousand dollars—instead.

"I hereby republish and confirm my said will, except as hereby changed."

At the date of the execution of said codicil the house and lot on Glen street had been sold, but the house and lot on West Main street had not been sold, but was then the property of the testator, and was not sold at the date of his death, but was still owned by him, in his possession, and is now a part of his estate.

Two questions are presented by the reservation for our advice: 1. Is the devise mentioned in section 7 of said will, to the said George W. Giddings, revoked by the clause of said codicil to said will? 2. If said devise is held to be so revoked, is said real estate part of the residuum, or is it intestate property which should be distributed to the heirs at law of the decedent?

In reference to the first question in behalf of George W. Giddings, who claims that the devise is not revoked, the case of *Dunham v. Averill*, 45 Conn. 62, 29 Am. Rep. 642, is relied on. In that ¹⁵⁷ case it was said on page 80: "It is true that the law will presume in favor of a devise or legacy that it is not annulled by a clause of revocation in a codicil if a mistake as to a fact moves the testator to write it and continue it in force, and he states in the writing what the fact is and therein shows that the revocation is made conditional upon its existence."

Other authorities cited in the brief support this general state-

ment: 1 Jarman on Wills, 351; Schouler on Wills, sec. 410; 1 Williams on Executors, 5th ed., 149; *Mordecai v. Boylan*, 6 Jones Eq. 365; *Campbell v. French*, 3 Ves. Jr. 321; *Doe v. Evans*, 3 Ad. & E. 228. But it is to be borne in mind that the question of revocation is "altogether a matter of intent," and that therefore the rule above stated only holds when it effectuates, and not at all when it defeats intention, and so are the authorities. It will be noticed that our own court, in the quotation above given, expressly limits the rule to cases where the mistake not merely exists, but is the moving cause, and the writing "shows that the revocation is made conditional upon its existence." Schouler, also, in his work on Wills, section 410, after stating the rule, and illustrating it by cases where the testator by a later will repealed legacies given by an earlier to his grandchildren, "they being all dead," when in fact they were living; where benefits were conferred upon one described as husband or wife, who turns out not to be legally a spouse, by reason of some prior and existing marriage; and where a testator treats a gift as made to A in an existing will, when it was in fact made to B, adds: "This rule regards the testator's intent, and the impulse which moved him to dispose as he did; the courts treat the revocation accordingly as a sort of contingent or conditional one." He further says that where grounds are stated "of whose falsity or truth the testator judged for himself, this rule does not apply." He adds, also, citing *Gifford v. Dyer*, 2 R. I. 99, 57 Am. Dec. 708, that not only must the mistake be apparent from the face of the testamentary papers, but also what the will of the testator would have been except for the mistake.

In Redfield on Wills, volume 1, side page 359, the author speaks ¹⁵⁸ of the general rule, that legacies and revocations founded in mistake shall not operate, as "very questionable in principle," and gives cogent reasons which would be unanswerable if such rule was to be understood as extending further than to effectuate manifest intention. Perhaps the case nearest in similarity to the present which can be found in the reports is that of *Hayes v. Hayes*, 21 N. J. Eq. 265. In that case there was a codicil revoking in express terms a legacy in the will, because the testator had provided the legatee with a permanent home, when in fact he had not so provided. It was held that the revocation was operative. The court, citing *Campbell v. French*, 3 Ves. Jr. 321. and

Kennell v. Abbott, 4 Ves. Jr. 808, claimed to be contra, said: "In this case no mistake is shown; he had not made a provision that was permanent, but he must have known whether he had so provided or not. He had provided a home, and may have intended to make it permanent at some future time, and omitted to do so, either from neglect or because he had changed his mind, which he had a right to do. . . . This case does not fall within the principle of these decisions, and it would be dangerous to extend it. It would cause every recital of a faithful wife, or trusty friend, or honest servant, to be inquired into to affect the validity of the bequest."

In the case before us, whatever may have been the reason why the testator made the statement which he did in the codicil, concerning the sale of the house and lot on West Main street, regarding which the record is silent, not only must he have known whether he had sold it or not, but there appears to be abundant reason to believe that it could not have been the intention of the testator to make the revocation conditional upon the fact of the sale. Certainly it is not manifest that it was his intention to make it so conditional. It appears that in the will he had given each of his other sons one piece of real estate specifically, but he had given George W. Giddings two pieces, in two separate paragraphs. Declaring that he had sold the parcel devised to William H. Giddings, he gave him, therefore, the proceeds—"five thousand ¹⁵⁰ dollars"—instead. Declaring that he had sold one of the parcels devised to George W. Giddings, he simply revoked "that portion of said will." Is there any reason why such a sharp discrimination should be made, as probable as that by such revocation, independent of the asserted fact of sale, he would accomplish substantial equality between his sons? It seems to us there is not, and that we ought to hold the revocation to be valid, as being intentional, not induced by mistake, and unconditional.

This leads to the remaining question, as to what disposition should be made of this property. In behalf of the heirs at law, it is claimed that by the settled law of this state (different, it is admitted, from that of most jurisdictions at the present time) it becomes intestate. The case of *Remington v. American Bible Soc.*, 44 Conn. 512, is relied upon in support of this contention. In that case it was indeed held that a lapsed devise of real estate went to the heirs at law,

upon the ground that, quoting *Greene v. Dennis*, 6 Conn. 304, 16 Am. Dec. 58, Hosmer, J.: "Wills must be construed by the intent of the devisor at the time of making them. Of consequence, when property is given to a person incapable of taking, and there is a general devise of the residue, so far as respects the estate specifically devised at the time of the will's being made, there is an intentional disposition, and it never was designed that it should fall into the residuum. The law respecting the bequest of personal estate is different, but as to the realty the decisions have been uniform and unquestioned."

Without stopping to inquire whether there is any distinction in principle, on the ground stated, between devises of realty and bequests of personal property, or whether we should now reach the same conclusion if the question were now a new one in this jurisdiction, it is very evident that the case itself has no relevancy to the present query. Neither the rule nor the reason of it applies. Here is neither a void nor a lapsed devise. The devise was valid. It did not fail to vest, either: 1. In consequence of the death of the devisee before the death of the testator; or ¹⁰⁰ 2. Because, notwithstanding the devisee survived the testator, he died before his interest could be said to have vested under the will. Hence there was no lapse: Schouler on Executors and Administrators, sec. 467. But, as we have just held, it was revoked by the testator in his codicil, which, in terms, confirmed the will. Now "the effect of a codicil which, in terms, ratifies, confirms, and republishes a will is to give the original will the same force as if it had been rewritten, re-executed, and republished at the date of the codicil. From a will and its several codicils, like a statute with its later amendments, the maker's full intention is to be gathered": Schouler on Executors and Administrators, sec. 82. "It is a clear principle of the English and American law that all codicils, however numerous, are to be regarded as parts of the will, and all, together with the will, are to be construed as one instrument. . . . It has often been held that a codicil may operate as a republication of a former will; which, in effect, it always is, if it recognizes the existence of such an instrument": 1 Redfield on Wills, 288.

It would seem to follow from the above that the will should now be read as if the devise in question, having been revoked, was never included in the will, now speaking from

the date of the codicil. But if a direct authority to this effect is desirable, it may be found in *Harris v. Davis*, 1 Coll. C. C. 416. In that case the testator bequeathed the rest of his personal estate, and certain freehold and leasehold estates, in equal shares, to L, M, N, O, and P. In a subsequent part of his will he bequeathed to H one-half of the legacy named to each of the other legatees; that is to say, one-half of what his brother M ought to receive. By a codicil the testator declared as follows: "I revoke all that part written in my former will which leaves a legacy to H, written in my will on the thirty-second and thirty-third lines." It was held that by force of this revocation the will was to be read as if the gift to H were not in it; consequently, that such revocation inured to the benefit of the other devisees and legatees. During the argument the vice-chancellor observed that the language of the codicil as to ¹⁶¹ the revocation of the legacy to H seemed to amount to a direction by the testator that his will should be read as if all that related to that legacy were struck out with a pencil. His lordship asked Mr. Simpkinson if he was aware of an authority upon that species of revocation. Mr. Simpkinson, amicus curiæ, mentioned a case. In the opinion afterward delivered, his lordship adhered to the view thus expressed.

The superior court is advised: 1. The devise mentioned in section 7 of the will to George W. Giddings was revoked by the codicil; 2. Said real estate referred to in said devise, by said revocation, becomes part of the residuum of the testator's estate.

In this opinion the other judges concurred.

WILLS—INTENT MUST CONTROL IN CONSTRUING—RESIDUUM.—In interpreting wills the cardinal principle is to arrive at and carry out the intention of the testator if it is lawful: *Morrison v. Estate of Sessions*, 70 Mich. 297; 14 Am. St. Rep. 500; *Sturgis v. Work*, 122 Ind. 134; 17 Am. St. Rep. 349; *Estate of Hunt*, 133 Pa. St. 260; 19 Am. St. Rep. 640; *Dickson v. Dickson*, 133 Ill. 541; 32 Am. St. Rep. 163. If bequests are given to a certain class, but are taken away by a codicil, and another class substituted, the provisions of the codicil must prevail: *Estate of Hunt*, 133 Pa. St. 260; 19 Am. St. Rep. 640. So, if a clause in the will, in clear and decisive language, gives all the residue of an estate to the testator's two sons, and a later clause or codicil, equally clear and decisive, gives the same subject matter to all of his children, share and share alike, the codicil must control, as being the final expression of the testator: *Sturgis v. Work*, 122 Ind. 134; 17 Am. St. Rep. 349. And if an estate is given by will to two, and the part given to one fails from any cause, that part, without an express and fresh disposition of it, will fall into the residue, or go to the next of

kin: *Sturgie v. Work*, 122 Ind. 134; 17 Am. St. Rep. 349. If a will contains a general residuary clause, specific legacies which have lapsed or failed from invalid disposition or other accident fall into the residuum, and pass to the residuary legatees: *Bendall v. Bendall*, 24 Ala. 295; 60 Am. Dec. 469; *Cunningham v. Cunningham*, 18 B. Mon. 19; 68 Am. Dec. 718. Under the statutes of New York and Massachusetts, both lapsed devises of real estate and lapsed legacies fall into the residue: *Cruikshank v. Home of the Friendless*, 113 N. Y. 337, 354; *Thayer v. Wellington*, 9 Allen, 283; 85 Am. Dec. 753.

REVOCATION BY MISTAKE—GENERAL PRINCIPLES.—There are few late cases on this abstruse question, and nearly, if not all, of the cases, both early and late, involve the revocation of wills. The scarcity of cases, therefore, is doubtless owing to the fact that statutes exist generally which provide that no will or codicil shall be revoked otherwise than by certain specified methods; they seem generally to exclude the method of revocation by mistake. But whatever may be the reason for the dearth of cases, the authorities clearly show that a mistake in fact may destroy the effect of a cancellation of a will, and that a mistake in point of law may also destroy it. For example, if a person mistakes the contents of his will at the time of cutting off his name and seal, it would be a mistake of fact; but if he mistakes the legal operation of the will, it is a mistake of law. In either case the mistake annuls the cancellation: *Perrott v. Perrott*, 14 East, 423. So a revocation of a will, founded on a mistake, is, as a general rule, inoperative, but this rule has its exceptions. Thus, if a testator, by a codicil, revokes a devise or bequest in his will, or in a previous codicil, expressly grounding such revocation on the assumption of a fact which turns out to be false, the revocation does not take effect, being conditional, and dependent on a contingency which fails. This rule applies to cases where the falsity or error of the alleged fact rested, not in the personal knowledge of the testator, but was assumed upon information derived from others: *Mendenhall's Appeal*, 124 Pa. St. 387; 10 Am. St. Rep. 590. But cases where the fact itself is the ground of revocation must be distinguished from those where such ground is the advice as to, or belief of, the fact: *Attorney General v. Lloyd*, 3 Atk. 552. If the testator intended to determine for himself the existence or nonexistence of the grounds of revocation, so as not to have doubtful questions litigated after his death, the revocation, though founded upon a mistake, is operative: See principal case and *Attorney General v. Lloyd*, 3 Atk. 552.

A will will stand, although made under an erroneous assumption of a fact, unless the mistake appears upon the face of the will. Thus, in *Gifford v. Dyer*, 2 R. L. 99, 57 Am. Dec. 708, a testatrix made a will supposing her son to be dead, when in fact he was alive, and it was held that the mistake could not be proved by testimony dehors the will, but that in order to affect the will it must appear upon its face, and that it must also appear what would have been her will had the mistake not been made. So a mistaken notion that a will has been destroyed or canceled, when, in fact, it has not been, does not affect the will. Thus, if a testator, being sick in bed, calls for his will, and directs his son to burn it, and instead of doing so he retains the will and burns another paper for the purpose of deceiving his father, who is thus led into the belief that his will was burnt, the act does not amount to a revocation, the will not having been actually burnt: *Hise v. Fincher*, 10 Ired. 139; 51 Am. Dec. 383; monographic note to *Graham v. Burch*, 28 Am. St. Rep. 347, on the revocation of wills; *Runkle v. Gates*, 11

Ind. 95. Although a testator has directed his will to be destroyed, and believes that it has been destroyed as requested, yet, if in fact it has not been destroyed, such direction and belief will not operate as a revocation of the will, even in relation to the personal estate: *Malone v. Hobbs*, 1 Rob. (Va.) 366; 39 Am. Dec. 263; *Boyd v. Cook*, 5 Leigh, 32.

EFFECT OF MISTAKE IN CANCELING WILL.—The destruction or cancellation of a will under an erroneous assumption of facts will not always operate as a revocation. Under the doctrine of dependent relative revocations, the act of canceling, etc., being done with reference to another act, meant to be an effectual disposition, will be a revocation or not, just as the relative act is efficacious or not: *Pringle v. McPherson*, 2 Brev. 279; 3 Am. Dec. 713; *McPherson v. Clark*, 3 Bradf. 92. Thus, if a former will is canceled by obliteration or erasure under the presumption that a later will is good, but which proves to be void, the first will is not revoked: *Pringle v. McPherson*, 2 Brev. 279; 3 Am. Dec. 713. So, where a first will is torn, as of no use, under an opinion that a second will actually revokes the first, if the first will is not effectually revoked by the second, neither ought the act of tearing the first to revoke it; for, though a man may as effectually destroy his will by tearing or canceling it, as by making a second will, yet, when he intends to revoke the first will by the second, and it is insufficient for that purpose, and the tearing and canceling of the first is only in consequence of his opinion that he thereby makes good the second will, the tearing and canceling should not destroy the first, but it ought to be considered as still subsisting and unrevoked: *Onions v. Tyrer*, 2 Vern. 742, a case in which the second will was void because it was not duly executed according to statute. The second will in this case was made to the use of the same person to whom the testator had devised the land by the first will, with a variation only in the name of one of the trustees; but it would have made no difference if the later will had been in favor of another person from the former: *Onions v. Tyrer*, 2 Vern. 742. In *Hyde v. Hyde*, 1 Eq. Cas. Abr. 409, the testator having given instructions for some immaterial alterations in a properly executed will, read over a draft of a new will made according to such instructions, and having signed such draft, tore the seals from his old will under the impression that his new will was completely executed so as to pass lands; it was held to have been done *sine animo cancellandi*, and therefore to be no revocation of the original will. So, where a testator writes a second will with his own hand, much like the first one, but does not complete it, and it appears that he does not intend an intestacy, that his design, by making alterations and obliterations in the duplicate of the first will, is to make a new will, and that it is his intention not absolutely to destroy his first will until the second is perfected, the first will ought to stand: 1 Williams on Executors, 6th Am. ed., 187. But if a person tears a will and interlines it *animo revocandi*, his intention to make another will afterward, and never carried out, will not re-establish the first will: *Johnson v. Brailsford*, 2 Nott & McC. 272; 10 Am. Dec. 601. In determining whether a will is revoked by interlineations and obliterations, "the effect of canceling depends upon the validity of the second will, and ought to be taken as one act done at the same time; so that if the second will is not valid, the canceling of the first, being dependent thereon, ought to be looked upon as null and inoperative": *Wisor v. Pratt*, 2 Brod. & B. 650, 656, per Dallas, C. J. So, where a will is canceled as simply preparatory to the act of making a new will, which is

prevented by the death of the testator, such cancellation is conditional only, and does not amount to a revocation: *In the Goods of Applebee*, 1 Hagg. 143. The act of cancellation is an equivocal one, and of no effect unless the *animus cancellandi* exists: *Perrott v. Perrott*, 14 East, 423, 439; *Burtenshaw v. Gilbert*, 1 Cowp. 49, 52; and if a testator designs to revoke a former will by an instrument making new dispositions of his property, he manifests simply a conditional intention to revoke. In other words, his intention to revoke is so coupled in appearance with his new testamentary act, that, unless he completes such testamentary act by observing the formalities requisite to its perfection, he is not looked upon in law as manifesting a deliberate purpose of revoking: *Winsor v. Pratt*, 2 Brod. & B. 650, 655. The general principle of the cases, as laid down in *Ex parte Earl of Ilchester*, 7 Ves. 348, 372, is that where "it is evident that the testator, though using the means of revocation, could not intend it for any other purpose than to give effect to another disposition, though if it had been a mere revocation it would have had effect, yet, the object being only to make way for another disposition, if the instrument cannot have that effect, it shall not be a revocation." Actual cancellation is an express revocation, but an act evincing an intention to cancel is but presumptive, and stands for an actual revocation only until an intention to the contrary appears, the matter being susceptible of explanation by evidence: *Burns v. Burns*, 4 Serg. & R. 567; *Perrott v. Perrott*, 14 East, 423, 440. If, therefore, the intention to revoke is changed before the act by which it is intended to be effected is executed, the paper which never ceased to be the will of the party will stand on the original proof: *Burns v. Burns*, 4 Serg. & R. 567.

REVOCATION UNDER AN ERRONEOUS ASSUMPTION OF FACT—ILLUSTRATIONS.—The rule that a revocation of an existing will, through some false or mistaken assumption of facts, discoverable from the face of the papers, is inoperative, is intended to aid the testator's intent, and the impulse which moved him to dispose as he did. Courts, therefore, treat the revocation accordingly as a sort of contingent or conditional one, whose condition or contingency has failed; the intent being deficient, as in other cases of fundamental mistake: *Dunham v. Averill*, 45 Conn. 61; 29 Am. Rep. 642. Thus, if one by a later will repeals legacies given by an earlier one to his grandchildren, "they being all dead," when in fact they are living: *Campbell v. French*, 3 Ves. 321; *Doe v. Evans*, 10 Ad. & E. 228; *Crosthwaite v. Dean*, L. R. 5 Eq. 245; or confers benefits upon one described as husband or wife, who turns out not to be legally a spouse by reason of some prior and existing marriage: *Kennell v. Abbott*, 4 Ves. 802; or makes a gift to one by will, and of the same property, under a mistake as to his existence, to another by codicil: *Barclay v. Maskelyne*, 1 John. (Eng.) 124; or, in attempting to divide his property equally among his children, makes a mistake as to its value by his voluntary omission to ascertain the value correctly: *Barker v. Comins*, 110 Mass. 477; the revocation is inoperative and devisees under the original will take thereunder. So in *Allen v. Bewsey*, 7 Ch. Div. 453, 464, a testator devised an estate as copyhold. By codicil he recited that he had since discovered that the estate was freehold and confirmed the devise. The court held that the intention was to confirm the devise whether the estate was freehold or copyhold, and that there was no revocation. A testator, in a codicil, gave as a reason for a legacy to a grandson that he had disinherited such grandson, but the fact was that he had not disinherited

him, but had given him a large legacy in a clause of his will. The bequest in the will was held not to be revoked by that of the codicil, but the latter itself was held to be void on account of the mistake. The mistake in such a case may be proved by parol evidence of the testator's feelings toward the legatee: *Mordecai v. Boylan*, 6 Jones Eq. 365. If, however, no mistaken assumption appears, but a testamentary purpose founded upon some recognized doubt or accompanied by a mere misdescription of the person, or stating grounds of whose falsity or truth the testator judged for himself, a revocation, though founded upon such mistake, is not conditional and contingent, but operative and binding. Thus, if a testatrix bequeaths money to such children of E. as may be living, but by a codicil gives the money designed for such children to another, as she knows not "whether any of them are alive, and if they are well provided for," the effect is to totally deprive E's children, though living, of the provision in the will, as the court will not inquire whether they are well provided for or not: *Attorney General v. Ward*, 3 Ves. 327. So a codicil revoking a legacy in the will, in express terms, because the testator had provided the legatee with a permanent home, when in fact he had not so provided, is not inoperative because made by mistake, no other evidence of the mistake being shown. The testator must have known whether he had provided such home: *Hayes v. Hayes*, 21 N. J. Eq. 265. Again, if a testator revokes a bequest to his daughter by a codicil, giving as a reason therefor that he had, since the execution of his will, made a gift and loan to her husband, such codicil will not be set aside on the ground that the transaction was a sale, and not a gift, and that no loan was made, when the facts were peculiarly within the knowledge of the testator, and the transaction was in effect an advancement and so regarded by him: *Mendinhall's Appeal*, 124 Pa. St. 387; 10 Am. St. Rep. 590. So, if a revocation is made dependent upon information received by the testator, or upon his belief or opinion, the act will be held valid, notwithstanding he may have been misinformed, or under a misapprehension. But unsound advice will not avoid a revocation where the revocation is not put upon the soundness of the advice, but is made because of the advice given. Thus, where legacies were revoked because the testatrix was advised that they would be liable to confiscation by the confederate government, and the revocation was made "in consequence of the state of the country," and no fact is stated upon the supposition of whose existence the testatrix proceeded in making the revocation, and it is not shown that the testatrix was under any mistake, the court will not go outside of the will, and ascertain from parol evidence what were the particular views and opinions of the testatrix, so as to lay the foundation for a case of mistake. To do so would violate fundamental principles, as the case is different from one in which the fact that the testator assumed to exist, and the assumed existence of which induced the revocation, appear on the face of the will: *Skipwith v. Cabell*, 19 Gratt. 758, 785. This case is a strong authority for the position that the mistake which induces the revocation must, to be available, appear on the face of the will: See, also, *Gifford v. Dyer*, 2 R. I. 99; 57 Am. Dec. 708. It is also held in *Dunham v. Averill*, 45 Conn. 61; 29 Am. Rep. 642, that the courts will not set aside a revocation of a devise or legacy, based upon the assumption of a fact which proves not to exist, where it does not appear by the will itself that it was made under the belief of the existence of such fact.

PAROL EVIDENCE.—As to whether parol evidence may be admitted to establish nonrevocation of a will by mistake, the cases are not satisfactory.

It is doubtless true that the mere physical act of destruction or cancellation is itself equivocal, and may be deprived of all revoking efficacy by explanatory evidence indicating the *animus revocandi* to be wanting; that if a testator destroys his will through inadvertence, or during a fit of insanity, or tears it up under the mistaken impression that it is invalid, or that it has been already by other means effectually revoked, it will remain in full force, notwithstanding such accidental or involuntary or mistaken act: 1 Jarman on Wills, 6th Am. ed., 153; and it follows that, if parol evidence is admissible to prove that the destruction was effected under a mistake, and consequently to prevent the revocation of the destroyed will, the contents of the destroyed or lost will may be proved by parol, if such evidence clearly shows that the contents of the second will were such as to revoke the first: 1 Jarman on Wills, 6th Am. ed., 127; *Powell v. Powell*, L. R. 1 Pro. & D. 209; *Brown v. Brown*, 8 El. & B. 876. But, where the original instrument is in existence, there are cases showing that nonrevocation cannot be established by showing mistakes not discoverable from the face of the testamentary papers: *Skipwith v. Cabell*, 19 Gratt. 758; *Dunham v. Averill*, 45 Conn. 61; 29 Am. Rep. 642; *Hayes v. Hayes*, 21 N. J. Eq. 285; and not only must the mistake be thus made apparent, but it must also appear what the will of the testator would have been except for the mistake: *Gifford v. Dyer*, 2 R. L. 99; 57 Am. Dec. 708. If two wills are dissimilar, owing to a mistake, the difference between the two will, of course, appear from the face of the papers, but it is not easy to see just how the mistake which occasions the difference may in all cases be made to appear from the face of the instruments without the aid of explanatory extrinsic evidence; and still more difficult would it be without the aid of such evidence to show what the will of the testator would have been except for the mistake.

STATE v. LEE.

[65 CONNECTICUT, 285.]

APPEAL BY STATE IN CRIMINAL CASES — GENERAL RULE. — As a general rule, the state has no right of appeal from a judgment in favor of the defendant in a criminal case, whether rendered upon a verdict of acquittal or upon the determination by the court of a question of law, unless expressly authorized by statute.

APPEAL BY STATE IN CRIMINAL CASES UNDER STATUTE AUTHORIZING IT. — Under a statute allowing an appeal, in criminal cases, to be taken by the state, with the permission of the presiding judge, "upon all questions of law arising on the trial," an appeal by the state in the nature of a motion for a new trial may be taken after a verdict of acquittal.

APPEAL—PROPER PRACTICE, WHEN TAKEN BY STATE. — The proper practice on an appeal in a criminal case, taken by the state, with the permission of the presiding judge, as authorized by statute, is to ask and secure his permission, and a formal record thereof should be made at the time of the judgment, and the accused, if in custody, should then be admitted to bail.

FORMER JEOPARDY—TWICE IN JEOPARDY ATTACHES, WHEN. — A person is not put in jeopardy twice for the same offense until both the facts and the law applicable to the facts are finally determined. Putting in jeop-

ardly means a jeopardy which is real and has continued through every stage of one prosecution, as fixed by existing laws relating to procedure, and while such prosecution remains, as where an authorized appeal is taken by the state, the one jeopardy has not been exhausted.

APPEAL BY STATE—VALIDITY OF STATUTE AUTHORIZING.—A statute authorizing an appeal to be taken by the state in criminal cases simply regulates the procedure by which the final determination of the questions involved in one prosecution may be had in accordance with law, is in full accord with the principle that no man shall twice be put in jeopardy for the same offense, and is therefore valid.

HOMICIDE—APPEAL BY STATE—REVERSIBLE ERROR IN EXCLUSION OF EVIDENCE.—If, upon the trial of a physician for causing the death of a woman by a lacerated wound in the uterus, made by some instrument used in the production of an abortion shortly prior to her death, the accused offers evidence tending to prove that the wound was inflicted by the woman herself, the state, in rebuttal, may inquire of a medical and surgical expert who had performed an autopsy on the body of the deceased, examined the uterus, and described its condition to the jury, whether, in his opinion, from his examination of the body and uterus, the wound described was self-inflicted, and the exclusion of such evidence is an error which entitles the state to a new trial.

INDICTMENT for murder in the second degree. There was a verdict and judgment of not guilty, and the state appealed.

Levi N. Blydenburgh, for the appellant.

Jacob P. Goodhart and Arthur C. Graves, for the appellees.

²⁷¹ **HAMERSLEY, J.** The defendant was indicted for the crime of murder in the second degree, was acquitted upon trial to the jury, and this is an appeal by the state, in the nature of a motion for a new trial, on the ground of alleged errors in the charge of the court and in the admission and exclusion of evidence.

The defendant makes a preliminary claim that the state has, under our law, no right of appeal to this court when the accused has been acquitted by a jury, and bases his claim upon two propositions: 1. A law authorizing procedure for the correction of errors in instructions to the jury, or in the admission and exclusion of evidence made by the court in a criminal trial, and followed by an acquittal of the accused, is in violation of the fundamental principle of the common law, which declares that "no person shall be subject for the same offense to be twice put in jeopardy"; 2. Section 1637 of the General Statutes does not in express terms authorize an appeal when the accused has been tried and acquitted by the jury.

1. "That no one shall be put in jeopardy twice for the same

offense is a universal maxim thought worthy to be incorporated, to a certain extent, into the constitution of the United States; and that an acquittal or conviction by a court having jurisdiction, on a sufficient indictment or information, is in all cases whatsoever a bar is equally clear": *State v. Benham*, 7 Conn. 418. This maxim is based upon a principle common to all systems of jurisprudence, i. e., the finality of judicial proceedings: Broom's Legal Maxims, 312. If questions once tried and determined could be again agitated at the option of the parties, one main object of any administration of justice would be defeated. The function of courts is to settle controversies according to law. The object of settlement is secured by the principle of finality of judgments. *Finis finem litibus imponit*. The object of settlement in accordance with law, ²⁷² the same in all cases, is secured by the correction of errors in the application of law in each case. Neither object is inconsistent with the other. The end is not reached, the cause is not finished, until both the facts and the law applicable to the facts are finally determined. The principle of finality is essential; but not more essential than the principle of justice. A final settlement is not more vital than a right settlement. The adjustment of these principles in the establishment of procedure by means of which the final judgment shall not only settle the controversy but settle it in accordance with law is determined in each jurisdiction by considerations of public policy and not by fundamental principles of jurisprudence. The principle, *nemo bis vexare pro eadem causa*, gives protection against a second judicial proceeding, and, in the event of such proceeding, gives to a party the right, in criminal cases, to the plea of *autrefois acquit* or *autrefois convict*, and in civil cases to the plea of *res judicata*; but the principle does not control the question whether the judgment pleaded in bar is in fact a legal and final judgment, and has no legitimate relation to the question whether existing procedure provides for correction of errors occurring in the trial.

This distinction has been lost sight of in some cases which discuss the application of common-law rules or statutory provisions to the correction of errors in criminal causes; and owing to the confusion of principle with practice, a theory seems to have at times prevailed which assumes that the punishment of crime is a sort of invasion of natural right, and that a person accused of crime should be exempt from

established rules of law binding on all other citizens; and therefore a procedure which proves incompetent to the correct application of legal principles in criminal trials can be changed like any other rule of practice when the change may tend to protect an accused from unjust punishment, but becomes a fundamental principle of jurisprudence that cannot be altered when the change may tend to secure his just punishment. It needs no argument to dispel such an illusion, or to demonstrate that the natural rights of the individual as well as the interests of public order are best served, and the essential principles of jurisprudence are most accurately followed when the proceedings in a criminal prosecution include such protection against injustice that the final disposition of the cause will not only settle the controversy, but settle it in accordance with law.

Judicious legislation for securing a full, fair, and legal trial of each criminal cause is not in derogation, but in protection, of individual right, and is in full accord with the principle that no man shall twice be put in jeopardy for the same offense.

That maxim, as we have seen, is based on the truth that a judicial proceeding lawfully carried on to its conclusion by a final judgment puts the seal of finality on the controversies determined by that judgment, and is not based on a theory that a person accused of crime has any natural right of exemption from those regulations of a judicial proceeding which the state deems necessary to make sure that the conduct and final result of that proceeding shall be in accordance with law. And so the putting in jeopardy means a jeopardy which is real and has continued through every stage of one prosecution, as fixed by existing laws relating to procedure; while such prosecution remains undetermined, the one jeopardy has not been exhausted. The jeopardy is not exhausted by an indictment followed by a nolle, nor in this state by a nolle after the trial has commenced when the prisoner does not claim a verdict: 2 Swift's Digest, 402; *State v. Garvey*, 42 Conn. 233; nor by the discharge of a jury in case of the sickness of a judge: *Nugent v. State*, 4 Stew. & P. 72; 24 Am. Dec. 746; the sickness of a juror: *Rex v. Scalbert*, 2 Leach, 620; *Rex v. Edwards*, 3 Camp. 207; *Commonwealth v. Merrill*, Thach. C. C. 1; the sickness of the prisoner: *Rex v. Stevenson*, 2 Leach, 546; *Rex v. Streek*, 2 Car. & P. 413; *State v. McKee*, 1 Bail. 651; 21 Am. Dec. 499; nor in case of the expiration of the

term of court during the progress of the trial: *Regina v. Newton*, 3 Cox C. C. 489; *State v. McLemore*, 2 Hill (S. C.), 680; nor in case of the inability of the jury to agree: *State v. Woodruff*, 2 Day, 504; 2 Am. Dec. 122; *Regina v.* ²⁷⁴ *Charlesworth*, 1 Best & S. 460; *Regina v. Davison*, 2 Fost. & F. 252; *People v. Olcott*, 2 Johns. Cas. 301; 1 Am. Dec. 168; *Commonwealth v. Bowden*, 9 Mass. 494; *Hoffman v. State*, 20 Md. 425; *Hurley v. State*, 6 Ohio, 399; *United States v. Perez*, 9 Wheat. 579; nor in case of influence exerted on the jury against the prosecution by an officer in charge of the jury: *State v. Wiseman*, 68 N. C. 203; nor in case of misconduct or incapacity of a juror: *United States v. Morris*, 1 Curt. C. C. 23; *People v. Damon*, 13 Wend. 351; *Stone v. People*, 2 Scam. 326; *Dilworth v. Commonwealth*, 12 Gratt. 689; 65 Am. Dec. 264; *Regina v. Ward*, 10 Cox C. C. 573; even after the case has been committed to the jury: *State v. Tuller*, 34 Conn. 294; nor when the prisoner offers to waive the disqualification of a juror who has expressed an opinion against him, and protests against the discharge of the jury: *State v. Allen*, 46 Conn. 531; nor is it exhausted by an acquittal when the verdict has been obtained through the fraud of the accused: 1 Chitty's Criminal Law, 657; *State v. Reed*, 26 Conn. 208.

The great significance of these cases lies in their illustration of the inherent power and duty of the court to see that the trial is conducted according to law, even if the impaneling of new juries and new trials are involved. The same underlying principle of justice which demands a retrial because a juror is legally disqualified calls for a retrial when illegal evidence has been admitted, or legal evidence excluded; in either case the trial is tainted and should not support a valid final judgment. Before the verdict is returned the trial court of its own motion can award a retrial; after the verdict is returned, a retrial is awarded only on further proceedings in the cause, which may or may not be authorized by the law regulating procedure. If such further proceedings are not authorized by law, the cause is ended, and the one jeopardy of the accused is exhausted; but this results not from any special sanctity attributable to a verdict tainted with illegality, but solely to the fact that the state, influenced by considerations of public policy, has decided to make such verdict, whether just or unjust, the end of that controversy. But when the state sees fit to provide ²⁷⁵ that the cause shall not necessarily be so ended, but that further

proceedings on motion of the accused may be had, an unjust verdict resumes its normal position of a legal nullity; and when the state provides for like proceedings on the motion of the prosecutor, a similar result must follow.

The rule as formulated by this court in *State v. Garvey*, 42 Conn. 233, rests upon solid foundations: "The principle which protects an individual from the jeopardy involved in a second trial for the same offense is well established and fully recognized. The question, however, as to what constitutes a trial depends upon the course of procedure of the particular jurisdiction in which it is had, and the construction of the courts there with respect to it."

The power and duty of the state to extend to criminal trials those methods of procedure which are found essential to that pure and impartial administration of justice to which every one, both as an individual and as a member of the body politic when the state itself appears as a party to the trial, is entitled by virtue of a principle which lies at the root of our jurisprudence, would never have been questioned were it not that the dicta of judges as to matters of practice became confused with statements of the legal principle that insists on the conclusiveness of a valid and final judgment.

The rule that a criminal cause once submitted to a jury cannot be submitted to another jury may be traced to a dictum of Coke; an able and interesting discussion of its authority will be found in an opinion of Judge Kent, given in full in a note to *State v. Woodruff*, 2 Day, 507, 2 Am. Dec. 122. That dictum was at most a statement of existing procedure, and as such has been repeatedly discredited in a large number of cases; and a rule of procedure in criminal law advanced during the seventeenth century cannot be held to dominate the settled principles of jurisprudence in the nineteenth. The administration of criminal law, as it formerly prevailed in England, has justly been regarded, in some respects, as an object lesson of barbaric codes. Its continuance, theoretically unchanged during the wonderful evolution of a ²⁷⁶ system of civil liberty and sound jurisprudence, is a marvel; not inexplicable, perhaps, but none the less strange. Judges were compelled to administer a criminal code in many ways sharply antagonistic to the system of civil liberty and justice which legislature and courts were slowly developing. It is not surprising that under such limita-

tions they should have been acute in stretching the technics to modify the harshness of the law, and should have occasionally given utterance to dicta, praiseworthy in view of existing conditions, but unsound when applied to conditions such as now happily prevail. General rules enunciated under such circumstances, and based on such dicta, are not authority for the fundamental principles of the common law of this state. At most they are general statements touching procedure, which must yield to the necessities of justice. The uncertainty of such rules was felt, and the principle to be followed in applying them was clearly stated by Sir Michael Foster as early as 1746: "Upon the whole my opinion is that all general rules touching the administration of justice must be so understood as to be made consistent with the fundamental principles of justice; and consequently all cases where a strict adherence would clash with those fundamental principles are to be considered as so many exceptions to it": *Kinloch's case*, Foster's Criminal Law, 16.

The defendant lays great stress upon the claim that at English common law the procedure did not permit a writ of error after acquittal. We incline to think that it cannot be fairly assumed from a comparison of all the early authorities that such writ of error was forbidden. A difficulty in reaching a certain conclusion arises from the fact that originally a writ of error in criminal causes was a writ of grace, and not of right, and that bills of exceptions were not allowed in criminal trials, so that neither the prosecutor nor the accused could place on record the grounds on which a writ of error would ordinarily be sought. But the common practice of reserving questions of law arising in the trial of a cause for the advice of the court of king's bench demonstrates the recognition of the principle that the final judgment ²⁷⁷ in a criminal cause should not be rendered until opportunity has been given for the correction of errors which, if not corrected, would make that judgment unjust. To what extent such corrections should be allowed, and whether they shall be accomplished by reservation before judgment, or by proceeding in error after judgment, is a matter of practice to be settled on considerations of public policy.

The United States supreme court, in an opinion delivered by Justice Gray, has collated the authorities, English and American, on the common-law practice, and reached conclusions which will doubtless be generally accepted, i. e., the

right of the crown at common law to a writ of error, after acquittal, is not wholly free from doubt; the practice in a few of our states recognizes the right of the prosecutor to proceedings in error; in a great majority of the states the courts hold "that the state has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment is rendered upon a verdict of acquittal, or upon the determination by the court of a question of law": *United States v. Sanges*, 144 U. S. 310.

It is, however, immaterial to the defendant what the practice at common law may have been. The gist of his contention is that, assuming the practice to have been as he claims, such failure of the ancient common-law procedure to provide for the correction of errors in a criminal trial was based on a settled and universal principle of jurisprudence incorporated into our own common law, and binding upon our courts, if not upon our legislature. For reasons already stated we deem such contention to be utterly unsound. Regulations for enforcing the correct application of law in all criminal trials are essential to the administration of justice, and a statute prescribing procedure for that purpose and requiring the verdict of the jury to be reached in accordance with the settled principles of law and justice before it can support a valid judgment is not in derogation of any fundamental doctrine of our common law, nor inconsistent with the principle ²⁷⁸ that enforces the conclusiveness of a valid and final judgment.

In this state there was at common law no practice authorizing a motion for new trial after acquittal: *State v. Brown*, 16 Conn. 54. There was no practice authorizing such motion after the verdict of a jury in any case, civil or criminal. Statutes enacted in 1702 and 1762 were construed as preventing courts from setting aside, on motion, any verdict either as against law or evidence. In 1807, acting under authority of a statute authorizing the establishment of rules of practice, this construction was modified and provision made for granting new trials, on motion, for errors in law: *Rules of Practice*, 3 Day, 28, 29; and in 1816 this court substantially overruled the old construction, and held that the superior court might grant motions for new trial and reserve the questions raised by such motions for advice of this court: *Bartholomew v. Clark*, 1 Conn. 472. This decision was confirmed and

its effect somewhat modified by the Revision of 1821, page 54. Such motion and review, however, was not a matter of right. In 1830 the right to a motion for a new trial, reviewable by this court, was given by statute to parties in all civil actions aggrieved by the decisions of the court on questions of law arising in the trial: Pub. Acts, 1822-35, p. 288; and the same year another statute authorized a motion for new trial by the defendant in criminal causes, in the same manner as in civil actions: Pub. Acts, 1822-35, p. 283. And in 1886 the legislature wisely extended this authority, with the permission of the trial judge, to the state.

2. The defendant urges that the act of 1886, incorporated into the General Statutes as section 1637, only authorizes an appeal by the state after judgment by the court, without the intervention of a jury, and does not authorize an appeal in the nature of a motion for a new trial after acquittal.

There is no ground for such a construction. The language of the statute is as explicit as its meaning is plain. In the Revision of 1875, page 448, the title relating to civil actions provided that "upon the trial of all matters of fact . . . whether to court or jury, if either party shall think himself aggrieved by the decision of the court upon any question of law arising in such trial" he may make a motion for a new trial, stating therein the questions of law so decided, and the court shall grant a rule to show cause, and reserve said motion and rule for the advice of the supreme court of errors. The title relating to crimes and criminal prosecutions provided that "any defendant in a criminal prosecution, aggrieved by any decision of the superior court upon the trial thereof, . . . may be relieved by motion for new trial . . . in the same manner and with the same effect as in civil actions": Revision of 1875, p. 539. The act of 1882 provided that "all questions of law arising on the trial of any cause . . . which may now by law be carried to . . . the supreme court of errors for revision by motion for a new trial . . . shall hereafter be removed to such higher court by an appeal from the judgment of the court . . . and no motions for a new trial shall hereafter be allowed": Pub. Acts, 1882, p. 144. The act of 1886 provided that "appeals from the rulings and decisions of the superior court upon all questions of law arising on the trial of criminal causes may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the

same effect as if made by the accused": Pub. Acts, 1886, p. 560. These several provisions of law were incorporated without substantial change in the General Statutes of 1888, and in express terms provide for a new trial upon motion of the state, as well as upon motion of the accused: *State v. Clerkin*, 58 Conn. 98. The preliminary claim of the defendant cannot be sustained, and the appeal is properly before us.

The fifth assignment of error is as follows: "The court erred in excluding the following question asked by Mr. Doolittle of the same witness [Moses C. White]: 'You examined the uterus in this case under the condition you testified to. You made the post-mortem and examined the uterus in this case, and have described its condition. Now, I wish to ask you whether from your examination of the body and the ~~220~~ uterus, in your opinion the wounds which you have described upon the wall of the uterus were self-inflicted.'"

The finding details in full the facts in the case claimed to have been proved by the state and by the defense. The victim of the crime charged was a woman, whose death was caused by a lacerated wound in the uterus, made by some instrument used in the production of an abortion shortly prior to her death. The defendant was a practicing physician whom the deceased consulted for the first time when she decided on suffering an abortion. The testimony introduced in chief by the state was sufficient to justify the jury, if they believed the witnesses, in drawing an inference of the defendant's guilt. The testimony introduced by the defendant consisted mainly in contradictions of the state's witnesses; the most important contradiction being that of the accused himself, who denied having performed any operation upon the deceased, and stated that in attending the deceased during her last illness caused by the abortion and superintending her delivery of a dead foetus and after birth, he acted only as an honest medical practitioner would act when called to attend a woman suffering from such injuries. He said the injuries were inflicted by the deceased herself, and offered testimony claimed as tending to show that she was familiar with the mode of producing abortion by mechanical means, and also testimony that the deceased stated she had inflicted the injury herself and had made this statement subsequent to her dying declaration testified to by the state's witnesses in which she charged the defendant with having produced the abortion. Upon rebuttal the state called the witness

Moses C. White, a practicing physician and medical examiner for the county, who had, as such public officer, performed an autopsy on the body of the deceased. Dr. White had been previously examined by the state and cross-examined by the defense, as a medical expert. It is patent that under these circumstances the opinion of Dr. White as a medical and surgical expert, upon the question whether the wound he had examined and described to the jury was so situated and of such a nature as to render its self-infliction ²⁸¹ impracticable, was admissible evidence. It is true that a wound may be so situated that the practicability of self-infliction is an inference which all men are competent to draw, requiring no peculiar knowledge or experience, and therefore not a proper subject of expert testimony. But to draw such an inference from this particular wound on the interior surface of the womb of the deceased plainly required peculiar knowledge and experience not common to the world, and therefore the opinion of an expert founded on such knowledge and experience is admissible: *Taylor v. Town of Monroe*, 43 Conn. 44; Wharton's Criminal Evidence, 403. The importance of the excluded testimony is no less clear. The testimony in the case, as appears from the record, was of such a nature that the question of the defendant's guilt might have wholly turned on the disputed fact of self-infliction of the wound. The defendant himself relied on the possibility of that fact existing as a principal hypothesis consistent with the evidence and his own innocence. The evidence excluded was relevant to that fact; justice required the admission of the evidence; what weight might have been given to it cannot be known, but it well may be that the opinion of Dr. White would have convinced the jury that the wound was not self-inflicted, and that there remained no reasonable hypothesis consistent with the evidence and the innocence of the prisoner. The exclusion of legal evidence which the court can see might, if admitted, have justly changed the result, is an error which destroys the judicial value of the verdict, and demands a new trial.

It is not necessary to comment in detail upon the other errors assigned. Whether such as are well taken might, if standing by themselves, furnish sufficient ground for a new trial in this case is immaterial; there is no need for strengthening the conclusion that the course of trial and verdict of the jury was not in accordance with law.

The record in this case is faulty in some respects, to which attention should be called. The appeal contains four or five pages of printed matter called "State's claim as to errors in the charge of the court, ³⁸² and exceptions thereto," consisting mainly of argumentative comments on the charge of the court. This is not that distinct statement of the special errors complained of which the statute requires. A similar fault appears in the appeal in *State v. Smith*, 65 Conn. 283, tried at this term; and a much more flagrant instance occurred at a recent term. Such practice cannot be permitted.

The permission of the presiding judge allowing the state to take this appeal does not appear in the record. It did not appear in the record in *State v. Clerkin*, 58 Conn. 98, although in that case the fact that the permission was granted at the time of the judgment appealed from was known to this court. We think the authority of *Reboul v. Chalker*, 27 Conn. 128, requires us to treat the finding of facts by the presiding judge, for the purpose of appeal, as sufficient evidence that the necessary permission was granted; but we do not think the formal permission is properly omitted from the record. Without passing on questions suggested in argument, but which cannot be decided on this appeal, we think, as a matter of practice certainly, that in all appeals under section 1637 the permission of the presiding judge should be asked and granted, and a formal record thereof made at the time of the judgment; and that the accused, if in custody, should then be admitted to bail.

There is error in the judgment of the superior court, and a new trial is granted.

In this opinion the other judges concurred.

JEOPARDY—APPEAL BY THE STATE AFTER ACQUITTAL.—This case, in its view of former jeopardy, stands out in bold relief against the commonly understood meaning of what constitutes once in jeopardy. If a person tried for a crime is not put "in jeopardy" until the case has been tried and finally determined on appeal, the question as to whether the prisoner had once been in jeopardy would be of little or no practical consequence, because the judgment of the appellate court either way would forever end the matter. Such a judgment would conclude all parties and every question connected with the case, and we conceive that the danger or jeopardy against which the law intends to shield the accused commences long before the final determination on appeal. Just when a person on trial for a crime is first put in jeopardy within the meaning of the constitutional guaranty is a question upon which there has been some diversity of judicial opinion. One view is that the jeopardy begins only after verdict, but the better one is that, when

the jury being full is sworn, and added to the other branches of the court, and all the preliminary things of record are ready for the trial, the prisoner has reached the jeopardy from the repetition of which the constitutional rule protects him. But, whatever differences of opinion may exist as to this, all the authorities are agreed that no jeopardy attaches until the jury have been impaneled and sworn: See monographic note to *State v. McKee*, 21 Am. Dec. 505, 507, on what is "in jeopardy." A defendant, therefore, is placed in apparent jeopardy when he is placed on trial before a competent court and a jury impaneled and sworn. "His jeopardy is real, unless it shall subsequently appear that a verdict could never have been rendered, by reason of the death or illness of the judge or a jurymen, or that after due deliberation the jury could not agree, or by reason of some other like overruling necessity which compels their discharge without the consent of the defendant": Notes to *State v. McKee*, 21 Am. Dec. 505; *McDonald v. State*, 24 Am. St. Rep. 742. The trial to constitute jeopardy must, of course, be upon a valid indictment. An arraignment on a void indictment is no jeopardy, and an acquittal thereon is no bar: Note to *McGinnis v. State*, 49 Am. Dec. 705. Jeopardy will not attach on the bringing in of a verdict of acquittal or conviction on an insufficient indictment until a judgment has been entered thereon: *Harp v. State*, 59 Ark. 113. The fifth amendment to the constitution of the United States and the state constitutions provide that no person shall be twice put in jeopardy for the same offense, and it is generally understood that when an accused has been once placed on trial upon a valid indictment or information before a legal jury, and in a court of competent jurisdiction, he has been placed in jeopardy, and cannot again be tried for the same offense, unless the jury was prevented from rendering a verdict by some legal necessity: *People v. Smalling*, 94 Cal. 112. And, if jeopardy has attached, the defendant cannot be deprived of the benefit of such jeopardy by the refusal of the court to proceed to render judgment, and its dismissal of the charge, even though the court is aware that by reason of an error of law committed on the trial, or by reason of the inefficiency of the evidence to support the charge, a mistrial will be the necessary result: *People v. Ny Sam Chung*, 94 Cal. 304; 28 Am. St. Rep. 129.

The law almost universally prevalent is that a verdict of acquittal in a criminal case is final and conclusive, and that there can be no new trial of a criminal prosecution after an acquittal in it: *People v. Corning*, 2 N. Y. 9; 49 Am. Dec. 364, and note, showing that, by the just interpretation of that provision of the statute which gives to the people the right of appeal in criminal cases, it must be confined to those cases in which errors in the proceedings may occur before legal jeopardy has attached to the accused. The law that no appeal can be taken by the people in a criminal case has been changed by statute in some of the states: Note to *People v. Corning*, 49 Am. Dec. 368; monographic note to *State v. Solomons*, 27 Am. Dec. 478, on whether a verdict of acquittal can be set aside; but, generally speaking, such statutes do not authorize a judgment of acquittal to be stayed, reversed, or otherwise affected by the state's appeal. Such an appeal seems to be designed merely for the purpose of correcting errors prejudicial to the due and uniform administration of criminal law—to determine the law for future guidance. It seems, also, that questions of law only are to be reviewed on the appeal, and that the state cannot appeal where the question is one of fact; and it is quite clear that, where there is a provision in the constitution of a state that no person shall, after acquittal, be again tried

for the same offense, a statute giving the prosecution a right of appeal after acquittal on a valid indictment or information is utterly void: See monographic note to *State v. Solomons*, 27 Am. Dec. 478, 479. It seems clear, in the light of all authority on the subject, that, in the absence of an express provision of the statute authorizing it, no appeal ought to be allowed on the part of the state, when the accused has been tried and acquitted, except for the purpose of future guidance as to questions of law. In the absence of statute, a verdict of acquittal is final, whether it be due to a misdirection of the judge on a question of law, a mistake of the jury, their refusal to obey the instructions of the court, erroneous instructions, disregard of the evidence, or any other like cause. It can never afterward, on the application of the prosecutor, in any form of proceeding, be set aside and a new trial granted on any ground except, possibly, that of fraud: Note to *State v. Solomons*, 27 Am. Dec. 472, 474.

It is true that the fifth and sixth amendments to the constitution of the United States, relating to criminal prosecutions, were not designed as limits upon the state governments in reference to their own citizens, but exclusively as restrictions upon the federal power: *Twitchell v. Commonwealth*, 7 Wall. 321; yet the practice in the federal courts, so far as it concerns putting an accused person in jeopardy more than once for the same offense, in violation of the fifth amendment to that constitution, is practically very much like that in the state courts, and the discharge of a jury from giving any verdict, whenever, in the opinion of the court, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated, and a trial by another jury, does not put the defendant twice in jeopardy for the same offense within the meaning of the fifth amendment: *Thompson v. United States*, 155 U. S. 271.

WITNESSES.—A PHYSICIAN may give his opinion of the cause of decedent's death, after having made a post-mortem examination of the body, on the trial of an indictment for murder caused by an attempt to procure an abortion: *State v. Smith*, 32 Me. 369; 54 Am. Dec. 578. He may express an opinion as an expert touching the probable effect of wounds such as other witnesses have described, with reference to their adequacy and tendency to produce death, though he has never seen nor examined the wounds himself: *Von Pollnitz v. State*, 92 Ga. 18; 44 Am. St. Rep. 72.

PAYNE'S APPEAL.

[65 CONNECTICUT, 297.]

SERVICES OR MATERIALS FURNISHED AS A FREE GIFT—ACTION FOR.—If two persons are in the habit of furnishing materials or service to each other under the mutual understanding that such reciprocal favors are a free gift, no cause of action can exist in favor of one against the other for the value of such services or materials.

SERVICES AND EXPENDITURES—ACTION FOR—RELATION OF HUSBAND AND WIFE.—A man living with a woman in the relation of husband and wife, whether legally married to her or not, does not have a right of action against the woman for the value of shelter, food, and clothing given her during the continuance of that relation, unless by virtue of some express agreement, as such relation implies a free interchange of support and service.

EXECUTORS AND ADMINISTRATORS—CLAIM FOR EXPENDITURES DURING EXISTENCE OF RELATION AS HUSBAND AND WIFE.—A man living with a woman in the relation of husband and wife, whether legally married to her or not, has no claim on the woman's estate, after her death, for the value of shelter, food, and clothing given her during the continuance of that relation, in the absence of any express agreement to that effect.

ACTIONS—DISTINCTION BETWEEN CAUSE OF AND AGGRAVATION OF DAMAGES.—The distinction between a personal injury as a cause of action, and the incidental aggravation of the damage following that injury as a cause of action, independently of the injury, should not be overlooked.

ABATEMENT—RELATION OF HUSBAND AND WIFE—WHEN ACTION ARISING OUT OF PERSONAL WRONG DOES NOT SURVIVE.—If a woman, having a lawful husband living, represents to another man, in ignorance of this fact, that she is single, and thereby induces him to assume and maintain toward her the status of husband, the deception is an injury to him complete with the consummation of the void marriage, and gives him a right of action against her for any pecuniary loss sustained by the fraud. His expenditures for her shelter, food, and clothing simply aggravate the damages caused by the deceit, and the cause of action, being founded wholly on a private wrong, does not survive against her legal representatives, where she acquired no property by her tort, though she did derive a benefit.

ABATEMENT—SURVIVAL OF ACTION ARISING OUT OF PERSONAL WRONG.—A right of action arising out of a personal injury does not survive against the wrongdoer's legal representatives, unless he, by the wrongful act, acquired specific property, by which, or by the proceeds of which, the assets in the hands of such representatives have been increased. That benefit resulted to him, or that he was saved expense, by which his estate has been increased, is not enough.

APPEAL from the doings of commissioners upon the estate of Lizzie Ferguson, deceased.

Eugene C. Dempsey, for the appellant.

William H. Williams, for the appellee.

399 **HAMERSLEY, J.** Harrison Ferguson and Lizzie Seymour intermarried October 27, 1891, and cohabited as man and wife until the death of the latter, April 26, 1893. At the time of the marriage and during its continuance Lizzie Seymour had a lawful husband living; she induced Ferguson to marry her by falsely representing to him that she was a single woman, and thereafter and until her death caused him to believe that he was her lawful husband; during this cohabitation, he, relying on the said representations, furnished her with board, lodging, medical attendance, and other necessities, of the value, in the whole, of seven hundred and forty-nine dollars and fifty-one cents. Upon the death of Lizzie Seymour the estate was represented by the administrator to be insolvent, and commissioners thereon were appointed.

Ferguson presented to the commissioners a claim against the estate, based on the above facts. The commissioners allowed on this claim the sum of four hundred and twenty-nine dollars and seventy-seven cents. Robert Payne, a brother, heir at law, and creditor of the intestate, appealed to the superior court from the doings of the commissioners ⁴⁰⁰ in allowing the claim. In the superior court Ferguson filed a statement of claims, setting out in detail the above facts, and accompanied by a bill of particulars. To this statement of claims Payne demurred. The court sustained the demurrer, and gave judgment disallowing the claim. This is an appeal by Ferguson from that judgment, and the only reason assigned is, that the court erred in sustaining the demurrer.

The presentation of the claim is, in effect, an action by Ferguson against the administrator of Lizzie Seymour's estate; the appellant in error represents the plaintiff, and the appellee in error the defendant; the judgment sustaining the demurrer is a judgment that the plaintiff, on the facts recited, has no cause of action against the defendant.

It is claimed on behalf of the plaintiff that these facts show he had a cause of action against Lizzie Seymour during her life; that such cause of action was essentially and in substance for a breach of contract obligation implied by law from the facts, and therefore survived against her administrator. It is claimed on behalf of the defendant that the plaintiff, for the special redress sought in the claim, had no cause of action against Lizzie Seymour during her life; or, if such cause of action existed, it was for a private wrong or injury to the person, and therefore does not survive against the administrator.

In discussing whether the plaintiff had a cause of action against the intestate during her life for the special redress now sought, the determination of the nature of such cause of action, i. e., whether founded substantially on a private wrong, or on some contract or quasi contract obligation, is necessarily involved. The precise question therefore presented is this: Does a man living with a woman in the relation of husband and wife have, under any circumstances, unless by virtue of some express agreement, a right of action against the woman for the value of shelter, food, and clothing given her during the continuance of that relation?

The statement of the question would seem to compel an answer in the negative. The relation of husband and wife

401 involves a mutual understanding that the man shall furnish support and the woman shall furnish services, not for hire, but as a free gift; all consideration of the value of such support or service, whether absolute or comparative, is excluded by the fact of this relation. It is a settled principle of law that where two persons are in the habit of furnishing materials or service to each other under the mutual understanding that such reciprocal favors are a free gift, no cause of action can exist in favor of one against the other for the value of such materials or service: *Potter v. Carpenter*, 76 N. Y. 157.

In this case no possible doubt could arise except for the confusion caused by the peculiar nature of the legal status of husband and wife. The relation of husband and wife, i. e., the cohabitation as man and wife, is a question of fact determined by the will of the parties; the status of husband and wife is a question of law determined by the absolute mandate of the state. The status may exist in law without the relation in fact; and the relation may exist at the will of the parties independently of the legal status, and is then unlawful so far and only so far as illicit intercourse is involved. The existence in fact of that relation, on general principles of law, expressly negatives any cause of action in one against the other for the value of the reciprocal gifts of support and service, whether the relation as carried on is legal or illegal. It may be knowingly illegal on the part of both, or innocently illegal on the part of both, or innocently illegal on the part of one only; but in either case the legal effect of the reciprocal gifts of one to the other is determined by the fact of the relation and is the same; except that when the relation is coincident with the legal status of husband and wife, such gifts rest not only on a mutual understanding proved by the fact of the relation, but also on the duty involved in the existence of the legal status: *Robbins v. Potter*, 11 Allen, 588.

But it is said that in this case the woman has deceived the man into falsely assuming the legal status of husband, and so has done him a great injury. True. And just here 402 comes in the confusion that has led some courts and text-writers into overlooking the distinction between a personal injury as a cause of action and the incidental aggravation of the damage following that injury as a cause of action independently of the injury.

What is this wrong? The overt act is a deception, a false statement. A false statement made by one and believed by another is not per se, a legal injury and actionable. If the false statement is the direct means of obtaining the property of another, there is a legal injury to rights of property, and the owner has an action for the property or its value, based on the fraud, and also in some cases on the implied contract to return property, or the proceeds of property, which legally or equitably belongs to another. But here the false statement as to the legal status of the woman was not the direct means of obtaining any property; it was the direct means of inducing the man to take part in the legal form of marriage. The form was a nullity. No property was or could be thereby secured. But the wrong was complete, the legal injury was inflicted, the moment this invalid marriage was consummated. The injury may continue, and subsequent events may aggravate the resulting damage, but they cannot change the nature of the wrong or alter the legal injury which is the cause of action. The legal injury is not to property, but to the person, and is of a nature entirely sui generis, owing to the peculiar nature of the legal status of husband and wife, and the far reaching and complex personal interests that depend on the maintenance and due observance of that legal status. The family is the foundation of society; the status of husband and wife is fixed and regulated by the state by virtue of its inherent right to settle the foundations of social order. Indeed the family and the obligations and privileges pertaining to it reach back of all state regulations; the family develops the state and is coincident with the birth of man. It is evident that the direct injury resulting from inducing a man to falsely assume the status of husband is one absolutely unique and far reaching in resulting damage. It may involve establishing a family ⁴⁰³ that is no family, but the home of shame; the raising children not to be heirs but bastards; the surrender of the devotion of a wife for the services of a harlot; the loss for a longer or shorter time, perhaps the total loss, of all the privileges, happiness, respect, and honor that follow the maintenance of a lawful home; such an injury is not analogous to any other injury known to the law. This supreme injury the plaintiff claims to have suffered, and, because he has suffered it, claims the right to bring an action, not to recover the direct resulting damage, but to recover the value of food and lodg-

ing he has given the woman who inflicted the injury. In other words, the claim is, that by reason of the primary wrong, the plaintiff for a year or more exchanged presents with the woman, that this exchange was not on the whole a remunerative transaction, although it might have resulted to his benefit; and therefore the alleged loss can be treated not merely as an incident possible to be considered in aggravation of damages for the wrong, but as a substantive injury directly resulting from the primary wrong, so as to constitute an independent and separate cause of action. The question might be refined by claiming that each mouthful of food or each night's shelter furnished was obtained by means of the woman's false statement as to her legal status; but this is a mere quibble and is palpably untrue. Plainly the actual condition is this—a man and woman live together on the distinct mutual understanding that the man shall furnish materials and the woman shall furnish services; the relative value of one to the other is not considered; the balance of gain may be on either side; in fact it proves to be on the woman's side; he is the loser and she is the gainer to the extent of such balance; the man says the woman made a false statement which he believed and by which he was induced to live with her; to be sure, this false statement had no relation to the relative value of the materials and services exchanged; it did not deceive him as to how the balance of benefit might turn out, and so as affecting that balance did not injure him, but did injure him in other ways. The damage resulting from that injury he can ⁴⁰¹ recover; but even if such damage can be enhanced by proof that the pecuniary value of the gifts he made the woman while the relation of husband and wife in fact existed exceeded the value of the gifts she made him, nevertheless, the fact remains true that such gifts were made in pursuance of a mutual understanding that no payment for them should be made by either, and therefore no implied contract of payment can be predicated of such gifts.

In this case the deception which caused the actionable injury relates to the legal status of the woman; suppose it related to her birth. She represents herself of pure white blood, when in fact she is partly of Indian or negro blood; the man claims that he would not have lived with her unless he had believed this false statement, and that his association with a half-breed has been an injury to him in many ways. Or suppose she falsely represents herself as not related to him,

when she is in fact his sister, does the fact that she has deceived him into unconscious participation in the crime of incest give him an independent cause of action for alleged loss on the exchange of materials and services which he would not have entered into had he not been so deceived? Or test the principle claimed by an application to conditions free from all complication with the marriage relation. A banker is deceived by an adventurer into believing him to be the officer and agent of a foreign bank; influenced by this deception he accepts the position of agent for the bank, holds himself out as such agent, makes contracts in the name of the bank, and when the deception is discovered has suffered a grievous loss in money and reputation. During the continuance of the relations between him and the adventurer, the supposed officer of the foreign bank, and in pursuance of a custom prevailing when such relations exist, he has made an exchange of presents with the adventurer. He finds the value of the presents sent exceeds the value of the presents received. Does the original deception as to the legal position of the adventurer, by which he was drawn into assuming a false position so disastrous to him, furnish an independent cause ⁴⁰⁵ of action for the recovery of an alleged loss on the exchange of presents?

The analogies are not complete, and herein lies the difficulty of demonstrating the principle which should control when a man, deceived into a false assumption of the status of husband, and into unconscious participation in the crimes of adultery and bigamy, and suffering the irreparable injuries involved in such deception, alleges this deception or this injury as ground for recovering an alleged balance on the exchange of gifts while living with the woman who inflicted the injury. There is no analogy to such a case. And, so far as we know, such a case has never been presented to a court. The question has been discussed in a few cases, where a woman who has been thus injured, and, shut out from all redress for the injury by the death of the man, has sought to make his estate liable for the value of her services. We believe this is the first instance where such a claim has been made by a man, and have no knowledge that such action by either man or woman was ever brought during the life of the wrongdoer. A court might be excused, when the perpetrator of such an injury has escaped punishment in life, for being acute in seeking reasons for making the estate liable

for some small fraction of the resulting damage, especially when the claim is presented by a woman whose sufferings from such an injury are liable to be so much more severe, but cannot be excused for pushing such acuteness into the region of fallacy.

The case of *Higgins v. Breen*, 9 Mo. 497, sustains the theory that a woman may recover the value of her services against the estate of a man who has deceived her into a false marriage, if on the whole they were valuable. The supreme court of Massachusetts, in an opinion which suggests the views we have indicated, upholds the opposite theory: *Cooper v. Cooper*, 147 Mass. 370; 9 Am. St. Rep. 721; *Grim v. Carr*, 31 Pa. St. 533; *Price v. Price*, 75 N. Y. 244; 31 Am. Rep. 463. But all courts agree that such action cannot be brought against the estate of the wrongdoer if the cause of action is in substance for the recovery of damages from a tortious injury to the person, ⁴⁰⁶ and cannot be brought unless the same cause of action existed against the wrongdoer while in life.

The question has never been decided in this state, and may therefore be determined wholly on principle. For the reasons stated, we think the true application of the legal principles under which rights are defined and causes of action are classified, to the confusing complication of ordinary rights with the peculiar legal status of husband and wife involved in this question, justify the following conclusions: The deception by which a married woman induces a man to falsely assume and maintain the status of her husband is an injury to the person complete with the consummation of the void marriage. Such injury gives to the man a right of action against the woman for damages resulting from such false assumption of the status of husband. A pecuniary loss sustained by having in fact lived with a woman in the relation of husband and wife may be considered in estimating the damages caused by this injury; but such loss, if it can be so recovered at all separate from all other damage, can only be recovered in an action based on the original wrong, in which the plaintiff abandons all claim to any resulting damage except this incidental loss; and therefore the substantial cause of the only action in which such loss can be separately recovered is the deception by which the plaintiff was induced to falsely assume the legal status of a husband. Such cause of action is founded wholly on a private wrong,

and under existing law cannot survive against the legal representatives of the perpetrator.

It follows from these conclusions that Ferguson had no cause of action against Lizzie Seymour during her life for the claim he now presents against her estate, unless such claim is for damages resulting from an injury to the person, and in that case the cause of action does not survive against her administrator.

The plaintiff, in support of his claim, invoked in argument the principle that, where property has been acquired by means of a tort, there may result a duty, imposed by law on the wrongdoer, of returning the property or its proceeds, which ⁴⁰⁷ duty may be enforced by an action placed on such quasi contract.

Such principle does not conflict with the substantial distinction between rights founded in tort and in contract—a distinction ordinarily of easy application. Doubts arise only where a transaction lies within that field, of necessity a shadowy one, where the essential element of the right passes from the domain of tort to that of contract. The principle invoked has been somewhat obscured by distinctions not of substance but of form, resulting from technical rules developed in the use of an arbitrary and artificial system of forms of action, now happily obsolete, and has been most frequently appealed to when a claim, as in this case, is sought to be enforced against the estate of a deceased person, and the liability of the estate depends upon the question whether the cause of action that existed against the person deceased was in substance founded in tort or in contract.

When such cases first arose an attempt was made to make the artificial form of action usually adopted, rather than the substantial cause of action, the test of a survival of the suit. In the case of *Hambly v. Trott*, 1 Cowp. 374, Lord Mansfield established the sound rule that in such cases the substance and not the form might control; but in the ardor of vindicating his position he used language and illustrations that led others to draw conclusions the decision did not justify; and Judge Swift in his Digest relies on this case in support of a broad statement of the rule: 1 Swift's Digest, 448. In *Phillips v. Homfray*, L. R. 24 Ch. Div. 439, the language of Lord Mansfield was pressed in support of the claim that when, by means of a tort, the wrongdoer benefits himself and saves the payment of money he might otherwise have paid, al-

though no specific property is acquired and added to his estate, yet a right of action for the amount of such benefit survives against the executor of the wrongdoer; but the court held that *Hambly v. Trott*, 1 Cowp. 374, did not justify such claim.

The principle involved is: In the case of a tort directly resulting in the wrongful acquisition of property, the law imposes on the wrongdoer the duty of returning that property ⁴⁰⁸ to the owner; this duty may be treated as a quasi contract, and the neglect to perform it may become a breach of such contract; in such case the damage resulting from the tort is substantially the value of the property, and the damage resulting from the breach of contract is substantially measured in the same way; and so, for determining the question of survival, the substantial cause of action may properly be treated as founded in contract, although the form of action might sound in tort. But such principle cannot apply unless property is acquired; merely deriving benefit from the tort is not sufficient; for otherwise we must hold that every tort by which the wrongdoer is benefited is also, by reason of such benefit, a quasi contract; and the field of pure tort must be restricted to such injuries as are wholly malicious or injure another without entailing any benefit whatever to the wrongdoer. To hold this involves a complete subversion of established law, already sufficiently shaken by the efforts to strain the principles defining rights to serve the exigencies growing out of artificial forms of action. A safe test, therefore, for determining the survival of an action on the ground of substantial cause of action being such quasi contract is, Did the wrongdoer acquire specific property by which, or by the proceeds of which, the assets in the hands of his executor have been increased? And so, in *Phillips v. Homfray*, L. R. 24 Ch. Div. 439, the court says: "In such cases the action, though arising out of a wrongful act, does not die with the person. The property, or the proceeds or value, which in the lifetime of the wrongdoer could have been recovered from him, can be traced after his death to his assets and recaptured by the rightful owner there." And also: "It seems to us that Lord Mansfield does no more than indicate that there is a class of cases in which assumpsit can be brought against a wrongdoer to recover the property he has taken or its proceeds or value, and that in such cases the action will survive against the executor."

Substantially the same view was stated by this court in *Mitchell v. Hotchkiss*, 48 Conn. 16; 40 Am. Rep. 146. "All private as well as public wrongs and crimes are buried with the offender. The ⁴⁰⁰ executor does not represent or stand in the place of the testator as to these, or as to any acts of malfeasance or misfeasance to the person or property of another, unless some valuable fruits of such acts have been carried into the estate." In *Jenkins v. French*, 58 N. H. 533, the court says: "The line of demarcation, separating those actions which survive from those which do not, is, that in the first the wrong complained of affects primarily and principally property and property rights, and the injuries to the person are merely incidental, while in the latter the injury complained of is to the person, and the property and rights of property affected are incidental."

There are indications in the opinion of the court, in some cases, of a theory that a tort may affect property in such manner that no action for any breach of contract or quasi contract can be maintained against the wrongdoer during his life, and yet after his death the retention by his executors of the resulting benefits of the wrong may give rise to a cause of action substantially in contract against the executor which did not exist against the testator. None of the authorities cited deal directly with such a theory, and such question is not raised in this case.

The principle the plaintiff invokes does not apply to his case; because during the life of the intestate he had no cause of action against her except for damages resulting from a private wrong; the injury he suffered was a personal injury, and if a consequential damage to his personal estate followed the injury, it was so dependent upon and inseparable from the personal injury which is the primary cause of action, that there is no right to maintain a separate action in respect of such consequential damage. *Drake v. Beckham*, 11 Mees. & W. 316; *Vittum v. Gilman*, 48 N. H. 419. The real reason and only ground in this and similar cases for the claim that the substantial cause of action is a breach of contract is to be found in the mandate of the law which says that public crimes and private wrongs shall be buried with the offender. If the law were different—if the liability of an administrator were the same as that of his intestate when ⁴¹⁰ living—no sane man would dream of maintaining that a breach of contract, express or implied, is the substantial cause of the action

by which the injured party would then recover of the administrator the damages, or any part of the damages, he suffered from the wrong committed by the intestate. This law is based on public policy; it may not be wise; it does not infrequently work hardships. But it is the law. We cannot override it; nor can we partially escape its operation by devising distinctions which, if extended to other cases, will introduce a dangerous confusion in the principles that define the nature and extent of legal rights, and if not so extended will have no foundation except the determination of the court to evade the law.

The bill of particulars contains one or two items of small amount which may raise a question of liability not met by the demurrer; but we understood such question to be withdrawn during argument, and we do not think it is properly presented by this appeal.

There is no error in the judgment of the superior court.

In this opinion the other judges concurred.

SERVICES—RELATION OF HUSBAND AND WIFE.—The law will not imply a promise of payment for services rendered under circumstances indicating that they were intended not to be paid for: *Notes to Williams v. Hutchinson*, 53 Am. Dec. 306; *Estate of Kessler*, 41 Am. St. Rep. 80. In order to recover for services voluntarily rendered, the plaintiff must affirmatively show either that an express contract for remuneration existed, or that the circumstances under which the services were rendered were such as to indicate a reasonable expectation that there would be compensation: *Diebrow v. Durand*, 54 N. J. L. 343; 33 Am. St. Rep. 678. While parties live together as husband and wife, no implied promise can arise that the one will pay for work done by the other. A woman deceived into the belief that she is married cannot sustain an action for services rendered by her as housekeeper for her supposed husband while living with him as his wife, and in ignorance that her marriage to him was void because the wife of a prior marriage was still living. If she has any remedy, it is by action for the deceit in inducing her to marry by false representations or by false promises: *Cooper v. Cooper*, 147 Mass. 370; 9 Am. St. Rep. 721.

ABATEMENT—SURVIVAL OF ACTIONS FOR TORTS.—An action for a wrong done does not survive against the representatives of the wrongdoer, if he or his estate received no benefit from the wrong: *Osborn v. Bell*, 5 Denio, 370; 49 Am. Dec. 275; note to *Hecht v. Skaggs*, 22 Am. St. Rep. 194; but, so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor chargeable: Note to *Boor v. Lowrey*, 53 Am. Rep. 529. In *Baker v. Crandall*, 78 Mo. 584, 47 Am. Rep. 128, it is held that a cause of action for deceit survives to the legal representatives of the injured party; but in *Price v. Price*, 75 N. Y. 244, 31 Am. Rep. 463, it is held that an action of damages for fraud of the defendant in inducing the plaintiff to marry and cohabit with him, by means of false and fraudulent representations that his first wife was dead, is for injury to the person, and does not survive.

STATE v. CONLON.

[65 CONNECTICUT, 478.]

CONSTITUTIONAL LAW—STATE AND FEDERAL.—The constitution of the United States is in reality a part of the constitution of every state, and must be so regarded in determining the validity of any legislative act.

CONSTITUTIONAL LAW—CONSTRUCTION—ESSENCE AND FORM.—In determining whether any law invades a right secured by constitutional enactment, the courts look at the essence as well as the form.

CONSTITUTIONAL LAW—REGULATION OF BUSINESS.—While the legislature has power to regulate business harmless in its nature, as well as that which is in its nature injurious to the public, the exercise of that power in the two cases is governed by different principles. The vital difference is that in the former all citizens have the right, and an equal right to engage, while no citizen has an absolute right to engage in the latter.

STATUTES—CONSTRUCTION.—“MAY” SHOULD BE CONSTRUED AS “SHALL,” if necessary to give effect to an act and the context will permit of such construction.

CONSTITUTIONAL LAW—EQUALITY IN RIGHTS.—No legislative act is valid that is clearly obnoxious to the principle of equality in rights guaranteed by the bill of rights.

CONSTITUTIONAL LAW.—THE RIGHTS PROTECTED by the bill of rights are those that inhere in “the great and essential principles of liberty and free government,” recognized in the course of events that resulted in our independence, and established by the adoption of our constitution.

CONSTITUTIONAL LAW—EQUALITY IS A PROTECTED RIGHT.—Equality under the law in the rights to “life, liberty, and the pursuit of happiness,” is one of the rights protected by constitutional guaranty, and “no man or set of men are entitled to exclusive public emoluments or privileges from the community.”

CONSTITUTIONAL LAW—SALES OF MERCHANDISE BY ITINERANT PEDDLERS. A statute providing that no person shall engage in any “temporary or transient business” for the sale of goods, wares, and merchandise, without obtaining a license therefor, and that the mayor of any city, the warden of any borough, and the selectmen of any town, “may issue a license to such persons as they find proper persons to engage in such business,” upon receipt of a stated fee, and affixing a punishment for its violation, is unconstitutional and void, as the legal effect of it is to authorize the local officers of each municipality to grant exclusive privileges to such persons as they please in the transaction of an ordinary lawful business, in which all have the right to engage. There is, in respect to its validity, no distinction between such a law and one authorizing such privileges to be granted by subordinate officers in the exercise of a mere arbitrary discretion wholly uncontrolled by law, and a conviction under it cannot be sustained.

PROSECUTION for the violation of a statute prohibiting the sale of merchandise by itinerant peddlers without a license. The defendant was convicted and sentenced, and appealed.

Charles E. Perkins and Jeremiah J. Desmond, for the appellant.

Joel H. Reed, states's attorney, for the appellee.

⁴⁸³ **HAMERSLEY, J.** "An act concerning sales of merchandise by itinerant peddlers" contains the following provisions:

"SECTION 1. The mayor of any city, the warden of any borough, and the selectmen of any town, may issue a license to such persons as they find proper persons to engage in a temporary or transient business, in one locality, either in a building, tent, or other premises, for the sale of goods, wares, and merchandise, . . . in their respective cities, boroughs, or towns, for a term not exceeding one year, upon the applicant paying to such municipal corporation a fee not less than one dollar, nor more than one hundred dollars, as the authority issuing such license may direct; . . .

"SEC. 2. Any person engaging in any business mentioned in section one of this act, except in the sale of articles that are the product of a farm or of the sea, without obtaining a license therefor, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than seven dollars, nor more than two hundred dollars, or imprisoned not less than thirty days, nor more than six months, or both": Pub. Acts of 1893, p. 271.

The state's attorney for Tolland county filed an information charging the defendant with a misdemeanor under this act in the sale of boots and shoes at a store in the city of Rockville. The defendant demurred to the information because the statute is void as being contrary to the provisions of the constitution of Connecticut, and of the constitution of the United States, and to the principles of natural justice. The demurrer was overruled, and the defendant was tried, convicted, and sentenced. This is an appeal from the judgment of conviction, and the only error assigned by the defendant is the action of the superior court in overruling the demurrer.

The legislature has power to require a license for the transaction of any business, either for the purpose of raising ⁴⁸⁴ a revenue, or for the purpose of regulating the conduct of such business, as public interests may demand. This power, however, is, in the manner of its exercise, subject to the limitations embodied in the constitution, including in that term

the constitution of the United States, as well as that of Connecticut; the former, so far as it relates to such question, is in reality a part of the latter, and must be so regarded by this court in determining the validity of any legislative act. The question whether or not a particular law is obnoxious to any such limitation does not depend upon the wisdom of the law. We therefore dismiss as immaterial all considerations urged in argument as to the propriety of this legislation and consider only the legal effect of the act, and the power of the legislature to enact such a law.

1. What is the legal effect of the act? The validity of the law in this case depends upon its real legal effect, and not merely upon its phraseology. In determining whether any law invades a right secured by constitutional enactment, the court looks at the essence as well as the form: *In re Application of Clark*, 65 Conn. 17.

The act is not an exercise of the power of taxation. This is too plain for argument. It is purely a trade regulation; and the crime of which the defendant was convicted consists solely in the violation of such regulation. The power: 1. To regulate the conduct of all business, or of any particular business, harmless in its nature and which every citizen has the right to carry on; and 2. To regulate, even to the extent of prohibition, any business in its nature injurious to the public—is vested in the legislature in the broadest terms; but the exercise of that power in the two cases is governed by different principles. In the latter case the controlling object is giving to the public that protection from danger which the state is bound to give, and ordinarily the legislature must be the judge of the degree of danger and of the required protection. It may restrict the business by requiring large license fees, or by other protective regulations; and it may restrict the conduct of the business to a limited number of persons, or to persons possessing certain qualifications, ⁴⁸⁸ to be determined by public officers to whom the administration of the law is given—or, in certain cases, to such persons as these public officers may select—thus treating the persons intrusted with the business as quasi public officers, and authorizing their selection on grounds of special fitness, similar to those applicable to the appointment of any state officer or agent. The illustrations of such regulations of a business dangerous to the public are familiar, and the cases maintain-

ing the power of the legislature to establish them are too numerous to cite.

But the law in question is not a regulation of a business dangerous to the public, and does not come within the special principles applicable to such regulations. It relates to all business "for the sale of goods, wares, and merchandise," to the bread and meat essential to the support of life, and to every commodity a human being has need of; the only distinction made by the law is that between a business that is temporary and transient and all other business. It does not define a "temporary or transient" business. Such phrase has no technical legal meaning. The natural meaning of the words as generally understood does not furnish a definite guide to what the statute permits and what it prohibits. Its validity might perhaps be questioned on the ground that the language used is too vague to constitute and define a crime, but that question was not discussed in argument. The defendant is punished for selling boots and shoes in the conduct of a temporary and transient business. There is nothing in the nature of such business more dangerous to the public when called temporary than if called permanent. There is no distinction as to public danger between a boot and shoe business conducted by a man for an indefinite time, and the same business conducted after his death by his executor in the settlement of his estate, for a short and definite time. The statute does not relate to any temporary business involving dangers peculiar to itself; it draws no line of distinction except between a business that is temporary and one that is not temporary. One is no more dangerous to the public than the other; one is no more essential to the conduct ⁴⁸⁰ of human affairs than the other; indeed, it would be impracticable to carry on the necessary transactions of life without "temporary and transient business for the sale of goods, wares, and merchandise." It may be that future conditions will produce a general conviction that any temporary business is as dangerous to public morals and good order as lotteries, disorderly houses, tippling shops, or those suspicious vagrants who more than two hundred years ago were called "peddlers and petty chapmen," and whose business was absolutely prohibited: 8 Colonial Records, 435. It is unnecessary to consider how far the legislature may anticipate common experience, in declaring a business generally regarded as harmless and lawful to be dangerous to public

morals and order; it is enough that the legislature has made no such declaration as to the business under discussion. The act, therefore, must be held to deal with temporary or transient business for the purpose of regulating an ordinary and lawful business essential to the conduct of human affairs, in which all citizens have an equal right to engage.

The legislature has full power to regulate such a business, but its regulations must be governed by very different principles from those which may govern the regulations of a business in its nature dangerous to the public. In the one business no citizen has an absolute right to engage; in the other all citizens have the right, and an equal right, to engage. The difference is vital.

What is the regulation prescribed by this act? It is simply a prohibition of the business unless a license is obtained from the officers of the municipality where the business is to be conducted. If the terms on which such license should be granted were defined, a different question would be presented. If the legislature believes that fraud and deception are increasingly liable to be practiced in the conduct of any kind of business, or of all business, it may undoubtedly require, by way of security against such fraud and deception, the persons engaging in such business to take out licenses on terms prescribed by law and applying equally to all citizens. In Massachusetts, "an act to prevent and punish ⁴⁸⁷ fraud in sales of goods, wares, and merchandise at public or private sale by itinerant vendors and to regulate such sales" was recently passed. The act attempted to define "itinerant vendors" so as to include ordinary transient business, provided security for their customers by requiring a deposit of money to be made with the state, and by other regulations, and required the amount of the license fee charged to be ascertained according to law, and a license to be issued to whoever complied with the law. This act was held not to violate the Massachusetts constitution by a majority of the supreme court: *Commonwealth v. Crowell*, 158 Mass. 215. However such an act might be regarded under our constitution, it is wholly different from the act under discussion, which not only forbids the transaction of the business without a license, but permits the local authority to grant a license to one and to refuse it to another, in pursuance of a discretion unguided and unrestrained by law. It says: "The mayor may license such persons as he finds to be proper per-

sons to engage in a temporary business for the sale of goods, wares, and merchandise," and "any person engaging in such business without obtaining a license therefor shall be guilty of a misdemeanor." The unrestrained power of selecting the favored recipients of a license is given to the mayor; all persons who cannot obtain this special privilege are forbidden to carry on the business under a penalty that may extend to a fine of two hundred dollars and imprisonment in the common jail for six months. If the word "may" as here used could be given the effect of "shall," the question would be presented in a little different form. It would be our duty to construe "may" as "shall," if necessary to give effect to an act, and the context would permit such construction. But here the context plainly forbids that construction. The conditions of the act do not support a mandate to issue a license upon compliance with rules established by law; on the contrary, they clearly provide for the exercise of a discretion unrestrained by law. The phrase, "such persons as he finds proper persons to engage in a temporary business," is too vague to support any definite judicial or quasi judicial action. ⁴⁸⁸ There is not a regulation established which the licensees are bound by law to observe, and there is absolutely no legal test and no indication of who may be a "proper person." Without some test fixed by law every person must be presumed to be a proper person to conduct an ordinary and lawful business. The mayor is authorized to select from those legally presumed to be proper persons such as he finds proper; the necessary legal effect of this phrase is "such persons as he pleases." So that if "may" were construed as "shall," the act would then say, "the mayor shall license such persons as he pleases."

Again, the provision giving the mayor absolute power to fix the license fee at one dollar for one year, or one hundred dollars for one day, i. e., to fix the license fee so that it shall be, at his pleasure, either nominal or prohibitive, in connection with the other provisions, renders it certain that the purpose of the statute, as well as its legal effect, is to authorize the mayor to permit or forbid the transaction of an ordinary lawful business at his pleasure. This purpose of the act to secure to favored persons special privileges in the conduct of a lawful business, open of right to all citizens, is further indicated by the provision that exempts from the operation of the act "articles that are the product of a farm or of the sea."

We can find no escape from the conclusion that the legal effect of the act is to authorize the local officers of each municipality to grant exclusive privileges to such persons as they please in the transaction of a lawful business essential to the conduct of human affairs, and in which each citizen has an equal right to engage for the support of life.

2. Has the legislature power to enact such a law? The constitution of Connecticut is somewhat peculiar in its limitation of legislative power. The "legislative power of this state" is, in the broadest terms, vested in the "general assembly." This power is, in a certain way, defined and limited by the provisions dividing the powers of government into distinct departments, and by those relating to the operation of the state government and duties of particular officers. ⁴⁸⁹ But, unlike the constitutions of many states, it contains no specific limitations on the exercise of legislative power, except some slight restrictions in one or two recent amendments. The limitations, however, are no less real, and perhaps more effective, than if phrased in specific terms.

Our bill of rights constitutes the fundamental condition on which all powers of government can be exercised. Its more definite declarations are chiefly concerned with the administration of justice, especially of the criminal law, the preservation of the trial by jury, the protection of private property from confiscation for public use, the right of the citizen to bear arms, and the subordination of the military to the civil power; but the protection of the citizen in the equal enjoyment of those essential rights belonging to citizens of a free government is guaranteed, not in narrow phrases of detailed statement, but in terms as broad as those which vest the legislative power in the general assembly, or the judicial power in the courts.

The bill of rights begins as follows: "That the great and essential principles of liberty and free government may be recognized and established, we declare that all men, when they form a social compact, are equal in rights; and that no man or set of men are entitled to exclusive public emoluments or privileges from the community." No legislative act is law that clearly and certainly is obnoxious to the principle of equality in rights thus solemnly made the condition of all exercise of legislative power. It is patent that not everything that can be called a right is included in this guaranty. The protected rights are those that inhere

in "the great and essential principles of liberty and free government," recognized in the course of events that resulted in our independence, and established by the adoption of our constitution. The language used is purposely broad, as the language in reference to the absolute power of legislation is broad; and the relation of limitation to power can, in the nature of things, be settled only through specific applications as emergencies arise. Among the principles thus established were those universally accepted as so essential ⁴⁰⁰ to free government as to justify the resort to armed rebellion in our war of independence; and of these equality under the law, in the rights to "life, liberty, and the pursuit of happiness" was clearly recognized.

Upon the first establishment of government in Connecticut, reliance for the security of civil rights and liberties was placed on the fact that the legislature, in which was concentrated all powers of government, depended on the free and annual election of the people; but as early as 1650 the free enjoyment of certain "liberties, immunities, and privileges" was recognized as essential to the stability of commonwealths, and the denial thereof as threatening their ruin. The enjoyment of such rights, however, was then recognized as due only to "every man in his place and proportion": Code 1650, p. 1. The full recognition of the principle of equality in rights, as well as of the necessity of protection by a fundamental law, was of later growth. In 1672 the right of every man to "enjoy the same justice and law within this colony" was recognized: Revision of 1672. These principles were embodied in a statutory declaration of rights, which remained substantially unchanged until the adoption of our constitution. During the period preceding and following the Revolution the conviction became general that equality under the law in the enjoyment of certain rights was so essential to free government that it must be defended against invasion even from the law-making power. In a proclamation issued June 18, 1776, Governor Jonathan Trumbull expressed the conviction of the colony of Connecticut in maintaining that the people "form themselves into society, and to set up and establish civil government for the protection and security of their lives and properties" from invasion by those "appointed by the people, the guardians of their lives and liberties," and that the course of the king of Great Britain in "depriving us of our natural, law-

ful, and most important rights, and subjecting us to the absolute power and controul of himself, and the British legislature," justified a rebellion: 15 Colonial Records, 450. And the declaration by Congress, that equality under the ⁴⁹¹ law in the right to life, liberty, and the pursuit of happiness is a self-evident truth, was formally approved by this state November 7, 1776 (1 Records State of Connecticut, 3, 243); and in August, 1777, was ordered to be recorded at length in the state records "that the memory thereof may be preserved to posterity": (1 Records State of Connecticut, 367.) It was an express purpose of our constitution "effectually to define, secure, and perpetuate the liberties, rights, and privileges" derived from our ancestors; and we deem it clear that our bill of rights includes this principle of equality among those principles essential to liberty and free government, to establish which it declares that all members of our political society are equal in rights; and that "no man or set of men are entitled to exclusive public emoluments or privileges from the community." Our legislation affecting any important interest has been so generally confined within the clear lines of legislative power that there has been no occasion to apply the limitations of the first section of the bill of rights. The nearest approach to a judicial determination on this subject is in *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 38, where the court holds that if the law then under consideration can be fairly viewed as intended to operate as a discriminating restriction upon carrying on an ordinary business in respect to which the government has no exclusive prerogative, it comes directly within the definition of a monopoly, and may be obnoxious to the first section of our bill of rights. The application of the bill of rights, approved in that case, is plainly necessary to the decision of this; we entertain no doubt of its correctness, and feel bound to hold distinctly that an act of the legislature, the only legal effect of which is to grant exclusive privileges in the conduct of an ordinary lawful business, in respect to which the government has no exclusive prerogative, is obnoxious to the first section of the bill of rights and void. There is, in respect to its validity, no distinction between such a law and one authorizing such privileges to be granted by subordinate officers in the exercise of a mere arbitrary discretion wholly uncontrolled by law.

⁴⁹² The act upon which the information against the de-

defendant is based, so far as its provisions relate to the right to engage in any lawful "temporary or transient" business, cannot operate so as to make engaging in such business a misdemeanor, and therefore the information does not show any legal offense.

It is unnecessary to consider the other grounds on which the defendant demurred to the information.

There is error in the judgment of the superior court and it is reversed.

In this opinion the other judges concurred.

CONSTITUTIONAL LAW—EQUALITY OF RIGHT.—The law cannot discriminate in favor of one citizen to the detriment of another. The principle of equality pervades all constitutions, and all the declarations of right are imbued with the same spirit. A bill of rights is a bill of equal private rights, and to secure to all as perfect equality of privilege and of burden as human wisdom permits was the chief end sought by the framers of such instruments. To this all other purposes were incidental and subordinate. Hence a license fee cannot be imposed upon persons while others of the same class or profession are exempt under similar circumstances and conditions: *State v. Hinman*, 65 N. H. 103; 23 Am. St. Rep. 22, and note. The right of a citizen to acquire, possess, and protect property cannot be questioned, and the legislature may regulate its use and keeping: *Stevens v. State*, 2 Ark. 291; 35 Am. Dec. 72. It may also regulate callings, when the public interests are affected by general laws operating alike on all citizens: *Mayor etc. v. Yuille*, 3 Ala. 137; 36 Am. Dec. 441. This authority may be delegated to municipal corporation, and the statute conferring it has the same force and effect within the corporate limits as a statute passed by the legislature itself: Note to *People v. Wagner*, 24 Am. St. Rep. 146. The state has power to exact a license for the conduct of a business, and to charge therefor: See monographic note to *People v. Naglee*, 52 Am. Dec. 331, discussing the subject; and municipal ordinances may regulate but not restrain trade; but where the power to tax occupations is conferred, it is to be exercised in conformity with constitutional restrictions. It is essential only that all persons pursuing the same occupation shall be taxed in the same ratio: See monographic note to *Robinson v. Mayor*, 34 Am. Dec. 637, 639, as to the general limitations on the power of municipal corporations to pass ordinances. A license proper is a permit to do business which could not lawfully be done without such license: *San Francisco v. Liverpool etc. Ins. Co.*, 74 Cal. 113; 5 Am. St. Rep. 425. A uniform tax imposed by a state on all sales of merchandise by peddlers or others made in it, whether by one of its own citizens or by a citizen of some other state, and whether the goods sold are the product of that state or of some other state, is valid: Note to *People v. Naglee*, 52 Am. Dec. 333; *Woodruff v. Parham*, 8 Wall. 123. But any attempt in such a statute to discriminate against the citizens or products of another state, in making such sales, would be an attempt to fetter commerce among the states and render the law void: *Welton v. State*, 91 U. S. 275; *Van Buren v. Downing*, 41 Wis. 122, overruling *Morrill v. State*, 38 Wis. 428; 20 Am. Rep. 12; note to *People v. Naglee*, 52 Am. Dec. 333. A statute forbidding the sale of foreign or domestic goods, wares, or mer-

chandise by any person as a hawker or peddler has been held to relate to the manner of sale, and not the right to sell, and that it is a valid exercise of police power, and not a violation of the right secured by the constitution of acquiring, possessing, and protecting property: *Commonwealth v. Gardner*, 133 Pa. St. 284; 19 Am. St. Rep. 645.

STATUTES—"MAY" AND "SHALL."—In construing a statute "may" will be construed to be synonymous with "shall," where the public or third persons have a claim de jure that the power should be exercised, but where this is not the case "may" will not be construed as "shall": *Bansemmer v. Mace*, 18 Ind. 27; 81 Am. Dec. 344; *Malcolm v. Rogers*, 5 Cow. 188; 15 Am. Dec. 464, and note; note to *Rafferty v. Central Traction Co.*, 30 Am. St. Rep. 775.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

WILLIAMS v. KIMBALL.

[85 FLORIDA, 49.]

DESCENT.—OFFSPRING OF SLAVE MARRIAGES terminating before emancipation or never recognized by the parties thereto after their emancipation have no inheritable blood, and cannot inherit property acquired by their ancestors after their emancipation.

CONFLICT OF LAWS.—DESCENT AND HEIRSHIP OF REAL ESTATE are exclusively governed by the law of the country within which it is actually situate. No person can take, except those who are recognized as legitimate heirs by the laws of that country.

CONFLICT OF LAWS.—LEGITIMATION in a foreign country does not make lawful heirs in other countries of those born out of lawful marriage, if the common law or statute of Merton prevails in the latter countries, and for the purposes of descent the different states of the United States are foreign countries to each other.

DESCENT.—RIGHT OF BASTARD TO INHERIT LAND.—A bastard, made capable by statute of inheriting or of transmitting inheritance on the part of his mother as if lawfully begotten of such mother, is not thereby rendered capable of taking by inheritance from collateral kindred upon his mother's side.

Cooper & Cooper, for the appellant.

M. C. Jordan and R. B. Archibald, for the appellee.

⁵⁰ **LIDDON, J.** Diana Landsbury (sometimes called in the record Diana Landsbury Kimball), a negro woman, who was born a slave, died in Duval county, Florida, on the twenty-third day of November, 1885, seised in fee simple of a tract of land situated in said county. The case below ⁵¹ was an action of ejectment brought by the appellant against the appellee, who is in the possession of the property, claiming as

the husband and heir at law of said Diana, who left no children surviving her. The judgment was for defendant.

The validity of the title of the defendant is attacked, upon the ground that he is not the lawful husband and heir of the deceased Diana. In actions of ejectment the plaintiff must recover upon the strength of his own title, and not upon the weakness of the title of his adversary. In view of the conclusion that we have reached, that the plaintiff has shown no right of recovery, it is unnecessary to pass upon the title of the defendant. The deceased had no living relatives except the appellant Williams. Williams claimed to be a brother of Polly Page, the mother of said Diana. Both the appellant and Polly Page were born slaves—of the same slave father and mother. Whether they were the children of a customary slave marriage, or some other cohabitation, does not appear from the record; but the said slave marriage or cohabitation, whichever it was, terminated before the emancipation of the parties thereto. The only question necessary to be considered is the inheritable capacity of the appellant, who (the land being held adversely) has made a quitclaim deed of the property to John Wallace, for whose use he brings suit. The question of the inheritable capacity of persons born of slave marriages is one upon which there has been considerable diversity of opinion. In this state it has been settled for years that the offspring of such marriages, which have never been recognized by the parties thereto after they became free persons, and capable of making such contracts of marriage, have no inheritable blood; they cannot inherit property acquired by their ancestors after ²² emancipation: *Daniel v. Sams*, 17 Fla. 487. It is contended, however, that the plaintiff Williams is and has always been a resident of the state of Georgia; that by an act of that state he has been legitimated, and that thus being legitimate in Georgia he has a status established by law which makes him legitimate in every other state and country. The effect of this contention would be that the capacity of a person to inherit real estate in this state would depend, not upon our laws, but upon the varying statutes of perhaps a hundred or more different states or countries in which the claimants of the estate might reside. In such a state of the law, one a resident citizen of the state would be excluded as an heir, but would be entitled to share in the estate if he accidentally lived over the border line of an adjoining state. By the common law, which is law with

us, all questions of the distribution and descent of real estate must be determined by the law of the jurisdiction in which the property is situated. Speaking upon this subject, Story on Conflict of Laws, section 483, says: "The descent and heirship of real estate are exclusively governed by the law of the country within which it is actually situate. No person can take, except those who are recognized as legitimate heirs by the laws of that country; and they take in the proportions and the order which those laws prescribe. This is the indisputable doctrine of the common law." Such is even the more prevalent view among the law-writers of those countries where the common law does not prevail. "Foreign jurists generally, although not universally, maintain the same doctrine; and accordingly hold that in cases of succession *ab intestato* we are to ascertain the persons who are to take the inheritance by the *lex loci rei sitæ*, whether the question respects legitimacy or ²³ primogeniture, or right of representation, or proximity of blood, or next of kin": Story on Conflict of Laws, sec. 484 a. Among a great mass of authorities which sustain the propositions quoted from Story on Conflict of Laws are: *Boyce v. St. Louis*, 29 Barb. 650; 18 How. Pr. 125; *Dawes v. Boylston*, 9 Mass. 337; 6 Am. Dec. 72; *Bryan v. Moore*, 11 Mart. (La.) 26; 13 Am. Dec. 347, and authorities cited in note; 3 Am. & Eng. Ency. of Law, 566; *Abston v. Abston*, 15 La. Ann. 137; *Potter v. Titcomb*, 22 Me. 300; *Elliott v. Lord Minto*, 6 Madd. 16; *Chapman v. Roberison*, 6 Paige, 627; 31 Am. Dec. 264.

Being convinced that a Georgia statute not in harmony with our system, upon the capacity of persons to inherit real estate, could not prevail here, we have not attempted to interpret or construe the same. It cannot be denied that a number of decisions can be found upholding the proposition that persons made legitimate by the laws of one state are legitimate everywhere. We have taken great pains to examine a number of these decisions. They mostly apply to residents of the states in which suits are brought, who, before their removal thereto, have been legitimated in other states. Some proceed upon statutory grounds, some expressly repudiate the common law and ancient English statutory doctrine. Before the parliament of Merton, in the twentieth year of Henry III., A. D. 1235, it had been the law of England, with respect to the descent of land, that the son must be born after the actual marriage of his father and mother. This rule was

framed for the express purpose of excluding in the descent of land in England the application of the rule of the civil and canon law, by which the subsequent marriage of the parents was held to make the son born before marriage legitimate. At the parliament ⁵⁴ of Merton the clergy proposed to change the law, so that *antenati* legitimated by the marriage of their parents might inherit, but the barons refused to change the law of the realm. Therefore, the statute of Merton, instead of being a new enactment upon the subject, was a legislative declaration of an ancient law. It has been declared to be in force in England by the British house of lords as late as 1839: *Birtwhistle v. Vardill*, 7 Clark & F. 895; 6 Bing. N. C. 385. It is now by adoption the law in this state: McClellan's Digest, sec. 7, p. 708; and with the statutory exceptions hereinafter noted those only possess heritable blood who are born in lawful wedlock or in a competent time after its termination. It has been held that legitimation in a foreign country does not make lawful heirs, in other countries where the common law or the statute of Merton is now in force, of those who were born out of lawful marriage. So far as the law of descents is concerned the *lex loci rei sitæ* must prevail, and the different states of this Union are foreign countries to each other. In the case of *Birtwhistle v. Vardill*, 7 Clark & F. 895, it was decided that a child born in Scotland before the marriage of his parents, but who was legitimated by their subsequent marriage according to the laws of that country, could not inherit lands in England. In *Lingen v. Lingen*, 45 Ala. 410, it was held that a bastard child conceived in Alabama, but born in France, and legitimated by an acknowledgment of the father in due form of law, according to the laws of that country, was not a lawful heir to real estate in Alabama.

In *Smith v. Derr*, 34 Pa. St. 126, 75 Am. Dec. 641, under the authority of *Birtwhistle v. Vardill*, 5 Barn. & C. 438, and same case on appeal to the house of lords, cited above, it ⁵⁵ was held that a bastard child duly legitimated by a decree of a circuit court of Tennessee, according to the laws of that state, was not thereby rendered capable of inheriting land in Pennsylvania. Later decisions in Pennsylvania are to different effect, but they are placed upon the express ground that the statute of Merton has been abolished in that state since the decision in *Smith v. Derr*, 34 Pa. St. 126; 75 Am. Dec. 641.

The status of negroes born of marriages terminating before the general emancipation of the slaves in the southern states is a peculiar one. To some extent the rite of marriage was recognized among them. It is a part of the history of the extinct institution of slavery in the southern states that these slave marriages were often had with the approbation of the owners of the slaves; that the marriage ceremonies were publicly celebrated, often by the ministers of the gospel, and were sanctioned by the churches of the country. The subsequent cohabitation of the parties was never regarded as illicit or immoral, but as perfectly right and proper; and it was regarded as a wicked thing for either party to be unfaithful to the marriage vow. The children born of such marriages were regarded as standing upon a different plane to those slave children who were bastards pure and simple. These views prevailed from regarding marriage as a divine institution, and not from looking upon it from the standpoint of the law which has concern with it only as a civil contract. The progeny of such marriages, while perhaps from a liberal point of view are not bastards, are yet, so far as want of inheritable blood is concerned, placed in the same category as bastards. It is therefore, we think, entirely right and proper to give the appellant the benefit of any statute changing the ancient statute of Merton, by adding to the inheritable capacity of ⁵⁶ bastards. The appellant not claiming to have been legitimated by a subsequent marriage of his parents in accordance with the statute of 1828 (McClellan's Digest, sec. 5, p. 127), the only change in our law which affects his claim is the act of 1829 (McClellan's Digest, sec. 8, p. 470), and is as follows: "Bastards, also, shall be capable of inheriting or of transmitting inheritance, on the part of their mother, in like manner as if they had been lawfully begotten of such mother." In the present case the estate never vested in the appellant's mother. She died, it appears, before the abolition of slavery. Neither did it vest in Polly Page, the mother of the intestate, and sister of appellant; she (Polly Page) died some years before the intestate.

The appellant claims to inherit by descent from his niece. The question presented is, Does the act under consideration legitimate the appellant in all respects, so far as the kindred of his mother is concerned, and can he take by inheritance from collateral kindred upon his mother's side? We think not. The construction given generally by the courts to acts

of this kind has been a strict one. In such cases it has been held that a bastard might inherit from his mother, or his mother from him; but there the inheritable blood became dammed up in his veins, and its current could flow no further; it did not extend to collateral kindred. The very language of the statute of this state has been construed by the supreme court of the United States in the case of *Stenson v. Sullivan*, 5 Wheat. 207, 260. The court, upon this subject, says: "The eighteenth section of the law of descents, under which this question arises, is as follows: . . . 'Bastards, also, shall be capable of inheriting or of transmitting inheritance, on the part of their mother, ⁵⁷ in like manner as if they had been lawfully begotten of such mother.' In the construction of this section it is never to be lost sight of that the appellants are to be considered as bastards, liable to all the disabilities to which the common law subjects them, as such, except those from which the section itself exempts them. Though illegitimate, they may inherit and transmit inheritance, on the part of the mother, in like manner as if they had been lawfully begotten of the mother. What is the legal exposition of these expressions? We understand it to be that they shall have a capacity to take real property by descent immediately or through their mother in the ascending line, and transmit the same to their line as descendants, in like manner as if they were legitimate. This is uniformly the meaning of the expressions 'on the part of the mother or father,' when used in reference to the course of descent of real property in the paternal or maternal line. As bastards they were incapable of inheriting the estate of their mother, notwithstanding they were the innocent offspring of her incontinence, and were, therefore, in the view of the legislature, and consonant to the feelings of nature, justly entitled to be provided for out of such property as she might leave undisposed of at her death, or which would have vested in her, as heir to any of her ancestors, had she lived to take as such. The current of inheritable blood was stopped in its passage from and through the mother, so as to prevent the descent of the mother's property and of the property of her ancestors, either to her own illegitimate children or to their legitimate offspring. The object of the legislature would seem to have been to remove this impediment to the transmission of inheritable blood from the bastard in the descending line, and to give him a capacity to inherit ⁵⁸ in the ascending line

and through his mother. But although her bastard children are in these respects quasi legitimate, they are, nevertheless, in all others bastards, and as such they have and can have neither father, brothers, nor sisters. They cannot, therefore, inherit from Richard Stevenson, because, in contemplation of law, he is not their brother; and even if he were their brother they would not inherit their estate under this section on the part of their mother, but directly from Richard, the descent from brother to brother being immediate. Upon no principle, therefore, can this section help the appellant's case. His estate never vested in the mother so as for her bastard children to inherit from her; nor did it pass through her in the course of descent to the bastard children." To same effect are *Jackson v. Jackson*, 78 Ky. 390; 39 Am. Rep. 246; *Curtis v. Hewins*, 11 Met. 294; *Pratt v. Atwood*, 108 Mass. 40; *Haraden v. Larrabee*, 113 Mass. 430. Considering the appellant as a bastard, he is not able by our statute to take the estate sued for.

The judgment of the court below is affirmed.

MARRIAGE BETWEEN SLAVES void at the time is made valid by ratification of the parties after they become free, and their children have inheritable blood: *Jones v. Jones*, 36 Md. 447; 11 Am. Rep. 505.

DESCENT OF REAL PROPERTY—BY WHAT LAW GOVERNED.—The succession of realty is governed by the laws of the place where the same is situated: *McCullum v. Smith*, Meigs, 342; 33 Am. Dec. 147, and note; *Sneed v. Ewing*, 5 J. J. Marsh. 460; 22 Am. Dec. 41. See, also, the extended note to *In re Ingram*, 12 Am. St. Rep. 95.

DESCENT—RIGHT OF BASTARDS TO INHERIT.—A bastard cannot inherit at common law: *Norman v. Heist*, 5 Watts & S. 171; 40 Am. Dec. 493, and note; *Sneed v. Ewing*, 5 J. J. Marsh. 460; 22 Am. Dec. 41. See, further, the extended notes to *In re Ingram*, 12 Am. St. Rep. 101, and *Simmons v. Bull*, 56 Am. Dec. 265.

BASTARDS—LEGITIMATION OF—CONFLICT OF LAWS.—The extraterritorial effect of the legitimizing of a child is not finally settled. The better opinion is, we think, that when an illegitimate child has been made legitimate in any mode sanctioned by the laws of the state or country in which it and its parents at the time reside, its status of legitimacy becomes thereupon established, and entitles it everywhere to inherit as the legitimate offspring of such parents: Extended note to *In re Ingram*, 12 Am. St. Rep. 103. See, also, the extended note to *Weatherford v. Weatherford*, 56 Am. Dec. 212, and the note to *Dayton v. Adkinson*, 14 Am. St. Rep. 763.

RICE v. STATE.

[35 FLORIDA, 235.]

RAPE—CHARACTER OF PROSECUTRIX—PROOF OF SPECIFIC ACTS OF LEWDNESS.—On a trial for rape the character of the prosecutrix for chastity, or the want of it, is competent evidence, as bearing upon the probability of her consent to the defendant's act. The impeachment of her character in this respect cannot be brought about by proof of specific acts of lewdness with others than the defendant. It must be confined to evidence of her general reputation, except that she may be interrogated as to her previous intercourse with the defendant, or as to promiscuous intercourse with men, or common prostitution.

RAPE INDUCED BY FEAR.—If, at the time a man has carnal knowledge of a female, her mind is so overpowered by fear induced by him as to cause her to make no resistance, it is rape.

RAPE—PHYSICAL FORCE.—Though a man lays no hands on a woman, yet, if by an array of physical force he so overpowers her that she dares not resist, his carnal intercourse with her is rape.

RAPE—REASONABLE DOUBT—NEW TRIAL.—If, on a trial for rape the guilt of the defendant is not shown beyond a reasonable doubt, he is entitled to a new trial.

F. Clark and S. T. Fletcher, for the appellant.

W. B. Lamar, attorney general, for the state.

237 LIDDON, J. The plaintiff in error was convicted of the crime of rape upon one Helen Smith, his stepdaughter. At the trial the defendant's counsel propounded the following question in cross-examination of the prosecutrix, to wit: "Did you ever have intercourse with this defendant or any other man previous to last Monday morning?" The time inquired about was that at which the offense was committed, as shown by her examination in chief. The ruling of the court sustaining an objection to this question is assigned as error. The assignment is not well taken. The avowed object of the question was to impeach the chastity of the prosecutrix, and to show a probability of her consent to carnal intercourse with the defendant. If the question had been confined to the matter of acts of intercourse between the prosecutrix and the defendant, it would have been admissible, but she could not be interrogated as to such acts with other persons than the defendant. On a trial for rape the character of the prosecutrix for chastity, **238** or the want of it, is competent evidence as bearing upon the probability of her consent to defendant's act, but the impeachment of her character in this respect must be confined to evidence of her general reputation, except that she may be interrogated as to her previous

intercourse with the defendant, or as to promiscuous intercourse with men, or common prostitution: *State v. Forshner*, 43 N. H. 89; 80 Am. Dec. 132, and authorities cited; *McQuirk v. State*, 84 Ala. 435; 5 Am. St. Rep. 381; 3 Greenleaf on Evidence, 15th ed., sec. 214; *State v. Knapp*, 45 N. H. 148; *McDermott v. State*, 13 Ohio St. 332; 82 Am. Dec. 444; *McCombs v. State*, 8 Ohio St. 643, and numerous authorities cited in text. The rule we here adopt is one sanctioned by the preponderance of authority. It has, however, in some states been held otherwise: See 3 Greenleaf on Evidence, 15th ed., sec. 214, note C; *State v. Reed*, 39 Vt. 417; 94 Am. Dec. 337; *People v. Benson*, 6 Cal. 221; 65 Am. Dec. 506. The Vermont case cited states the proposition in a very doubting, hesitating way. It cites no authorities, and the principal reason assigned for so holding is, that the question had already been so decided in that state, though the decision was by a divided court. Not only is the rule which we adhere to better founded in authority, but we think more in accordance with reason and justice. The fact that a woman may have been guilty of illicit intercourse with one man is too slight and uncertain an indication to warrant the conclusion that she would probably be guilty with any other man who sought such favors of her. If she was a woman of general bad reputation for chastity, or had been guilty of acts of lewdness with the defendant, the case would be different. In the first instance the evidence would bear directly upon the ²³⁹ question as to whether such a woman would be likely to resist the advances of any man; and, in the second, as to whether, having yielded once to the sexual embraces of the defendant, she would not be likely to yield again to the same person. The greatest objection to such testimony is that it introduces collateral issues which have no bearing upon the defendant's guilt. Although the prosecuting witness may have been guilty of specific acts of unchastity, such acts afford no justification to the defendant for having ravished her; she is still under the protection of the law, and not subject to a forced violation of her person by every man who has the strength to overpower her. If she denied having acts of carnal intercourse with other men, of course the defendant would attempt to prove specific acts in contradiction of her denial, and there would be presented to the jury other collateral issues calculated to embarrass and mislead them, and in no way decisive of the guilt or innocence of the accused: *McDermott v. State*, 13

Ohio St. 332; 82 Am. Dec. 444; *Boddie v. State*, 52 Ala. 395. In the further progress of the case, the specific question was asked the prosecutrix as to whether she had ever before the time inquired about had sexual connection with the defendant, and she emphatically denied such connection. She was also asked, without objection (and, we might add, properly asked), whether she had not had sexual intercourse with some other man on the Saturday afternoon preceding the said Monday morning, and denied that she had any such connection. The apparent object of this question was to show that the bloody stains upon the clothing of the prosecutrix were caused by some other person than the defendant, and was relative, and an important matter of evidence. Considering the line of defense adopted by the defendant,²⁴⁰ no injury could have been done him by ruling out this testimony. The only purpose for which such testimony was offered was to show a probability of consent on the part of the prosecutrix to the act of the defendant. The defense was not based upon any theory of consent to the act, but upon a denial by the defendant that he had ever had any carnal intercourse whatever with the girl. Therefore the testimony was wholly immaterial, and could not have any reference to the defense made by the defendant: *McDermott v. State*, 13 Ohio St. 332; 82 Am. Dec. 444; *Strang v. People*, 24 Mich. 1, 7; *People v. McLean*, 71 Mich. 309; 15 Am. St. Rep. 263, and English cases cited therein. See, also, 19 Am. & Eng. Ency. of Law, 961, 962; 3 Am. & Eng. Ency. of Law, 158, note, and American and English authorities collated; *Wilson v. State*, 17 Tex. App. 525, and Texas and other cases collated therein; *Shirwin v. People*, 69 Ill. 55; *State v. Jefferson*, 6 Ired. 305; *State v. Fitzsimon* (R. I., March 15, 1893), 27 Atl. Rep. 446.

The next assignment of error argued is based upon the following instruction given by the court to the jury: "If, at the time the man had carnal knowledge of the female, her mind was overpowered by fear induced by the man, and therefore she made no resistance, it is rape." We do not think this instruction was erroneous. In 2 Bishop's Criminal Law, eighth edition, section 1125, it is said: "Though a man lays no hands on a woman, yet, if by an array of physical force he so overpowers her that she dares not resist, his carnal intercourse with her is rape." A note to the text cites numerous authorities sustaining the proposition. The same doctrine has been indirectly approved in this state in the case

of *Hollis v. State*, 27 Fla. 387. The gist of the offense is forcible carnal knowledge against the will of the woman. ²⁴² Surely there could not be such an absurdity as claiming that the act was not against the will of the woman when her will was paralyzed with fear through the wrongful act of the defendant, and she was incapable of voluntarily consenting.

The last assignment of error that is argued is the refusal of the court below to grant a new trial. Upon this assignment it is contended that the verdict of the jury is not supported by the evidence. Upon this point the court is divided. One member thinks that while the evidence was highly improbable, yet, it having been submitted to the jury, and approved by the judge who presided at the trial, who had better opportunities to judge of the truthfulness of the statements than we have, that the verdict ought not to be disturbed. The majority of the court are of the opinion that the improbable nature of the evidence, taken with the fact of the contradiction of the prosecutrix, the inconsistency of her statements to other witnesses, make the truth of the matter so doubtful that the verdict ought to be set aside, and there should be at least another trial of the case. This view is also influenced to a considerable extent by the fact that the trial was had within four days of the alleged perpetration of the offense charged, which is so likely to arouse excitement, indignation, and prejudice against the accused. As the case is remanded, it is not proper to further comment upon the evidence.

The judgment of the circuit court is reversed and a new trial awarded.

RAPE—CHASTITY OF PROSECUTRIX—PROOF OF SPECIFIC ACTS OF LEWDNESS.—In prosecutions for rape, the general reputation of the prosecutrix for chastity may be impeached, but specific acts of sexual intercourse by her with third persons cannot be shown: *People v. McLean*, 71 Mich. 309; 15 Am. St. Rep. 263; *McQuirk v. State*, 84 Ala. 435; 5 Am. St. Rep. 381, and note; *McDermott v. State*, 13 Ohio St. 332; 82 Am. Dec. 444, and note; *State v. Forslner*, 43 N. H. 89; 80 Am. Dec. 132, and note. See, also, the note to *Woods v. People*, 14 Am. Rep. 311.

RAPE ACCOMPLISHED BY FEAR.—Consent induced by fear of bodily harm is no consent, and though a man lay no hands on a woman, yet, if by an array of physical force, he so overpowers her mind that she dare not resist, he is guilty of rape by having the unlawful intercourse: *Bailey v. Commonwealth*, 82 Va. 107; 3 Am. St. Rep. 87; extended note to *Smith v. State*, 80 Am. Dec. 365; but in *Whittaker v. State*, 50 Wis. 518, 36 Am. Rep. 856, it

was held that if a woman finally consents to sexual intercourse, although such consent is reluctant, and is obtained through fear, duress, and fraud, or partly through fear and partly by force, the offense is not rape: See, also, the note to the latter case as well as the note to *Don Moran v. People*, 18 Am. Rep. 291.

TAYLOR v. BRANHAM.

[35 FLORIDA, 237.]

CORPORATIONS—FOREIGN—RIGHT TO DO BUSINESS WITHIN STATE.—A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law and by force of the law. Where that law ceases to operate the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty and do business therein as a corporation without reincorporation under its laws.

CORPORATIONS—FOREIGN—DOING BUSINESS WITHIN ANOTHER STATE—LIABILITIES AS PARTNERS.—If a number of individuals assume to act in a corporate capacity in a state where they have not been clothed with corporate authority, they cannot there be recognized as a legally constituted corporation, though they may have been duly incorporated in another state, and such persons are to be treated as, and held to the responsibility of, partners, both in courts of law and equity in the state where they assume corporate capacity without reincorporation.

JUDGMENTS—NONPREJUDICIAL ERROR.—Entry of judgment without express disposition of a special plea filed by the defendant therein, though technical error, if not prejudicial, does not warrant a reversal.

JUDGMENTS—INDEFINITENESS—AIDED BY RECORD.—Every judgment may be construed and aided by the entire record, and while the judgment should be so complete within itself as that the officer issuing process to enforce it can see at a glance the parties for and against whom the process is to be issued, yet, if the parties for and against whom the judgment is rendered are so referred to therein as that a reference to its caption or to the pleadings, process, and proceedings in the action makes certain the names of the parties thus referred to, it is sufficient.

E. R. Gunby and Beggs & Palmer, for the appellants.

W. H. Jewell, for the appellees.

208 TAYLOR, J. The defendants in error, as plaintiffs below, sued the plaintiffs in error, as defendants below, in the circuit court of Orange county, in assumpsit upon an account for work and labor and materials; the suit being instituted against the defendants as former copartners. All of the defendants appeared by attorney, and all joined in a plea of nil debit. Although this form of plea is 209 expressly prohibited by our sixty-eighth rule of practice in common-law actions, the plaintiffs joined issue thereon. After thus join-

ing issue the parties by consent had the cause referred to an attorney, as referee, for trial. On motion before the referee the defendants were allowed to amend their pleas. By virtue of this permit to amend, the defendants on May 23, 1889, interposed the following plea in abatement: "And now comes James A. Knox, one of the defendants, and for himself and the other defendants herein, for plea to above action, says that the defendants never were partners trading as the Florida Orange Hedge Fence Company, but that the Florida Orange Hedge Fence Company was and is a corporation duly and legally organized under the laws of Tennessee, and the said defendants therefore ask to be dismissed with their costs," etc. Issue being joined on this plea, the parties held a separate trial before the referee upon the special issue thus presented on the 23d of January, 1890. To sustain their plea the defendants introduced a certified copy from the secretary of the state of Tennessee of a charter of incorporation to the Florida Orange Hedge Fence Company, creating it a corporation of and in the state of Tennessee. They also introduced as a witness the defendant James A. Knox, who testified, in substance, that he was secretary of the Florida Orange Hedge Fence Company, and custodian of its papers; that the defendants sued herein were on the first day of January, 1887, and still were, stockholders in said corporation; that he was present when the Florida Orange Hedge Fence Company organized in Orlando on the fifth day of March, 1885; that he was a director by election on that date, and was one of the original stockholders; that they organized under the charter already offered in evidence. This comprised the entire ³⁰³ evidence offered to sustain said plea. The referee overruled the plea upon the ground that a corporation cannot be legally organized in this state under a charter granted by another state. Upon overruling this plea the referee allowed the defendants until the first Monday in February, 1890, to file pleas. On the 3d of February, 1890, all of the defendants interposed the plea of "never was indebted," and the defendant G. Taylor on that day filed also a special plea to the effect that he had no interest in the said company; that the only interest he has or has ever had therein is as administrator of the estate of one J. C. Fleming, deceased; that J. W. Childress, one of the original incorporators of the defendant company, gave the said Fleming in his lifetime fifty shares of the stock of said company, but

failed to have same issued to him in his lifetime; that after his death he became administrator of the estate, and at the request of the heirs of the said estate he consented that said stock should be issued to him, but that instead of said stock being issued to him as administrator of said estate, the officers of said company issued them to him individually, but he has no interest in the said stock except as administrator as aforesaid; and that neither he nor the said Fleming ever assumed any liability of the said company.

By agreement of counsel representing all parties the cause was set down for trial on February 17, 1890, and on that day the referee rendered judgment in favor of the plaintiffs, the judgment being in the following form:

"In the Circuit Court, 7th Judicial Circuit of Florida, Orange county.

301 "A. G. BRANHAM & Co.,

vs.

"COLLIS ORMSBY ET AL., doing
business as the Florida Orange
Hedge Fence Co.

"On the 17th day of February, A. D. 1890, the above cause came on to be heard, and after argument of counsel and a careful examination of the testimony I find that the defendants are indebted to the plaintiffs in the sum of eight hundred and thirteen dollars and thirty cents as principal, and seventy-five dollars and eighty-three cents interest. It is therefore ordered and adjudged that the plaintiffs do recover of and from the defendants the sum of eight hundred and eighty-nine dollars and thirteen cents, together with the further sum of twenty-eight dollars and forty-five cents (costs) of suit.

"H. C. HARRISON,

"Referee."

The defendants then moved the referee to set aside his findings and to grant a rehearing of the cause upon the following grounds: "1. Because the findings of the referee are contrary to law; 2. Because said findings are contrary to the evidence; 3. Because the referee erred in overruling the defendants' plea in abatement; 4. That the referee erred in entering judgment while the plea of the defendant G. Taylor was not disposed of; 5. Because the referee did not report the findings of law; 6. Because the . . . finding and judgment of the referee is vague and indefinite." Which motion the

referee denied and refused. From this judgment the defendants take writ of error.

The errors assigned are: "1. That the referee erred in overruling the defendants' plea in abatement; 2. That the referee erred in overruling the defendants' motion for a rehearing."

³⁰² The defendants are sued as, and sought to be charged as, copartners; the plea in abatement denies the alleged partnership, but says that defendants are, instead, members of an incorporated company chartered in and by the state of Tennessee. The proof adduced to sustain the plea shows that the individual defendants sued are stockholders in an incorporated company chartered in and by the state of Tennessee, that the company came to Orlando, in Orange county, Florida, and "organized" (in the language of one witness) there, electing a board of directors, etc., and that it undertook in Florida to carry on and conduct the business for which it had been incorporated in Tennessee; and that in the conduct of such business the debt sued for was contracted in Orange county, Florida. There is no proof that the defendants took any steps whatsoever to acquire corporate existence and authority in Florida, but they rely entirely upon the incorporation conferred by the state of Tennessee.

The law is settled "that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. That it exists only in contemplation of law and by force of the law; and where that law ceases to operate the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty": *Bank of Augusta v. Earle*, 13 Pet. 519; *Miller v. Ewer*, 27 Me. 509; 46 Am. Dec. 619; *Freeman v. Machias Water etc. Co.*, 38 Me. 343. It seems to be further well settled that where a number of individuals assume to act in a corporate capacity in a state where they have not been clothed with a corporate existence and authority, they cannot there be recognized as a legally constituted corporation, though they may have been duly incorporated in another ³⁰³ state, and that such persons, in the state where they assume corporate capacity, will be treated as, and held to the responsibility of, partners, both in courts of law and equity: *Hill v. Beach*, 12 N. J. Eq. 31; *Fuller v. Rowe*, 57 N. Y. 23; *Wells v. Gates*, 18 Barb. 554; *Hurt v. Salisbury*, 55 Mo. 310; *Richardson v. Pitts*, 71 Mo. 128. The proofs adduced to sustain the de-

defendants' claim that their liability was that of members of an incorporated company instead of that of copartners shows that they were incorporated in Tennessee; that they then came to Florida and organized here by electing a board of directors and a president and general manager, without becoming incorporated under Florida laws, and that they assumed to conduct here, in their corporate capacity, the business of planting and cultivating hedge fences, for which they had been incorporated in Tennessee, and that the work and labor sued for was done for them in and about the conduct of that business. Under these circumstances they are liable individually or as copartners here, and the referee correctly overruled their plea in abatement.

We do not think the findings and judgment of the referee are contrary to the law of the case, or to the evidence adduced therein, as is contended for in the motion for rehearing, the overruling of which is assigned as the second error. On the contrary, we think the judgment is fully sustained by the evidence; and the law of the case, as we have before seen, was with the plaintiffs.

The entry of judgment by the referee without any express disposition of the special plea filed by the defendant G. Taylor, to the effect that the stock held by him in the defendant company was really held by him as administrator of a deceased party's estate, though ³⁰⁴ it may have been technically erroneous, was not such error as will warrant a reversal of the judgment by this court. The same facts set up in the special plea, if they could have availed him as a defense under the circumstances of this case, could just as well have been adduced and taken advantage of under his plea of "never was indebted," yet he offered no word of proof to sustain the position assumed in the special plea. Under these circumstances the special plea served no other purpose than to encumber the record, and no such error was committed in making final disposition of the cause without specially disposing of it, as would authorize us to reverse the judgment found: *Walter v. Florida Savings Bank*, 20 Fla. 826.

The fifth ground of the motion for rehearing, to the effect that the referee did not report the findings of law, is not supported by the facts disclosed by the record, even if the failure of a referee to report his findings upon the law questions presented furnished a valid ground of exception upon writ of error. The only question of law presented in the case was

whether the defendants were liable as copartners instead of as a corporation, as presented by their plea in abatement, and the referee's findings upon this question are explicitly set forth in the record.

Under the sixth ground of the motion for rehearing, the defendants contend that the judgment is void because it is vague and indefinite in that it fails, in the body of the judgment, to give the names of the plaintiffs in whose favor it is rendered, or the names of the defendants against whom it is pronounced, they being referred to therein simply as the "plaintiffs" and "defendants"; and that no valid execution can issue thereon to enforce the same, as it does not show from ³⁰⁵ whom the adjudged amount is to be collected. There is no merit in this contention. The declaration gives accurately the names of each defendant; the judgment gives the style of the cause at its head with sufficient definiteness to show without doubt that the "plaintiffs" and "defendants" referred to therein are the same individuals named and designated as such in the declaration and throughout the proceedings composing the record in the cause. While it is best that a judgment should be so complete within itself as that the officer issuing the process to enforce it can see at a glance the parties for and against whom such process is to be issued, yet, if the parties for and against whom a judgment is rendered are so referred to therein as that a reference to its caption or to the pleadings, process, and proceedings in the action will make certain the names of the parties thus referred to, it is sufficient. Every judgment may be construed and aided by the entire record: 1 Freeman on Judgments, 4th ed., sec. 50 a; *Smith v. Chenault*, 48 Tex. 455; *Little v. Birdwell*, 27 Tex. 688; *Hays v. Yarborough*, 21 Tex. 487; *Wilson v. Nance*, 11 Humph. 189.

Finding no errors in the record, the judgment of the court below is affirmed.

CORPORATION—FOREIGN—POWER TO CONTRACT.—A corporation of one state cannot do business in another without the latter's consent, express or implied: *Commonwealth v. New York etc. R. R. Co.*, 129 Pa. St. 463; 15 Am. St. Rep. 724. The right of individuals to be a corporation and act in a corporate capacity is a peculiar privilege, the creation of local law, and cannot by the mere force of that law exist or be exercised beyond the territorial limits of the state which enacts it: *Commonwealth v. Milton*, 12 B. Mon. 212; 54 Am. Dec. 522. In Massachusetts a foreign corporation may make contracts within the scope of its charter and may sue and be sued thereon: *Folger v. Columbian Ins. Co.*, 99 Mass. 267; 96 Am. Dec. 747, and note. The

cases discussing this subject further will be found in the notes to *Rockrock v. Dwelling-House Ins. Co.*, 42 Am. St. Rep. 420, and *Deringer v. Deringer*, 1 Am. St. Rep. 161.

CORPORATIONS—FOREIGN—POWER TO MIGRATE.—A corporation dwells in the state of its creation and cannot migrate to another, though it may there exercise such franchises as the laws of that state permit: *Comles v. Keyes*, 89 Wis. 297; 46 Am. St. Rep. 839; *Aspinwall v. Ohio etc. R. R. Co.*, 20 Ind. 492; 83 Am. Dec. 329, and note; note to *Simmons v. Norfolk etc. Steamboat Co.*, 37 Am. St. Rep. 617; but see *Young v. South Tredegar Iron Co.*, 85 Tenn. 189; 4 Am. St. Rep. 752, and especially the note thereto.

LEUDERS v. THOMAS.

[35 FLORIDA, 518.]

GUARDIAN AND WARD—JUDICIAL SALES OF WARD'S ESTATE.—Under a statute empowering county judges to authorize a guardian to sell the estate of his ward "under such conditions as the interests of such infant may, in the opinion of said judge, seem to require," a general unconditional order issued by such judge permitting the guardian to sell does not authorize a sale of the ward's property at private sale, and such sale is void. In the absence of a special order for a private sale, the sale must be public, and after due advertisement.

GUARDIAN AND WARD—SALES OF WARD'S PROPERTY.—Statutory proceedings by a guardian to divest his ward of his real estate by sale must be strictly pursued.

GUARDIAN AND WARD—SALES OF WARD'S PROPERTY—CAVEAT EMPTOR.—Parties who purchase from a guardian the real estate of his ward must ascertain whether he has full legal authority to make a valid title thereto before they deal with him. In such case the doctrine of caveat emptor applies.

LES PENDENS—PURCHASERS—NOTICE.—In a suit in reference to specific property well described in the pleadings all persons purchasing while the suit is in full prosecution do so at their own peril. They take the risk of the result of the suit, and are concluded by the decree therein.

APPEAL—REVERSAL—MATTER IN AN ANSWER NOT DIRECTLY RESPONSIVE TO THE COMPLAINT, and put in issue by the replication, but not proved, is not ground for the reversal of a decree otherwise proper.

R. B. Archibald, for the appellants.

H. H. Buckman and John Wallace, for the appellees.

519 LIDDON, J. Sarah L. Thomas and her husband, Robert Thomas, brought their bill in equity in April, 1888, in the circuit court of Duval county, against Frederick Leuders, as guardian of said Sarah, John R. Burleigh and wife, and J. C. Greeley. The purpose of said bill was to obtain an accounting by said Leuders, as guardian, with said Sarah,

his ward, she having attained her majority, and become a married woman, and also to set aside as fraudulent and void a sale of the real estate of said Sarah, made by said Leuders as guardian. The sale attacked was a private one, without advertisement. The defendants Burleigh and wife were purchasers of said real estate from Leuders as guardian, and the defendant Greeley was a purchaser from Burleigh and wife. The court granted both branches of relief prayed for, setting aside the sale of the real estate by Leuders, as guardian, as void, and decreeing an accounting by him as to his guardianship of the estate of said Sarah. The defendants appeal from this decree.

520 The appellants (defendants) expressly state in their brief that they make no objection to that portion of the decree of the court below which directed an accounting by said Leuders as guardian. They allege error only as to that portion which declared the sale of the real estate void, and which directed that all persons claiming said lot by, through, or under the defendants, or either of them, since the commencement of this suit, surrender up and deliver to the said complainants possession of said lot without delay.

The sale of the property by the guardian is attacked as having been fraudulently and collusively made, and it is also claimed that the proceedings in the probate court upon which the sale was made were unauthorized by law, and were void. The court reaching the conclusion that, upon direct attack, the sale cannot be sustained because illegally made, independent of any question of actual fraud, it is not necessary to consider or state the evidence upon this point. We deem it proper, however, to state that the court is of the opinion that there was not such proof of collusion and actual fraud as would authorize the guardian's sale to be set aside upon that ground.

As to the legality of the notice of the sale, a question before us, we do not pass upon it, for the reason that, admitting that due and proper notice of application to sell was given as required by law, a private sale was wholly unauthorized by law. The order of sale, after reciting the presentation of a petition therefor, and the giving of notice thereof, and the determination of the court that the property was unproductive, and that it would be for the best interest of the minor that the same be sold, concluded as follows: "It is ordered, adjudged, and decreed that the said Frederick

Leuders be, and he is hereby, authorized and empowered as ⁵²¹ guardian as aforesaid to sell and convey the said real estate for the use and benefit of said minor." By the statute under which the order was made it was "declared lawful to authorize said . . . guardian to sell said estate under such conditions as the interests of said infant may, in the opinion of said judge, seem to require." It is insisted by the appellees that the statute gave no jurisdiction to the county judge to grant a general, broad, unconditional power to a guardian to sell the real estate of his ward. Without determining whether a public sale for a fair price after due notice would or would not be upheld under this order, we are clearly of the opinion that a private sale under it should not be sustained. The county judge has power to prescribe the conditions of the sale. If he failed to prescribe the conditions or to direct a private sale, the sale should have been made as judicial sales generally are—i. e., publicly and after due advertisement. A private sale was not authorized by the order, and was wholly illegal. The general rule is, that statutory proceedings to divest a minor of his real estate should be strictly pursued. They cannot be deprived of their property except by "due process of law." In this case there does not appear to have been any report to the court, or any confirmation of the sale, from which a ratification by the court might be inferred. Parties who purchase from a guardian the real estate of his ward should ascertain whether he has full legal authority to make a valid title before they deal with him. In such a case the doctrine of caveat emptor has peculiar application, and the purchaser at such sale buys at his peril: *Gwynn v. McCauley*, 32 Ark. 97, 112; *Black v. Walton*, 32 Ark. 321, 324, and authorities cited.

⁵²² The appellants also object to that portion of the decree of the circuit court which directed that "all persons claiming said lot by, through, or under the defendants, or either of them, since the commencement of this suit, surrender up and deliver to the complainants possession of said lot without delay." In a case where the suit is in reference to specific property which is well described in the pleadings, all persons purchasing while the suit is in full prosecution do so at their own peril. They take the risk of the result of the suit, and are concluded by the decree therein; it is not necessary that they be made parties thereto. Such is the general doctrine of *lis pendens*: 1 Daniell's Chancery Pleading and Practice,

6th ed., 280, and notes; 13 Am. & Eng. Ency. of Law, 883, 900, 901, and notes.

The answer of the defendant Greeley stated that he had sold and conveyed the property to a corporation, whose name is given, before the commencement of the suit. This matter was not directly responsive to the bill of complaint, and was put in issue by the replication to the answer. No effort was made to prove the allegation. Neither does the decree by its terms expressly affect such purchaser. In such a state of the case we could not reverse a decree upon the appeal of the parties who were before the court, and as to whom the decree was entirely proper.

There is no error in the record, and the decree of the circuit court is affirmed.

JUDICIAL SALES—STATUTORY CONSTRUCTION.—Statutory authority, by which one is deprived of his estate, must be strictly pursued: *Bloom v. Burdick*, 1 Hill, 130; 37 Am. Dec. 299, and note with the cases collected.

JUDICIAL SALES—CAVEAT EMPTOR.—A purchaser at a judicial sale buys at his peril and is bound to satisfy himself of the authority under which the sale is made: *Frost v. Atwood*, 73 Mich. 67; 16 Am. St. Rep. 560, and note. Sales by order of the probate court are judicial in their character, and the maxim of caveat emptor applies thereto: *Owen v. Slatter*, 26 Ala. 547; 62 Am. Dec. 745, and note. See, also, the extended note to *Neal v. Gillaspie*, 26 Am. Rep. 38.

LIS PENDENS.—In Kentucky, under the statute, an equitable lis pendens is acquired in a suit to subject specific property to the payment of a debt by filing a petition and suing out summons: *Rothschild v. Kohn*, 93 Ky. 107; 40 Am. St. Rep. 184, and note. This question is fully treated in the monographic note to *Newman v. Chapman*, 14 Am. Dec. 775.

GREELEY v. WHITEHEAD.

[35 FLORIDA, 522.]

NEGOTIABLE INSTRUMENTS—NOTE PAYABLE AT PARTICULAR PLACE.—In an action against the maker of a note payable at a particular place, it is not necessary to allege a presentation of the note for payment at the time and place designated, or to prove such presentation, in order to entitle the plaintiff to recover.

NEGOTIABLE INSTRUMENTS—PLACE OF PAYMENT—PRESENTATION—DEFENSE.—The maker of a note payable at a particular time and place is liable thereon, though it is not presented at the time and place named, but he may avoid the payment of future interest, damages, and costs of suit by plea therein alleging both a readiness and ability to pay at the time and place designated and ever since, and that he brings the money into court for that purpose. The plea to be sufficient must set up all of these facts.

NEGOTIABLE INSTRUMENTS—PLACE OF PAYMENT—PRESENTATION—WAIVER OF DEFENSE.—If a note is made payable at a particular time and place the payment of interest thereon long after its maturity is a waiver of any defense by the maker for the failure of the holder to present the note for payment at the time and place named therein.

ASSUMPSIT on a note made payable one year after date, negotiable and payable at a particular bank. Judgment for plaintiff. Defendant appealed.

R. B. Archibald, for the appellant.

J. E. Hartridge, for the appellee.

⁵²⁸ **MABRY, C. J.** It is now the accepted doctrine in the United States that in a suit against the maker of a promissory note, payable at a particular time and place, it is not necessary to allege in the declaration a presentation for payment at the place named, or to prove such presentation at the trial in order to entitle the plaintiff to recover on such note. What was the English rule on the subject ⁵²⁹ prior to the decision in *Rowe v. Young*, 2 Brod. & B. 165, rendered in 1820, is uncertain, as there was great diversity of opinion on the subject among English judges. It was at that time decided by the house of lords that if a bill of exchange be accepted, payable at a particular place, the declaration must aver presentment at that place, and the averment must be proved. It seems that prior to that time the king's bench had followed the rule now accepted by the American courts. In 1839 the supreme court of the United States decided in the case of *Wallace v. McConnell*, 13 Pet. 136, that in an action against the maker of a note, payable at a particular time and place, no demand for payment need be averred or proved; and since that decision the American courts have been practically unanimous in holding the same doctrine: *Reeve v. Pack*, 6 Mich. 240; *Montgomery v. Tutt*, 11 Cal. 307; *Caldwell v. Cassidy*, 8 Cow. 271; *Wolcott v. Van Santvoord*, 17 Johns. 248; 8 Am. Dec. 396; *Hills v. Place*, 48 N. Y. 520; 8 Am. Rep. 569; *Payson v. Whitcomb*, 15 Pick. 212; *Carley v. Vance*, 17 Mass. 389; *Lyon v. Williamson*, 27 Me. 149; *Armisted v. Armisted*, 10 Leigh, 512; *Washington v. Planters' Bank*, 1 How. (Miss.) 230; 28 Am. Dec. 333; *Yeaton v. Berney*, 62 Ill. 61; *Humphreys v. Matthews*, 11 Ill. 471; *Ripka v. Pope*, 5 La. Ann. 61; 52 Am. Dec. 579; 3 Randolph on Commercial Paper, sec. 1117; Story on Promissory Notes, sec. 228, and notes; Tiedeman on Commercial Paper, sec. 310. While the American courts uni-

formly hold that in a suit on a note against the maker it is unnecessary for a plaintiff to aver a presentation of the note for payment at the time and place designated for that purpose, it must not be supposed that the maker ⁵³⁰ cannot set up as a matter of defense, so far as costs and damages are concerned, the fact that he was prepared with funds and ready to make payment of the note at said time and place, and that the holder was not there to receive the money. The theory of the American courts is that the maker of the note, being the principal debtor, is still liable to pay, though the note be not presented at the time and place designated for payment, and that it devolves upon him to show as a matter of defense a readiness with the money at the time and place to meet the note, and such defense must be set up by plea, and can only be in bar of damages and costs. Such a plea, in order to be available, must allege that the maker was ready to pay the money at the time and place named; that he has ever since been ready there to pay the note, and that he brings the money into court for the plaintiff: *Carley v. Vance*, 17 Mass. 389; *Lyon v. Williamson*, 27 Me. 149.

The first plea of the defendant below was clearly demurrable. It goes no further in its allegations than that the defendant, at the time and place named for the payment of the note, had the money ready to pay the same and interest thereon, and would have paid the same had it been presented for payment, which had never been done. It does not make a tender of the money in court, nor does it allege that defendant had ever since the note matured been ready with the money to pay. It falls far short of the requisites of a good plea setting up such a defense: *Forcheimer v. Holly*, 14 Fla. 239.

The second plea is more extensive in its allegations. It alleges that ever since the note became due defendant had the amount of money named therein and interest, at the designated place of payment, and had been ready and willing to pay the same, but the note was ⁵³¹ never presented for payment; that plaintiff had always declined to present the note for payment, and requested payment of the interest thereon semi-annually, which was always promptly paid. Profert of the amount due on the note was made and paid into court. Conceding that the allegation as to the *profert in curia*, in reference to which there is no contention here, is sufficient, it is evident that the second plea is good under the

rule of pleading above stated, unless the averment relating to the payment of interest after maturity of the note render it bad. It is insisted for appellee that the payment of the interest on the note after it matured, as alleged in the plea, was a waiver by the maker of any defense that he might have set up by reason of a failure on the part of the holder to present the note for payment, and the rule as to a waiver of protest and notice by payment, or promise to pay, on the part of an indorser of a note, is invoked. The rule is well settled that a payment on a note, or a clear and explicit promise to pay it after maturity, by an indorser, with full knowledge of the fact that it had not been presented for payment, operates as a waiver of such presentation and protest: *Whitaker v. Morrison*, 1 Fla. 25; 44 Am. Dec. 627; *Curtis v. Sprague*, 51 Cal. 239; *Salisbury v. Renick*, 44 Mo. 554; *Hughes v. Bowen*, 15 Iowa, 446; *Smith v. Curlee*, 59 Ill. 221. The principle upon which the maker of a note is held liable is not exactly the same as that applicable to the liability of an indorser. The maker is the primary debtor, and, as we have seen, no presentation at all is necessary to hold him liable. But while this is true, he may show by way of defense, in a suit against him on a promissory note, payable at a particular time and place, that he was then and there ready with the money to make payment, and has ever ⁵²² since continued so to be; and, in that event, under proper plea with tender in court of the money due, he will not be liable for costs, damages, or expenses of the suit. In such a case he will have done everything under his obligation with the holder of the note to avoid costs, damages, or expenses, and in justice should not be burdened with them.

It will be observed that the second plea alleges, in addition to the readiness of the maker to pay the note and interest at the time and place of payment, that the holder declined to present the note for payment, but requested payment of interest thereon semi-annually, which was promptly paid. The note was past due something over three years when suit was instituted on it, and from the allegations of the plea it is inferable that both maker and holder of the note acquiesced in a postponement of its payment, upon the payment of semi-annual interest thereon, but it is not made to appear that the postponement was for any fixed time. The interest on the note was ten per cent per annum, and it appears from the plea that, though the note was not presented for payment

semi-annual interest thereon was requested and paid. This of course was a recognition on the part of the maker that the holder was entitled to interest on the note so long as he permitted it to run, but it was then past due, and was liable to be sued on at any time at the option of the holder. The contract in the note is, that if not paid at maturity, it may be placed in the hands of an attorney for collection, and, in that event, an additional sum of one hundred dollars for attorney fees was agreed to be paid. The contingency expressed in the note, upon which the liability to pay the attorney fee depended, to wit: the placing the note after maturity in the hands of an attorney for collection, is not denied; but the defense in the plea is that the defendant was all the time ready at the proper place to pay the note, which was never presented for payment, but only the interest thereon demanded, and which was promptly paid. If the plea had alleged that by agreement based on sufficient consideration the principal debt had been postponed for a definite time, and before the expiration of that time suit had been instituted, without presenting the note for payment, a different question would arise. But the plea here does not present such a defense. It appears to us that the payment of the interest on the note after its maturity, for the length of time and under the circumstances stated, amounts to a waiver of any defense that the maker might have had by reason of the failure of the holder to present the note at the time of its maturity. The right under the circumstances stated to cease paying interest on the note after maturity, by reason of a failure to present it at the time and place of payment, would exist as well as an exemption from costs and expenses in the event of a suit, but the plea expressly alleges that defendant continued to pay semi-annual interest on the note after maturity. In the judgment of the court the second plea was also bad, and the court did not err in sustaining the demurrer to it.

The only questions here relate to the decision of the court on the demurrer to the pleas, and our conclusions thereon already stated result in an affirmance of the judgment of the circuit court, and an order will be entered accordingly.

NEGOTIABLE INSTRUMENT PAYABLE AT A PARTICULAR PLACE — PRESENTMENT.—A note payable at a particular place need not be presented at that place in order to hold the maker liable: *McNairy v. Bell*, 1 Yerg. 502; 24 Am. Dec. 454, and note; *Washington v. Planters' Bank*, 1 How. 230; 28

Am. Dec. 333, and note; *Ripka v. Pope*, 5 La. Ann. 61; 52 Am. Dec. 579, and note. But in suing without such presentment, the plaintiff takes the risk of being subjected to costs, as in case of a tender, should the defendant prove a readiness to pay at the place before suit: *Indiana etc. R. R. Co. v. Davis*, 20 Ind. 6; 83 Am. Dec. 303, and note.

GRANT v. STATE.

[35 FLORIDA, 581.]

EMBEZZLEMENT.—AN INDICTMENT for embezzlement describing the property alleged to have been fraudulently converted as “the proceeds” of a sale of lumber mentioned is insufficient for vagueness and indefiniteness.

EMBEZZLEMENT.—AN INDICTMENT for embezzlement must state the description of the property embezzled with the same particularity as is required in an indictment for larceny.

EMBEZZLEMENT—INDICTMENT.—If it is impossible to give an exact description of property embezzled in an indictment charging the crime, the best description practicable should be given, and if the description given is indefinite, a reason for not giving a better description should be stated.

EMBEZZLEMENT—INDICTMENT.—Omission to describe, in an indictment charging embezzlement, the property embezzled is a fatal objection at any stage of the case, including a motion in arrest of judgment.

EMBEZZLEMENT.—IN AN INDICTMENT FOR EMBEZZLEMENT THE RECEIPT BY DEFENDANT OF THE PROPERTY embezzled must be directly and positively alleged. An allegation that defendant sold certain lumber and converted the proceeds to his own use is not equivalent to an averment that the proceeds of the sale came into his hands.

EMBEZZLEMENT.—An indictment for embezzlement, which fails to allege the value or ownership of the property embezzled is void.

EMBEZZLEMENT—INDICTMENT.—THE OWNERSHIP AND VALUE OF PROPERTY embezzled must be stated in the indictment with the same particularity as is required in an indictment for larceny.

EMBEZZLEMENT—INDICTMENT.—An allegation in an indictment for embezzlement that the fraudulent conversion of the proceeds of certain property by the defendant injured the bailors in a certain sum of money is not an allegation of the value of the property embezzled.

A. J. Henry, for the appellant.

W. B. Lamar, attorney general, for the state.

582 **LIDDON, J.** The plaintiff in error was convicted in the circuit court upon an indictment charging “that Daniel F. Grant, late of said county, lawyer, on the thirtieth day of June, A. D. 1891, at and in the county, circuit, and state aforesaid, was then and there intrusted by Frank M. Bell and T. C. Glover with a large amount of property, which was then and there subject of larceny, to wit: thirty thousand feet of

yellow pine lumber" (giving a detailed description of the dimensions of the ⁵⁸³ said lumber); "and the said Daniel F. Grant was so intrusted as aforesaid with the lumber aforesaid by the said Frank M. Bell and T. C. Glover for the purpose of shipping and selling the same, and having the proceeds thereof remitted to them, the said Frank M. Bell and T. C. Glover; and the said Daniel F. Grant did afterward sell the said lumber with the consent of the said Frank M. Bell and T. C. Glover, and after the sale aforesaid did, without the consent of the said Frank M. Bell and T. C. Glover, fraudulently convert the proceeds thereof to his own use, and fail and refuse to pay the same over to the said Frank M. Bell and T. C. Glover on demand, to the injury of the said Frank M. Bell and the said T. C. Glover in the sum of one hundred and seventy dollars. So the jurors aforesaid upon their oath aforesaid do say that the said Daniel F. Grant, at the time aforesaid, and in the county, circuit, and state aforesaid, did commit the crime of fraudulent conversion of property, contrary to the laws," etc.

The jury rendered a verdict finding the defendant guilty of the fraudulent conversion of forty-nine dollars of the money set forth in the indictment, and recommended him to the mercy of the court. The counsel for defendant moved an arrest of judgment upon numerous grounds. Included in said grounds, among many others, are: 1. That the indictment was vague, indefinite, and insufficient, and did not charge any offense; 2. That it did not allege the ownership or value of the property alleged to have been fraudulently converted by the defendant. The court overruled the motion, and imposed a penalty upon the defendant.

We think the objections stated above were good ones, and the motion to arrest the judgment should have been granted. As to the first objection, the indictment ⁵⁸⁴ is exceedingly vague and indefinite. It was found under the statute, section 2454 of the Revised Statutes of Florida. Leaving out those portions of the section not applicable to the present case, the pertinent portions in question would read as follows: "If . . . any . . . person with whom any property which may be the subject of larceny is intrusted or deposited by another, . . . after a sale of any of said property with the consent of the owner or bailor, shall fraudulently and without consent aforesaid convert or embezzle the proceeds, or any part thereof, to his own use, and fail and refuse to pay the

same to the owner or bailor on demand, . . . (he) shall be punished as if he had been convicted of larceny." The gist of the contention upon the objection now under consideration is that the indictment does not describe or state in what the proceeds consisted which are alleged to have been converted by the defendant to his own use. The indictment describes the property alleged to have been fraudulently converted only as "the proceeds thereof," alluding to the sale of the lumber mentioned. We are not advised whether the lumber was sold for cash or other thing of value, or on credit, or whether "the proceeds" consisted of money, promissory notes, or other thing of value. The general rule is that an indictment for embezzlement should state the description of the property embezzled with the same particularity as is required in an indictment for larceny: *Rapalje on Larceny*, sec. 385; *People v. Cox*, 40 Cal. 275; *Commonwealth v. Smart*, 6 Gray, 15; 2 Bishop's Criminal Procedure, sec. 320, and authorities cited; 1 Wharton's Criminal Law, sec. 1044, and authorities cited. See, also, many English and American cases collated in a note to *Calkins v. State*, 98 Am. Dec. 157 (18 Ohio St. 366), and 9 Am. & Eng. Ency. of Law, ⁵⁸⁵ 498 *c*. It might be impossible in some cases to give a very exact description of the property embezzled, but the best description practicable should be given, and, if the description is indefinite, a reason for not giving a better description should be stated: 2 Bishop's Criminal Procedure, sec. 321. The omission to describe the property alleged to have been embezzled is a fatal objection at any stage of the case the same may be presented, including a motion in arrest of judgment: *People v. Cox*, 40 Cal. 275; *Commonwealth v. Smart*, 6 Gray, 15.

We need only notice one other point under this ground of the motion to arrest the judgment, which is that the indictment contains no direct allegation that the defendant received any proceeds of the sale of lumber intrusted to him. It only alleges that he sold the lumber and converted the proceeds to his own use. The allegation of a sale by defendant is not equivalent to an averment that the proceeds of the sale came into his hands. He might have sold on credit, or he might have sold and not have been paid. Upon so vital a point nothing should be left to conjecture, or to be supplied by presumption, but the receipt of the proceeds of the sale by the defendant should have been directly and positively alleged.

The next objection is that the indictment failed to allege the value or ownership of the property alleged to have been embezzled. This objection is well taken in point of fact, and is fatal to the indictment, and it must fall before it. The ownership of the property should have been alleged with the same particularity as in an indictment for larceny: *Rapalje on Larceny*, sec. 386; 2 *Bishop's Criminal Procedure*, sec. 320; *Heard's Criminal Law*, 527; *State v. Roubles*, 43 La. Ann. 200; 26 Am. St. Rep. 179. See, also, a large ⁵⁸⁶ number of cases collated in note to *Calkins v. State*, 98 Am. Dec. 157, and 9 Am. & Eng. Ency. of Law, 498 d. The value of the property alleged to have been embezzled should have been stated. The allegation in the indictment that the fraudulent conversion of the proceeds of the property by the defendant injured the bailors in the sum of one hundred and seventy dollars is not an allegation of the value of the property embezzled. Such an allegation might be useful as showing the amount of damage claimed in a civil proceeding, but not for any other purpose. The authorities agree that it is necessary to allege the value of the property embezzled in an indictment for embezzlement: See note to *Calkins v. State*, 98 Am. Dec. 157, and 9 Am. & Eng. Ency. of Law, 498 h. It is necessary, upon general principles, to state the value of the property in an indictment of this character, and it is especially necessary under our statute. The statute provides that upon a conviction of this offense, the defendant "shall be punished as if he had been convicted of larceny." The value of the property should be stated in order to ascertain the penalty proper to be inflicted. We have two grades of larceny, as regulated by the value of the property stolen, of which the circuit court has jurisdiction, and for which different degrees of punishment are provided. Where the value of the property stolen is one hundred dollars or more, it is called grand larceny, and more severely punished than when the value is less than one hundred dollars, which is called petit larceny: *Rev. Stats.*, secs. 2440, 2441.

For the reasons stated the judgment of the circuit court is reversed, with directions to dismiss the proceedings against the plaintiff in error and discharge him from custody.

EMBEZZLEMENT—INDICTMENT—DESCRIPTION OF PROPERTY—SUFFICIENCY OF.—An indictment for the embezzlement of money must definitely describe the money embezzled, and a general description thereof as so many dollars of good and lawful money of the United States is not sufficient: *State v.*

Ward, 48 Ark. 36; 3 Am. St. Rep. 213, and note. See the extended note to *Calkins v. State*, 98 Am. Dec. 154.

EMBEZZLEMENT—INDICTMENT.—The indictment for embezzlement should directly allege that the property came into the defendant's hands, or was under his care, by virtue of a bailment; Extended note to *Calkins v. State*, 98 Am. Dec. 154.

EMBEZZLEMENT—INDICTMENT—ALLEGATION OF VALUE.—Value should be alleged as in an indictment for larceny; Extended note to *Calkins v. State*, 98 Am. Dec. 154.

EMBEZZLEMENT—INDICTMENT—ALLEGATION OF OWNERSHIP.—The ownership of the embezzled property must be alleged with the same degree of certainty required in an indictment for larceny; *State v. Roubles*, 43 La. Ann. 200; 26 Am. St. Rep. 179, and note. See, also, the extended note to *Calkins v. State*, 98 Am. Dec. 157.

JENKINS v. STATE.

[35 FLORIDA, 737.]

INDICTMENT.—PLEA IN ABATEMENT of an indictment setting up simple irregularities in the selection of jurors must be framed with the greatest strictness as to accuracy and precision, and be certain to every intent.

INDICTMENT.—PLEA IN ABATEMENT of an indictment alleging simply that the indictment was found by a grand jury not drawn according to a certain named statute, but was summoned from the body of the county at large, is bad on demurrer, in failing to state wherein such statute has not been complied with.

WITNESSES—COMPETENCY OF GRAND JURORS.—A grand juror is not permitted to testify how any member of the jury voted, or the opinion expressed by any of them upon any question before them, or to disclose the fact that an indictment for felony has been found against any person not in custody or under recognizance, or to state in detail the evidence on which an indictment was found, but he may be required by the court, when justice demands it, to testify to what a witness testified to before the grand jury, or to testify to any other competent fact, not within the foregoing restrictions.

WITNESSES—COMPETENCY OF GRAND JURORS.—A statute providing that "members of the grand jury may be required by any court to testify whether the testimony of a witness examined before them is consistent with or different from the evidence given by such witness before such court, and they may also be required to disclose the testimony given before them by any person upon a complaint against such person for perjury or upon his trial for such offense" does not restrict the inquiry to the facts expressly mentioned in the statute, and a grand juror is competent and may be required to testify to any other competent fact within his knowledge which he is not expressly prohibited by law from disclosing.

WITNESSES—COMPETENCY OF GRAND JURORS AND PROSECUTING ATTORNEY.
It is the duty of the prosecuting attorney when required by the grand

jury to attend that body for the purpose of examining witnesses in its presence and to give it advice upon legal matters, and whenever it is proper for a grand juror to testify to the statements of witnesses before the grand jury the prosecuting attorney may testify to such matters within his knowledge.

EVIDENCE IN CRIMINAL CASES—DECLARATIONS BEFORE GRAND JURY.—A statement made by a party under oath before a grand jury concerning a crime then under investigation, prior to his indictment or arrest therefor, and after he has been warned that he is under suspicion and need not testify unless willing to do so, and that he cannot be compelled to criminate himself, is voluntary and admissible against him on his subsequent trial for such crime.

EVIDENCE IN CRIMINAL CASES—DECLARATIONS OF ACCUSED BEFORE GRAND JURY.—Written memoranda of evidence made by the prosecuting attorney in the ex parte examination of a witness by him before a grand jury, not read to or signed by such witness, are not admissible against him as evidence per se of what he there testified to concerning a crime then under investigation, and for which he is subsequently placed on trial. Such memoranda can be used for refreshing the memory, but for no other purpose.

CONSPIRACY—EVIDENCE.—**EVERY ACT AND DECLARATION** of each member of a conspiracy, in pursuance of the original concerted plan, and with reference to the common object is, in contemplation of law, the act and declaration of them all, and is original evidence against each of them without reference to the time that any one of them entered into the conspiracy.

CONSPIRACY—LIABILITY OF MEMBERS.—Every one who enters into a conspiracy is deemed a party to every act connected therewith done by the others before that time, and a party to every act afterward done by any of the others in furtherance of such common design.

CONSPIRACY—EVIDENCE.—Proof of overt acts or declarations by one in pursuance of a common purpose or design by several to commit a crime may be given in evidence against all of the conspirators. If such acts or declarations occur at a subsequent time after the accomplishment or abandonment of the crime, and are merely narrative of past occurrences, they are not admissible against any but the party making or uttering them.

EVIDENCE IN CRIMINAL CASES.—In cases of circumstantial evidence every fact material, relevant, and within the issues from which the jury may legitimately deduce the guilt or innocence of the accused should be submitted to them, and although the relevance of any fact when standing alone may not be apparent, yet when taken in connection with any other fact or all the other facts, properly admitted, its relevancy is made to appear, it should go to the jury.

EVIDENCE IN CRIMINAL CASES.—In cases of circumstantial evidence, testimony that does not tend to prove motive or establish some other material fact essential to the crime charged should not be admitted, especially when it may tend to produce an erroneous impression on the minds of the jurors to the prejudice of the accused.

EVIDENCE—ORDER OF—ADMISSION AND EXCLUSION OF IRRELEVANT TESTIMONY.—The court can regulate the order of the introduction of evidence, but when irrelevant testimony is offered and objected to, and is

admitted on the theory that its relevancy may be shown by subsequent evidence, if such evidence is not introduced the irrelevant part should be excluded by the court upon its own motion and without further action on the part of the party objecting. A failure to so exclude it is error.

EVIDENCE IN CRIMINAL CASES.—TESTIMONY VOLUNTARILY GIVEN BEFORE A CORONER by one not then under arrest nor accused of the crime under investigation is competent evidence against him on his subsequent trial for such crime, or, if reduced to writing and signed by him the writing is evidence against him. If not reduced to writing it may be shown by witnesses who can testify of their recollection what it was.

EVIDENCE—CIRCUMSTANTIAL—INSTRUCTIONS—REASONABLE DOUBT.—An instruction that in cases of circumstantial evidence it is not necessary that the proof shall be conclusive; that it is sufficient if the jury believe from all the facts and circumstances that the accused is guilty, and that they have no reasonable doubt in their minds of this fact; that if the jury think that all the facts are consistent with the supposition that the prisoner is guilty, and cannot reconcile the circumstances in evidence with any other supposition than that of his guilt, it is their duty to find him guilty; that all that can be required is not absolute and positive proof; but such proof as convinces them that the crime has been made out against the accused is correct, and not open to objection as a whole.

INSTRUCTIONS—OBJECTION TO PART OF CHARGE.—In considering an objection to a portion of a charge given to the jury, the entire charge must be considered, and, if as an entirety it is free from the objection made, it is sufficient and proper.

INSTRUCTIONS ON CIRCUMSTANTIAL EVIDENCE.—An instruction that in cases of circumstantial evidence the conclusion to which the jury must be conducted is that degree of certainty that they would come to before acting in their own grave and important concerns, and that this degree of certainty justifies them in returning a verdict of guilt, is improper and erroneous, as laying down an improper standard for the guidance of the jury in arriving at conclusions from the evidence in criminal cases.

TRIAL—ARGUMENT—STATEMENTS OUTSIDE OF EVIDENCE.—Comments of counsel in arguing a case before a jury are controllable in the discretion of the trial court. This discretion is subject to review, and when counsel make material statements, outside the evidence likely to do the accused an injury, it is deemed an abuse of discretion when not stopped by the court on objection made at the time.

TRIAL—COUNSEL MAY, DURING ARGUMENT, take a pistol that has been put in evidence and identified as belonging to the accused, and request the jury to examine it, and the jury may thereupon properly examine the pistol to ascertain its condition.

VERDICT—DIRECTING.—A FINDING OF A JURY in a case involving a charge of murder that they find the defendants guilty as charged, but recommend one of them named to the mercy of the court, is a nullity, and cannot be considered by the court as a verdict of murder in any degree. The case is still in the hands of the jury, whose duty remains unchanged, and the court cannot then, any more than at any other time, intimate to the jury what its verdict should be.

E. K. Foster and Miller & Austin, for the appellants.

A. St. Clair-Abrams and W. B. Lamar, attorney general, for the state.

*** MABRY, C. J. In December, 1891, Francis Joseph Packwood, with his sister in law, Miss Adelaide Bruce, and his four-year-old son, lived on the Hillsboro river in Volusia county, Florida, about half way between the towns of New Smyrna and Oak Hill. Mr. Packwood's place was somewhat isolated, being immediately on the river and about one mile east of the public road between the towns mentioned, with a road extending from the public road to the place on the river. On Thursday preceding the twelfth day of December, 1891, Mr. Packwood left his place to visit Orange county and, as was his custom on remaining from home overnight, he induced a Mrs. Hatch, living a few miles distant, to stay with his family until his return. During his absence in Orange county, and on the twelfth day of December, 1891, the dead bodies of Miss Bruce, the little boy, Mrs. Hatch, and her little son, who had accompanied her to the Packwood place, were found in the house, under circumstances about which there is no dispute, indicating that they had been brutally murdered. The plaintiffs in error were convicted of murder in the first degree—one of them (Marion Clinton) being recommended to the mercy of the court—under an indictment found at the fall term, A. D. 1893, of the Volusia circuit court, charging them with the murder of Adelaide Bruce.

The indictment contains six counts; the first one alleging that Irving Jenkins effected the death of Adelaide Bruce by means of a leaden bullet discharged by him from a certain pistol, and that the other defendants *** were present, aiding and abetting the commission of the murder. The second count alleges that William A. McRae effected the death of Adelaide Bruce by means of a leaden bullet discharged by him from a certain pistol, and that the other two were present aiding and abetting the commission of the murder. The third count alleges that Marion Clinton effected the death of the person named by means of a leaden bullet discharged by him from a certain pistol, and that Jenkins and McRae were present aiding and abetting the murder; and the fourth count charges that Irving Jenkins effected the death of Adelaide Bruce by striking and beating her with a certain double-barrel gun,

and that McRae and Clinton were present aiding and abetting the commission of the murder. The other counts charge the commission of the offense the same way, except in the one McRae and Clinton in the other are charged as committing the offense, and that the others were present aiding and abetting the commission thereof.

On application made by the accused, the case was transferred to Lake county, and upon a trial in that county the accused were convicted upon the fourth count in the indictment. Motions in arrest of judgment and for new trial were made and overruled, and the accused sentenced—Jenkins and McRae to be hung, and Clinton to confinement in the penitentiary for life.

An assault was made on the indictment by plea in abatement on the ground that it was found by a grand jury not drawn according to law, in that said jurors were not drawn from any box as required by chapter 4122 of the laws of 1893, nor were thirty persons summoned as jurors for said term from whom eighteen were selected ~~was~~ to serve as grand jurors by the court as required by section 5 of said act, but the same were summoned by the sheriff of Volusia county from the body of the county at large. A demurrer was sustained to this plea and defendants excepted, and the ruling is assigned as error here. Great strictness is required in pleas in abatement setting up simply irregularities in the selection of jurors. We said in *Reeves v. State*, 29 Fla. 527, that in framing such pleas, the authorities held that no uncertainty or ambiguity should exist, and in fact the greatest accuracy and precision are required, and they must be certain to every intent: *Woodward v. State*, 33 Fla. 508. The act of 1893, chapter 4122, repealed the act of 1891, chapter 4015, appendix to the Revised Statutes, and was a substitute therefor. The plea before us alleges that the indictment was found by a grand jury not drawn according to the act of 1893, but was summoned from the body of the county at large. If for any sufficient cause a grand jury can be legally drawn from the body of the county at large, it is evident that the plea is defective, because it does not allege that such cause did not exist. Section 1157 of the Revised Statutes, which is a revision of the law of 1875, provides that "whenever, for any cause, no petit jurors or less than the whole number have been drawn or summoned in the manner provided by law for any regular or special term of the circuit or county courts of this

state, it shall be lawful for said courts to issue a special venire for a sufficient of such jurors for said term, to be directed to the sheriff commanding him to draw from the box provided for in section 3 of chapter 4015 of the laws of Florida of 1891, or to summon from bystanders, or the body of the county at large, the number of qualified jurors so ordered." The same rule ³⁰³ applies to the selection of grand jurors: Rev. Stats., sec. 2803. The act of 1893, chapter 4122, has repealed and taken the place of the act of 1891, chapter 4015, but the former act has not repealed section 1157 of the Revised Statutes. The repealing clause of the act of 1893 is confined to the statute of 1891, and there is no conflict between the former and section 1157 of the Revised Statutes. In fact there would be a deficiency in the statutory regulation of selecting jurors if the court did not have the power to provide a jury in case there was a failure for good cause to draw one under the act of 1893. In our judgment the plea was defective, and the court did not err in sustaining a demurrer to it.

The objections urged in the trial court, and the assignments of error made here, based upon the alleged disqualification of certain petit jurors, are not argued, and we will devote no space to them.

Counsel representing the state announced, during the taking of testimony, that it had become of importance to the state that what the accused testified in the grand jury room should be placed before the jury, and it was explained that the state attorney himself took down the testimony of the witnesses before the grand jury. The state attorney being sworn, was asked to look at a paper and state in whose handwriting it was, and said in reply that the portions to the ninth line on the third page, and beginning from the bottom of the sixth page on, was in his handwriting, and that it purported to be the testimony of W. A. McRae before the grand jury at the spring term, 1893. He further testified that he was present, examined McRae, and took down the testimony mentioned as being in his handwriting, and that a member of the grand jury took down a portion of it, but the witness' recollection was that he continued ³⁰⁴ the examination, and superintended the taking of it down, and looked over the shoulders of the juror while it was being taken down. He also stated that it was barely possible that he may have gone from the room a few moments, but did not remember leaving the room. The state attorney was not present when the grand

jury elected a clerk, but he stated that the grand jury had a clerk. At the time McRae was examined before the grand jury he was under subpoena as a witness to attend that body, and at that time he was not charged with the commission of the offense in reference to which he was examined, and for which he was subsequently indicted, nor was he at that time in custody of any officer. The state attorney notified him when he appeared in the grand jury room that he was under suspicion, "that he need not testify unless he saw fit; that he need not testify to anything that would criminate himself; that he could not be compelled to do so; that he was at liberty to testify or not." After this he was willing to testify as to anything he knew about the case, and did testify. Before the introduction of the paper in evidence the state attorney was asked, on cross-examination, if he took down McRae's testimony in writing, and stated the writing was what he took down, and that he had designated the part he did not take down. He had already stated that he superintended the taking of the part taken down by the grand juror and looked over his shoulders when it was done. The state attorney further testified that he did not remember that the testimony referred to was read over to McRae after it was taken down—thought that it was not; portions of it may have been read to him as it was taken down. The testimony was not signed by McRae or anyone else. Counsel for the state asked the court to authorize the removal of ^{see} secrecy from the testimony of William A. McRae before the grand jury, preliminary to the introduction before the trial jury of his testimony before the grand jury at the spring term, 1893, of the circuit court for Volusia county. Objection was made on the part of the accused on the following grounds, viz., that defendant McRae had not testified in the case, nor was there any complaint against him for perjury; the law requires that the grand jury shall have a clerk, who shall preserve the minutes of the proceedings before it, which minutes shall be delivered to the state attorney when it shall direct, and there was no evidence before the court that the grand jury directed the minutes to be given to the state attorney; that the evidence showed that the proposed testimony was not taken by the clerk of the grand jury. The objections were overruled, and defendants excepted.

The state attorney further testifying, was asked if that (referring to the paper) was the testimony of McRae at the

spring term, 1893, of the circuit court of Volusia county, and stated that it was. He also stated "this is substantially the testimony as taken down by me and that clerk; it is the testimony which is substantially as given by Mr. McRae taken down by me at the time and the clerk; it is not verbatim." The paper was admitted in evidence, and the witness read it to the jury as the statement of McRae before the grand jury at the spring term, 1893, of the Volusia circuit court, and the defendants excepted.

A statement of the testimony of Marion Clinton before the grand jury at the same term was also admitted in evidence under similar circumstances, over the objections of the defendants. Clinton was not at the time charged with the offense, or under arrest, and was cautioned by the state attorney before testifying as ~~soe~~ was McRae. In Clinton's case the state attorney alone took down the testimony. Referring to the paper, the state attorney testified that it was the testimony of Marion Clinton given before the grand jury at the spring term, 1893; it was the substance of his testimony, and was correct. On cross-examination he was asked if it was what may be termed his notes of the testimony of Clinton, and replied it "might be termed that, and a little more than the notes of the testimony; I took it down as near as I could, abbreviating a little in the matter." The paper was introduced in evidence, and was read to the jury by the witness as the testimony of Marion Clinton before the grand jury, and defendants excepted. It appears that there were various abbreviations by letters and figures in the statement, and as it was read to the jury the state attorney stated what they stood for. These statements, admitted as evidence, do not contain any confessions on the part of the accused, but they purport to contain their statements before the grand jury in reference to their connection with the case, and in respect to which they were contradicted by testimony introduced for the state.

It is insisted here on behalf of the accused that the court erred in permitting the written statements to be introduced as evidence against the defendants, and the grounds of this insistence may be arranged under three heads: 1. The introduction of the written statements in evidence was an invasion of the secrecy of the grand jury not authorized by law; 2. The statements made by the accused before the grand jury were not voluntary, and should have been excluded on

this account; and 3. The statements themselves were not admissible as evidence, and at most could only be used for the purpose of refreshing the memory ⁸⁰⁷ of the witness in case it became necessary and proper to do so in giving his oral testimony of what was said by the accused before the grand jury. It is provided by statute in this state that "no grand juror or officer of court, unless the court shall so order, shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, otherwise than by issuing or executing process on such indictment, until such person has been arrested." "That no grand juror shall be allowed to state or testify in any court in what manner he or any other member of the jury voted on any question before them, or what opinion was expressed by any juror in relation to such question." "Members of the grand jury may be required by any court to testify whether the testimony of a witness examined before such jury is consistent with or different from the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person upon a complaint against such person for perjury or upon his trial for such offense": Rev. Stats., secs. 2812-2814.

It is contended under the first objection that the only cases in which a grand juror can be required, or should be permitted, by the court to disclose the testimony of witnesses before that body are those mentioned in section 2814 (the one last mentioned), and that, as the accused never testified before the court, and there was no complaint against them for perjury, the statements should not have been admitted. The cases of *Tindle v. Nichols*, 20 Mo. 326, *Beam v. Link*, 27 Mo. 261, and *Commonwealth v. Green*, 126 Pa. St. 531, 12 Am. St. Rep. 894, are cited in support of this contention. The fifteenth section of a Missouri statute was the same as section 2814 ⁸⁰⁸ of our revision, but in a subsequent section of the Missouri statute it was provided that "no grand juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify as a witness in relation thereto." In the case of *Tindle v. Nichols*, 20 Mo. 326, the court say: "In what cases can a grand juror be lawfully required to testify as a witness in relation thereto? Such as are embraced in the fifteenth section, and such only." The cases mentioned in the fifteenth section were the only ones,

as held by the court, in which a grand juror could lawfully be required to testify in relation thereto. This ruling was affirmed in the case of *Beam v. Link*, 27 Mo. 261. We have no such provision in our statute as that contained in the fifteenth section of the Missouri statute. The Pennsylvania case referred to holds that, on a motion to quash an indictment upon the ground that the presentment was not made upon the knowledge and observation of the grand jury, as required by their practice, but upon the testimony of witnesses taken before them on another complaint, a member of the grand jury was a competent witness to testify that that body, in making the presentment, acted upon such testimony, and not upon their own knowledge and observation. It is stated generally in the books, referring to the subject, that, at common law, members of the grand jury should not disclose what transpired before that body in the course of their investigations, but the reasons for excluding such disclosures rest upon grounds of public policy. In *Commonwealth v. Hill*, 11 Cush. 137, it is said: "The extent of the limitation upon the testimony of grand jurors is best defined by the terms of their oaths of office, by which the commonwealth's counsel, their fellows, and their own, they are to keep ~~so~~ secret. They cannot, therefore, be permitted to state how any member of the jury voted, or the opinion expressed by their fellows or themselves, upon any question before them, nor to disclose the fact that an indictment for a felony has been found against any person not in custody or under recognizance, nor to state in detail the evidence on which the indictment is founded: 1 Greenleaf on Evidence, sec. 252; *Freeman v. Arkell*, 1 Car. & P. 135, 137; *Huidekoper v. Cotton*, 3 Watts, 56. To this extent the free, impartial, unbiased administration of justice requires that the proceedings before grand juries be kept secret. By no other means can perfect freedom of deliberation and opinion among jurors be effectually secured, and the ends of an energetic administration of criminal justice surely attained. But we are not aware that the sanction of secrecy has ever been extended beyond this; we know of no authority which carries the rule of exclusion further, and we can see no ground of policy or sound reason for its extension. This rule has been substantially recognized by the Revised Statutes of this commonwealth, chapter 136, sections 12, 13, which would seem to be

a significant indication of the extent to which public policy, upon which the rule mainly rests, requires it to be carried. It seems to us, therefore, that a member of a grand jury may testify to any fact, otherwise competent, which does not violate the restrictions above stated." The sections of the statute referred to in this decision are substantially the same as sections 2812 and 2813 of our Revised Statutes. To the same effect was the decision in the case of *Commonwealth v. Mead*, 12 Gray, 167; 71 Am. Dec. 741. The grounds of public policy for excluding the testimony of grand jurors are said in this case to be threefold: "One is, that the utmost freedom of disclosure of alleged crimes and offenses ^{§10} by prosecutors may be secured. A second is, that perjury and subornation of perjury may be prevented by withholding the knowledge of facts testified to before the grand jury, which, if known, it would be for the interest of the accused or their confederates to attempt to disprove by procuring false testimony. The third is, to conceal the fact that an indictment is found against a party, in order to avoid the danger that he may escape and elude arrest upon it, before the presentment is made." It is further said in this case: "But when those purposes are accomplished, the necessity and expediency of retaining the seal of secrecy are at an end. *Cessante ratione, cessat regula.*" A different rule might have the effect to exclude from the investigation of a case essential and important evidence by adhering to a principle of exclusion based upon public policy, after the reasons on which the rule is based have ceased to exist. How a grand juror or any member of the jury voted on any question before them, or what opinion was expressed by any juror in relation to such question is forever sealed, not only on grounds of public policy, but by positive statute: Rev. Stats., sec. 2813. The courts have no discretion to go into such matters. But independent of statutory regulation, it has long been established that it is discretionary with the trial court to permit a grand juror to be examined as to what a witness testified to before the grand jury, when competent and the ends of justice require it, and we do not see that our statutes have changed this rule. Authorities cited supra; *State v. Broughton*, 7 Ired. 96; 45 Am. Dec. 507; *State v. Moran*, 15 Or. 262; *United States v. Kirkwood*, 5 Utah, 123; notes to *Commonwealth v. Green*, 12 Am. St. Rep. 894. The provisions of section 2814 as to the special cases mentioned do not, in our judgment,

§11 exclude an inquiry in other cases sanctioned by law when, in the discretion of the court, it becomes proper to open up such inquiry.

Section 2807 provides that the state attorney shall, when required by the grand jury, attend that body for the purpose of examining witnesses in its presence and to give it advice upon legal matters, and whenever it would be proper for a grand juror to testify as to the statements of witnesses before the grand jury the state attorney can likewise testify as to such matters. There is no difference in principle between the two in such matters: *State v. Van Buskirk*, 59 Ind. 384; *Knott v. Sargent*, 125 Mass. 95.

The second objection is, that the testimony of the accused before the grand jury was not voluntary. In *Newton v. State*, 21 Fla. 53, it was said that "the general rule is that what a party says in relation to the offense is admissible in evidence against him, whether on oath or not; provided, always, he is not at such time charged with the commission of the crime, and such statement is voluntary." The view expressed in *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721, was also quoted to the effect that "in all cases, as well before coroner's inquests as on the trial of issues in court, when the witness is not under arrest, or is not before the officer on a charge of crime, he stands on the same footing as other witnesses. He may refuse to answer, and his answers are to be deemed voluntary, unless he is compelled to answer after having declined to do so. In the latter case only will they be deemed compulsory and excluded." The question in the *Newton* case arose on the admission of an affidavit made by the accused before a coroner. According to ancient nisi prius decisions in England it seems to have been held that testimony given under oath in any judicial investigation §12 could not be voluntarily given, but this view was overthrown by the case of *Regina v. Wheeler*, 2 Moody C. C. 45, in which all the judges participated. In some of the cases it is stated that the testimony given in a judicial investigation, although under oath, may be omitted if, at the time it was given, the prisoner was not resting under any charge or suspicion of having committed the crime. Where an accused has been charged in a judicial way, or taken into custody on an accusation of crime, his examination on oath is viewed in a different light than when he is examined before arrest or charged with the offense. The accused were not at the time of testi-

lying before the grand jury charged with the offense, or in custody, and we need not here say what would be our ruling if such had been the case. The rule stated in the *Newton* case, in reference to an examination before a coroner, that where a witness is not under arrest, or charged with the crime, and is instructed by the official conducting the examination that he need not answer any question that would criminate him, his testimony may be given in evidence, in a proper case, on a subsequent indictment for the offense, applies to all judicial investigations. The right to protect himself by refusing to answer questions tending to criminate himself, and which he can do under all circumstances, is deemed a sufficient shield against injury or harm under such circumstances: *State v. Vaigneur*, 5 Rich. 391; *Teachout v. People*, 41 N. Y. 7; *Hendrickson v. People*, 10 N. Y. 18; 61 Am. Dec. 721; *People v. McMahon*, 15 N. Y. 384; *Farkas v. State*, 60 Miss. 847; *State v. Clifford*, 36 Iowa, 550; 41 Am. St. Rep. 518. In the present case, as stated, the accused were not in custody, nor were they at the time resting under any charge of the crime for which they were subsequently indicted, and it is made to appear that the state attorney cautioned them before being examined that they need not testify unless they were willing to do so, and that they could not be compelled to criminate themselves. The fact that they were told at the time that they were under suspicion does not have the effect to exclude their testimony before the grand jury.

The next objection is, that the statements reduced to writing in the manner shown were not competent or proper evidence against the accused, and at most could only be used as memoranda for refreshing the memory of the witness in case it became necessary for that purpose. The bill of exceptions shows that the written statements of evidence of the accused before the grand jury as made by the state attorney were themselves admitted as evidence, and the original papers sent up for inspection, under the order of the circuit judge, show by indorsements that the veil of secrecy was removed, and the papers themselves offered in evidence on the examination of the state attorney. From what has been said it follows that it was competent for the state to prove on the trial what the accused testified to before the grand jury, and that a member of that body, or the state attorney, could testify as to such matters within their knowledge. We can see no objection to the state attorney or a member of the grand

jury testifying from recollection as any other witness as to what the accused said before the grand jury, but we have been unable to find any authority to sanction the view that the written statements of evidence made by the state attorney in the ex parte examination of witnesses by him, before the grand jury, are evidence of themselves of what the witnesses there testified. We presume that the written statements of evidence were admitted in this case on the ground ⁸¹⁴ that they were made by an officer of the law in the performance of an official duty, and that as such they were entitled to consideration as evidence of what they contained. It is true that in investigations before examining courts, such as committing magistrates and coroner's inquests, where the testimony of witnesses has been reduced to writing, as provided by statute, it may be introduced as evidence of what the witnesses there swore. In *Jackson v. State*, 81 Wis. 127, it was held that on the second trial of a criminal case the testimony of a deceased witness, as taken down by the official stenographer at the former trial, may be received in evidence on behalf of the prosecution. And in California it seems the notes of the official reporters can be used as evidence of what witnesses testify to: *People v. Morine*, 61 Cal. 367. The case of *State v. Freidrich*, 4 Wash. 204, holds that a stenographer's notes of evidence taken at a former trial cannot be introduced to impeach the testimony of a witness on the second trial regarding matters alleged to have been testified to by him at such former trial. In this case it is said: "Bowman [the stenographer] was present, and competent to testify. He could have been asked whether Longstaff had testified as he claimed; and if unable to answer without his notes he could have been permitted to refer to them to refresh his recollection. But independent of him his notes had no standing in the court." The California case cited was referred to, and it was observed that under the statute of that state the notes of reporters when written out and certified were made prima facie correct statements of testimony: *Rounds v. State*, 57 Wis. 45. Our statutes provided that the grand jury "may appoint one of its ⁸¹⁵ number to be clerk to preserve minutes of the proceedings before it, which minutes shall be delivered to the state attorney when it shall direct." "Whenever required by the grand jury, it shall be the duty of the state attorney to attend it for the purpose of examining witnesses in its presence, or for giving it advice upon any legal matter, and to issue sub-

poenas and other process to secure witnesses": Rev. Stats., secs. 2806, 2807. It is also provided in section 2809 that the foreman of the grand jury shall return to the court a list under his hand of all witnesses who shall have been sworn before the grand jury during the term, and the same shall be filed of record by the clerk. In the present case it is not shown that the written statements introduced in evidence were minutes of the proceedings kept by the clerk of the grand jury. The state attorney himself took down the evidence, except a small portion of the testimony of one of the accused, which was taken down by a member of the grand jury, but if it had all been taken down by the clerk of the grand jury we do not see that it would have made any difference. The accused did not sign the statements of evidence, and it does not appear that they approved them in any way, or that they were even read over to them after being reduced to writing. To authorize the introduction of such evidence against a party some statutory warrants must be shown, and we fail to find any statute giving such statements the effect of evidence, or even making them matters of public record. The investigations before grand juries are *ex parte* and secret, and, aside from the presentments, the only portions of the proceedings before such bodies required to be filed or recorded are the lists of witnesses sworn before them. The rules of the common law, as shown by the cases we have already cited, forbid grand jurors ²¹⁶ to disclose the testimony of witnesses before their body, the reasons for which are obvious, and unless required by some court, in the exercise of a discretion in the furtherance of justice, public policy required such matters to remain undisclosed. Our statutes have indicated two cases in which public policy no longer requires, in the judgment of the legislature, that the veil of secrecy should be so closely guarded, and, as we have held, the mention of these cases does not deprive the court of the right to inquire into such other matters before the grand jury as is sanctioned by the practice of the courts, and not in violation of express statutory provisions. The authority to preserve minutes of proceedings before the grand jury, and for them to be delivered to the state attorney when it shall direct, and the duty devolving upon the state attorney to attend the grand jury, examine witnesses and give advice, do not, in our judgment, contemplate that the grand jury shall make any official record of the testimony of witnesses examined before it. The

minutes of the proceedings kept by a grand jury are for its own use, and for the information and assistance of the prosecuting officer, but such *ex parte* proceedings have not been invested by statute with the force of a binding record against individuals who appear before that body as witnesses. They may not know, or be able to know, what the state attorney or grand jury has reduced to writing, and there is no way open to them for an investigation as to what has been reduced to writing as their statements. Upon no principle of law ought witnesses to be bound by such statements, and in our judgment the court was in error in permitting such statements to be introduced as evidence *per se* of what the accused stated before the grand jury. The state attorney should have been examined as to his knowledge ^{§17} of what the accused stated, and an opportunity afforded to investigate what was said independent of any written statements made at the time. Such statements could have been used, if necessary, for refreshing the recollection, but for no other purpose. The statements admitted as evidence do not, as already stated, contain confessions of guilt, but they purport to contain statements of the accused in reference to matters connected with the murder of Adelaide Bruce that were contradicted by other evidence of the state, and we cannot say what harm was done by the use of the statements as evidence. In cases involving such consequences the court cannot say that improper testimony was harmless unless it affirmatively appear that no injury was done.

Mrs. Hatch was one of the four persons found dead in the Packwood house, in a room adjoining the one in which the dead body of Miss Bruce was found. The husband of Mrs. Hatch was asked, on examination as a witness for the state, whether or not his wife possessed a red flannel undershirt, and stated that she did. Being further asked if it was like the one exhibited to him, replied that he could not state; that he did not know that he ever saw the skirt; his wife said that she was making one a few days before she went away, and that he could not identify the skirt; that he could not recall ever having seen it—may have done so, but could not recollect of doing so. He further stated that a Mrs. Berry left a piece of red flannel at his house as a present while they were away, and that he told his wife to make it up for herself; that his wife made it into skirts for herself; she told him that she had, or rather for herself and sister;

one she sent to her sister, and the other she said she was going to keep. He also stated ^{s18} that no red flannel skirt was found among his wife's clothing at home after the murder. The testimony of the witness as to what his wife said to him about the flannel skirt was objected to as being hearsay evidence, and the court overruled the objection. While the witness stated positively that his wife possessed a red flannel skirt, it is evident from all that he said that he had not seen the skirt, and what he knew about its being made was derived from what his wife told him. It is proper to state in this connection that there was testimony tending to show that a red underskirt was discovered on the dead body of Mrs. Hatch at the time of the inquest held over the dead bodies. Some of the persons who assisted in dressing the bodies for burial were asked about the red skirt, but could not recollect of seeing one. There was testimony, however, as stated, tending to show that Mrs. Hatch had on a red skirt. There was no question about the identity of Mrs. Hatch, as she was well known to many of the witnesses who saw the dead bodies, and clearly recognized by them. The state introduced in evidence a statement made by the defendant McRae a short time after the murder was discovered, in speaking about seeing Mrs. Hatch on the Packwood place the day before the dead bodies were discovered, to the effect that he would never forget, or could never forget, the red skirt and white waist of Mrs. Hatch. In connection with this statement it is apparent without further recital that the importance of showing that Mrs. Hatch was wearing a red skirt at the time she was killed extends beyond the mere proof of the corpus delicti. That the testimony as to what Mrs. Hatch said to her husband about making the flannel into skirts is hearsay is entirely clear, and the court should have excluded it on the objection made. We do not decide ^{s19} that the ruling on this exception, if it stood alone, would result in a reversal of the judgment. In so far as the testimony objected to bore on the question of the corpus delicti, it was wholly immaterial in this case, but in so far as it added weight to the testimony that Mrs. Hatch had on a red skirt, in view of the statement of McRae above referred to, a different estimate should be placed upon it. The fact that Mrs. Berry left red flannel at the house of Mr. Hatch can be shown in connection with the other facts, but the statements of the wife as to making the flannel into skirts was hearsay, and the

only proper way for the court to deal with such evidence when offered is to exclude it from the case.

William Baxter testified for the state that he had conversations with defendant Clinton regarding the Packwood murder, after the murder was discovered. Witness did not remember dates of the conversations, but they were had at various places. Witness referred to a conversation at Olsen's and at the house of witness. The last conversation witness remembered was on the twelfth day of February, 1893, something over one year after the discovery of the dead bodies at the Packwood place. Witness was asked if Clinton said anything with regard to McRae in the conversation, and answered that he did not at that conversation, referring, as shown by the connection, to the last conversation mentioned. Witness stated that Clinton referred to McRae in one of the conversations when he, McRae, was not present. Objection was made to what Clinton stated McRae said in the latter's absence, and the court overruled the objection and permitted the witness to detail such statement. Witness testified that he and Clinton were talking in regard to the murder, and Clinton said McRae told him (witness) that he (McRae) ^{saw} saw Miss Bruce blow the light out on the night that they were murdered. Q. "What else?" A. "Well, that is all, with the exception that he told me and showed me the position she stood in to blow the light out." Q. "Clinton did?" A. "Yes, sir; that McRae told him." Q. "Clinton showed you the position?" A. "Yes, sir; that she stood in when she blew the light out." Q. "Clinton showed you the position that McRae stood?" A. "Yes, sir." Witness stated on cross-examination that he could not remember the date when the conversation in reference to blowing out the light occurred. He could remember that it was on the road between his place and Smyrna, as they were walking there, and thought it was in the evening, but could not remember the day, the week, or the month. All the conversations the witness had with Clinton were subsequent to the discovery of the dead bodies at the Packwood place.

The rule as to the admission in evidence of the acts and declarations of a co-conspirator in reference to the common design affecting his associates is thus stated by Mr. Greenleaf, viz.: "A foundation must first be laid by proof sufficient in the opinion of the judge to establish *prima facie* the fact of conspiracy between the parties, or proper to be laid before the

jury as tending to establish such fact. The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is, therefore, original evidence against each of them. It makes no difference at what time any one entered into the conspiracy. Every one who does enter into a common purpose or design is generally deemed, ^{§ 31} in law, a party to every act which had before been done by the others and a party to every act which may afterward be done by any of the others in furtherance of such common design. . . . If they took place at a subsequent period, and are, therefore, merely narrative of past occurrences, they are, as we have seen, to be rejected": 1 Greenleaf on Evidence, 15th ed., sec. 111; *Williams v. Dickenson*, 28 Fla. 90; *Hall v. State*, 31 Fla. 176. The rule is that, while proof of an overt act or declarations by one in pursuance of a common purpose or design to commit a crime may be given in evidence against all of the conspirators, the acts and declarations to be admitted must be such only as were done and uttered during the pendency of the criminal enterprise and in furtherance of its objects. If they occur at a subsequent period, and are merely narrative of past occurrences, they are not admissible against any but the party making or uttering them. The principle upon which said evidence is admitted is that it must show the acts or declarations to be a part of the *res gestæ*, and when the criminal enterprise is at an end, whether by accomplishment or abandonment, no one of the confederates can be permitted by any subsequent act or declaration of his to affect the others: *State v. Larkin*, 49 N. H. 36; 6 Am. Rep. 456; *State v. Duncan*, 64 Mo. 262; *People v. McQuade*, 110 N. Y. 284; *Phillips v. State*, 6 Tex. App. 364; *Card v. State*, 109 Ind. 415.

In our judgment the court erred in permitting the witness Baxter to testify as to what Clinton said McRae told him in reference to seeing Miss Bruce blow out the light. McRae was not present, and, as it appears from the record, the statement was made after ^{§ 32} the murder at the Packwood place occurred. The conversation with McRae, as given by the witness, was a mere narrative of a past transaction, and shown to be subsequent to the commission of the crime.

There is another exception to the admission of evidence

which, in our judgment, should have been sustained by the court. It appears that for two or three months in 1892 the defendant Jenkins was confined in the jail of Duval county, in the custody of the sheriff of that county, on a charge of selling liquors in violation of the United States statutes. Prior to that time Jenkins had been arrested under a charge for the murder of which he now stands convicted, but had been discharged before his incarceration in the Duval county jail on the complaint of violating the laws of the United States. The sheriff of Duval county had received information that Jenkins probably knew material facts in reference to the Packwood tragedy, and had conversed with him in jail several times on that subject. The state put in evidence the statements of Jenkins to the sheriff of Duval county in reference to the murders at the Packwood place, and in connection with the evidence of such statements the sheriff was asked if he knew of Jenkins paying any money, or giving an order for any money, to any lawyer or person while he was confined in jail. He stated that an attorney, giving name, went to the jail while witness was there and told him he would like to have him witness an order, and to get him a pen and ink; that the attorney wrote the order on a piece of paper, and said to witness he would like him to witness the order Jenkins was to sign on Dr. McRae for fifty dollars. The order was written in the jail, signed by Jenkins in presence of witness and witnessed by him. The witness further stated that he did not recollect whether ²²³ he noticed on the paper itself to whom it was addressed, but it was an order on somebody for money. Being asked if he could recall the order, said that when he signed it, his recollection was that he was signing an order on Dr. McRae. He was further asked if he could recall what Dr. McRae the order referred to, and said: "Only this way, that the only Dr. McRae that we had talked about was Dr. McRae at Sanford; I supposed he lived there, somewhere in Orange county." The witness did not know Dr. McRae. It appears from other evidence that Dr. McRae of Sanford was the father of William A. McRae, one of the codefendants of Jenkins, and also that Jenkins had been working for and staying with the son on the McRae place, near the Packwood place for some time before the murder.

It appears further from the evidence that one Isaiah Adams, who was confined in the Duval county jail with Jen-

kins, was examined by the state in reference to statements made by Jenkins in jail touching the murders at the Packwood place, and, in that connection stated that he, witness, wrote a letter for Jenkins to Dr. McRae for money. He further stated that Jenkins told him "to say in the letter that they wanted him to swear that Mr. McRae and Clinton were connected with that murder, and he would not do anything of the kind." The letter after being sealed and delivered to Jenkins was passed out to a trusty girl, also an inmate of the jail, and witness never saw it after it was handed to the girl. Witness knew Dr. McRae personally, and the letter was directed to Sanford.

The defendants objected to the testimony of the sheriff in reference to giving the order on Dr. McRae on the ground that it was irrelevant and immaterial evidence, and insisted that it had nothing to do with the case. The judge stated that it was difficult to tell, ³²⁴ where everything was circumstantial, what relevancy it may have; it did n't appear to him to be relevant then, because he did not know its object, and if it was not made relevant, defendants could move to strike it out. The objection made was overruled, and defendants excepted. Further objection was made by defendant Jenkins to the testimony of the sheriff by moving to strike it out, and this motion was denied. The testimony, other than that in reference to the order for the money, need not be stated. After the motion on behalf of the defendant Jenkins to strike out the testimony of the sheriff had been overruled, the defendants McRae and Clinton objected to the testimony bearing upon the case against them on the ground that they were not present, and the court stated that the testimony could not be used against them if not present. Counsel for the state also stated that the testimony would not be used against them.

It is competent to introduce any and all evidence that is material and relevant, and that tends to prove the guilt or innocence of the accused. In cases of circumstantial evidence every fact from which the jury may legitimately deduce guilt or innocence is proper to be submitted to them, and although the relevancy of any fact, when standing alone, may not be apparent, yet when, taken in connection with any other fact, or all the other facts, properly admitted, its relevancy is made to appear, it should go to the jury for their consideration. This rule thus broadly stated should not, however, in cases of purely circumstantial evidence, any more than in

others, be carried to the extent of infringing upon another rule, that all evidence should be confined to the question in issue, and tend to prove some essential fact involved in the issue in the case. The view expressed in *State v. Meader*, 54 Vt. 126, 825 was approvingly quoted by this court in the Newton case, to the effect that the admission of illegal evidence, if objected to, though under an offer of connecting it with other proof that would render it competent, and though charged out of the case by the court, is a cause for setting aside a verdict unless the court is able to say affirmatively that it worked no injury to the adverse party. It was also said that "it is a well-settled rule of law that when the error is in the admission of illegal evidence which bears in the least degree on the question in issue, it cannot be disregarded." In cases depending solely upon circumstantial evidence the court should permit nothing that bears upon the case in the least to go to the jury, unless warranted by law or the rules of evidence. Testimony that does not tend to prove motive, or establish some other material fact essential to the crime charged, should not be admitted, and especially when it may tend to produce an erroneous impression on the minds of the jurors to the prejudice of the accused. These elementary principles in the introduction of evidence are well established. We do not see that any legitimate inference that Jenkins was connected with the murder at the Packwood place can be drawn from giving the order in question. He was not at that time under arrest for, or charged with, the murder, but was in custody for another and different offense. The record does not affirmatively show that Dr. McRae owed Jenkins any money, and if any unfavorable inference is to be drawn from drawing the order, taken in connection with the letter written, the reasonable one is, that he was seeking to obtain money for the purpose of extricating himself from the charge under which he was then in custody. The need of Jenkins for money on the order given was while he was in jail on a charge 826 for violating the statutes of the United States, and the order was in favor of an attorney who appeared in the jail, and it is not shown to have any connection with the charge of murder against Jenkins. The fact that he had worked with the son on the McRae place may account for the order on Dr. McRae, but if it be legitimate to infer from it, taken in connection with the statement in the letter to the effect that they were trying to get him to

swear that Mr. McRae and Clinton were connected with that murder, and he would not do anything of the kind, that he was using improper means to extort money, still the legitimate inference, it seems to us, is that he was trying to get out of custody under a different charge than the one for which he and his codefendants were subsequently indicted. At the time the order was given none of the defendants are shown to have been under indictment for the murders at the Packwood place, and to permit the order, given under the circumstances mentioned, on the father of W. A. McRae, subsequently indicted with Jenkins, to be considered as evidence on the trial for said murder, would be extending the proof of facts, from which a legitimate inference of guilt could be drawn, too far. The record does not show anything material in reference to the order or letter further than as above stated. We do not know that Dr. McRae ever received any letter or order from Jenkins, nor is there any showing that the defendant W. A. McRae was ever connected with the order or letter, or ever knew anything about them. This testimony, while not affording any legitimate inference that the defendants were connected with the murder for which they were tried, is calculated, it seems to us, to produce an erroneous impression on the minds of the jury. The circuit judge stated at the time the testimony was admitted ²²⁷ that he did not then see its relevancy, and we agree with him in this, and discover nothing further in the evidence to make it relevant. It is true that the court stated that if the testimony was not made relevant, defendants could move to strike it out, but we do not see that they are precluded from insisting on the objection made to the introduction of the evidence by not, at a subsequent stage of the case, moving to strike it out. The court can regulate the order of the introduction of evidence, but when irrelevant testimony is offered and objected to, and it is admitted on the theory that its relevancy may be shown by subsequent evidence, if such evidence is not introduced the irrelevant part should be excluded by the court. We do not overlook the fact that the court stated that the evidence in reference to the order could not be used against McRae and Clinton, but we deem the evidence improper as against Jenkins, and its prejudicial character is that the jury may have been somewhat influenced by it to believe that the defendants were connected with the murder. How it could have any legitimate effect to establish

guilt against Jenkins, without operating to the prejudice of the other defendants, is difficult to see.

It is further insisted that all the testimony of Broward as to the statements of Jenkins should have been excluded from the consideration of the jury. Had proper exceptions been taken to this testimony, on the ground that such statements were not shown to have been voluntarily made to the witness, a majority of the court are inclined to the view that the testimony should have been excluded, but as exceptions, on the ground stated, were not properly made of record, further discussion of this objection will not be indulged in here.

⁸²⁸ What was said in reference to the admissibility of the testimony of the accused before the grand jury disposes of the objections made as to their testimony before the coroner's jury. Such testimony voluntarily given before the coroner, when they were not under arrest, is competent, and when reduced to writing and signed by them, the writing itself is the proper evidence. This testimony, when not reduced to writing and signed by them, may be shown by witnesses who can testify of their recollection what it was.

Other objections to the admissibility of evidence insisted on here need not be considered. To the extent permitted by the court, we find nothing objected to by the accused and insisted on here of which they can justly complain.

The court charged the jury at the instance of the state as follows, viz.: "That in cases of circumstantial evidence it is not necessary that the proof shall be conclusive; that it is sufficient if the jury believe from all the facts and circumstances of the case that the accused are guilty, and that they have no reasonable doubt in their minds of this fact. If the jury think that the facts in this case are all consistent with the supposition that the prisoners are guilty, and cannot reconcile the circumstances produced in evidence with any other supposition than that of their guilt, it is their duty to find them guilty. All that can be required is not absolute and positive proof, but such proof as convinces them that the crime has been made out against the accused." Objections are made to portions of this charge. The first one is to the following portion: "If the jury think that the facts in this case are all consistent with the supposition that the prisoners are guilty, and cannot reconcile the circumstances produced in evidence with any other supposition than that of their guilt, it ⁸²⁹ is their duty to find them guilty"; and the

second objection is to the last sentence of the charge. It is claimed that instead of telling the jury that if they think that the facts in the case are all consistent with the supposition of guilt, the court should have said, if the jury believe from the evidence beyond a reasonable doubt, etc. It is claimed further that the words "beyond a reasonable doubt" should have been added to the last sentence of the charge. The entire charge must be looked to in considering the objections made: *Smith v. Bagwell*, 19 Fla. 117; 45 Am. Rep. 12; *Andrews v. State*, 21 Fla. 598; *Pinson v. State*, 28 Fla. 735. The last clause of the charge standing alone would be amenable to the objection made, but we find in the first clause of direction that the jury must have no reasonable doubt of the sufficiency of the facts and circumstances of the case to establish guilt, and in the clause objected to the jury were told, in effect, that the facts of the case must all be consistent with the supposition that the prisoners were guilty, and irreconcilable with any other supposition than that of their guilt. Considering the entire charge, we do not see that the court excluded from the jury the requirement that they must believe from the evidence beyond a reasonable doubt that the defendants were guilty. The charge as an entirety enforces this requirement upon the jury. The objections urged against the charge are not good. The charge asserts that in cases of circumstantial evidence it is not necessary that the proof should be conclusive. As to the conclusiveness of evidence Mr. Starkie says: "What circumstances will amount to proof will never be matter of general definition; the legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. On the one hand absolute, metaphysical, ³³⁰ and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt." This author also says that the circumstances should be of a conclusive nature and tendency. Such views have been approved by this court: *Whetston v. State*, 31 Fla. 240; *Kennedy v. State*, 31 Fla. 428.

At the request of the state the court further charged the jury that "in cases of this kind the conclusion to which the jury are conducted is that degree of certainty that they would come to in their own grave and important concerns, and that is the degree of certainty which the law requires, and which will justify them in returning a verdict of guilt from all

the facts and circumstances laid before them. That the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of their guilt." This charge distinctly directs the jury that the degree of certainty which the law requires and which will justify them in finding a verdict of guilty on circumstantial evidence is that to which they would arrive in their own grave and important concerns. This charge is wrong, and lays down an improper standard for the guidance of juries in arriving at conclusions from the evidence in criminal cases. The subject matter of this charge was thoroughly considered in the case of *Lovett v. State*, 30 Fla. 142, and we do not deem it necessary here to go into any extended discussion of the cases bearing on the point. There are cases sustaining the view that the reasonable doubt which the jury must entertain in order to convict means that their minds must be so thoroughly convinced that they would act upon the conviction as they ⁸³¹ would in matters of the highest concern and importance to themselves: *State v. Nash*, 7 Iowa, 347; *Polin v. State*, 14 Neb. 540. In *Lovett v. State*, 30 Fla. 142, this court approved the views announced by the California and Kentucky courts on the subject. The Kentucky court in the case of *Jane v. Commonwealth*, 2 Met. (Ky.) 80, pronounced as improper and erroneous the following instructions, viz.: "That the jury should weigh and consider all the facts and circumstances proven to their satisfaction, in connection and combination, and should hold them and pass judgment on them in that condition, and that if the conclusion from the facts and circumstances so proven to their satisfaction be that there is that degree of certainty in the case that they would act on it in their own grave and important concerns, that that is the degree of certainty which the law requires and which will justify and warrant them in returning a verdict of guilty." The court said: "Men frequently act in their own grave and important concerns without a firm conviction that the conclusion upon which they proceed to act is correct; but having deliberately weighed all the facts and circumstances known to them, they form a conclusion upon which they proceed to act, although they may not be fully convinced of its correctness. But this degree of certainty is wholly insufficient to authorize a verdict of guilty in criminal cases. In such a case the jury should be fully

convinced of the correctness of their conclusion that the prisoner was guilty, and that conviction should be so clear and strong as to exclude from their minds all reasonable doubt that their conclusion was correct." The California and other courts indorse this view: *People v. Ah Sing*, 51 Cal. 372; *People v. Bemmerly*, 87 Cal. 117. The degree of certainty required by the law, as asserted by the charge ⁸³² before us, does not even demand that the jury should be so thoroughly convinced as that they would act upon the conviction as in matters of the highest concern and importance to themselves. It asserts that the degree of certainty is such as they would reach in their own grave and important concerns. A charge containing such language was declared erroneous in the Kentucky decision cited. It is true that all through the instructions given to the jury by the court it is stated that the evidence must convince them of the guilt of the accused beyond a reasonable doubt before they could convict, but the charge under consideration fixed a degree of certainty in weighing the evidence which was calculated to mislead the jury throughout the entire case, and we cannot say that it did not do so.

We do not deem it necessary to refer to but one other charge excepted to and discussed by counsel for plaintiffs in error, and that is the third charge given at the instance of the state. It is not improper for the court, when deemed necessary to do so, to tell the jury that the fact that unfortunate cases have occurred where innocent persons have been convicted upon circumstantial evidence, should not enter into their consideration of the evidence before them. So far as what is here stated is embodied in the charge referred to it is not objectionable, but the other features of the charge should, in our opinion, be omitted.

Counsel for plaintiffs in error insist that the court erred in permitting argument of counsel for the state to go to the extent that it did. Some of the language used by counsel for the state, and found in the bill of exceptions, does not appear to have been excepted to at the time the argument was made. The comments of counsel in arguing a case before a jury are controllable ⁸³² in the discretion of the trial court, but this discretion is subject to review, and when counsel make material statements outside of the evidence which are likely to do the accused an injury, it will be deemed an abuse of discretion when not stopped by the court on objection made: *New-*

ton v. State, 21 Fla. 53; *Killins v. State*, 28 Fla. 313; *People v. Aikin*, 66 Mich. 460; 11 Am. St. Rep. 512. In *Wilmington v. State*, 21 Fla. 761, it was held that objections to the argument of counsel as being beyond the evidence or otherwise improper should be made at the time of such abuse of the right or privilege of argument, and the action of the court overruling the objection, and the fact that exception was taken to such ruling should appear with the objection in the bill of exceptions. The bill of exceptions recites as follows: "The defendants object to so much of the argument to the jury by Major Abrams, of counsel for the state, as is in the following language: I go further, and say that if these murders are not punished the state of Florida is largely responsible for the failure of justice; that the state has failed and refused to furnish to its officer the adequate means to make conclusive every possibility—not merely probability, but every possibility—and that when the man who speaks before you succeeded in passing in the senate of Florida a bill to furnish the state with the means for investigating all secret crime, it was laid on the table in the house, and that man who opposed the bill in the house was the member of the legislature from Orange county who lives in Sanford." We do not hesitate to express our disapproval of the language quoted. There was no testimony to authorize such comment, and it was calculated to prejudice the accused,⁶³⁴ as it was made to appear that the father of McRae, one of the accused, lived in Sanford.

So far as we can see there was nothing improper in counsel taking up a pistol that had been put in evidence, and stating that it had been identified as the pistol of one of the defendants. There was testimony tending to prove such fact. Nor was there any impropriety in counsel, during his argument, handing the pistol to the jury to be examined. The pistol had been put in evidence before the jury and testimony introduced as to its condition. The jury could properly examine the pistol to see its condition, and it was not improper for counsel to ask them to do so.

The other language used by counsel and found in the record does not appear to have been even objected to, and we will not refer to it.

After deliberation the jury returned into court and announced that they had agreed upon a verdict, and handed to the clerk a paper signed by the jurors as follows, viz.: "We,

the jury, find the defendants guilty as charged, but recommend Marion Clinton to the mercy of the court." The court declined to receive the return as a verdict, and made certain statements to the jury in reference to their verdict. Counsel excepted to what the court said to the jury, and insist that the province of the jury was invaded. As the judgment must be reversed on other grounds, we do not deem it necessary to specially consider the exceptions on this point, further than to call attention to some decisions bearing on it. We have held that a finding like the one referred to above in cases of homicide is under our statute a nullity, and no judgment or sentence can be pronounced upon it: *Hall v. State*, 31 Fla. 176; *Lovett v. State*, 31 Fla. 164; *Murphy v. State*, 31 Fla. 166. ²²⁵ In *Grant v. State*, 33 Fla. 291, the jury returned a verdict of manslaughter in the first degree, and the court refused to receive it, stating to the jury at the time that the verdict was not in such form as could be received by the court, and directed the jury to retire and present a verdict in proper form. The trial of the case was under the Revised Statutes, abolishing degrees in manslaughter. We said that while it was entirely clear that the trial judge may send a jury back to the consultation room for the purpose of correcting their findings as to matters of informality or uncertainty, and when the issue had not been passed upon by them, yet the judge must not even suggest the alteration in substance of the verdict, and that the action of the judge in reference to the correction of verdicts should be with great caution. In *Bryant v. State*, 34 Fla. 291, the verdict was, We, the jury, find the prisoner guilty of murder in the first degree, and on objection to the form of the verdict by the state attorney, the court directed the jury to retire, and if they agreed to return a verdict of guilty of murder in the first degree against the prisoner, to name him in their verdict. This was held to be not improper: See, also, *People v. Bonney*, 19 Cal. 426.

When a jury returns such a finding as the one stated in this case, the case is still in their hands, and their duty in the premises remains undischarged. The court cannot consider such a finding as being a verdict of murder in any degree, and cannot, of course, then any more than at any other time intimate to the jury what their verdict should be.

The judgment of the court below is reversed and a new trial awarded.

INDICTMENT—PLEAS IN ABATEMENT.—Objections to the qualifications of a grand juror may be raised by a plea in abatement: *State v. Davis*, 12 R. L. 492; 34 Am. Rep. 704, and extended note; *Reich v. State*, 53 Ga. 73; 21 Am. Rep. 265. See, further, the extended note to *Commonwealth v. Green*, 12 Am. St. Rep. 909.

GRAND JURORS AS WITNESSES.—At common law a member of the grand jury could not testify as to what transpired in the juryroom for reasons of public policy: Extended note to *Commonwealth v. Green*, 12 Am. St. Rep. 915; but it is now quite well settled that a grand juror may be called to show that a witness who has just testified on the trial swore differently before the grand jury: Same note at p. 917.

EVIDENCE—CONFESSIONS BEFORE GRAND JURY.—Testimony or a confession given before a grand jury, under oath and involuntarily, by one at the time under arrest and charged with the crime then being inquired about, without informing him of his rights, or the effect of his testimony, or the possibility of its use against him, is inadmissible on his subsequent trial for such crime: *State v. Clifford*, 86 Iowa, 550; 41 Am. St. Rep. 618, and extended note.

WITNESSES—REFRESHING MEMORY.—A witness may use a memorandum to refresh his memory: *Holladay v. Marsh*, 3 Wend. 142; 20 Am. Dec. 678; *Riordon v. Davis*, 9 La. 239; 29 Am. Dec. 442, and note; *Henderson v. Haley*, 11 Smedes & M. 9; 49 Am. Dec. 41, and note. See, also, the extended notes to *Acklen v. Hickman*, 35 Am. Rep. 56, and *State v. Bacon*, 98 Am. Dec. 619.

CONSPIRACY—EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATORS.—When a conspiracy to commit crime is established, the act or declaration of one conspirator or accomplice in the prosecution of the enterprise is considered the act of all, and is evidence against all. Each is deemed to assent to or to commend what is done by any other in furtherance of the common object: *McKenzie v. State*, 32 Tex. Cr. Rep. 568; 40 Am. St. Rep. 795, and note with the cases collected. But after a conspiracy is ended and its object has been actually reached, the declarations of one conspirator are not admissible in evidence against the others: *State v. Green*, 40 S. C. 328; 42 Am. St. Rep. 872, and note.

EVIDENCE—CIRCUMSTANTIAL.—To warrant a conviction of crime on circumstantial evidence, absolute certainty is not essential, and if the circumstances produce moral certainty to the exclusion of every reasonable doubt, it is sufficient: *Carlton v. People*, 150 Ill. 181; 41 Am. St. Rep. 346, and note. Circumstantial evidence is sufficient to support a verdict of conviction if the jury believed beyond a reasonable doubt from such evidence the guilt of the defendant: *State v. Atkinson*, 40 S. C. 363; 42 Am. St. Rep. 877, and note. See, also, the extended note to *Rippey v. Miller*, 62 Am. Dec. 179-187.

CIRCUMSTANTIAL EVIDENCE—REASONABLE DOUBT—INSTRUCTIONS.—In a case where the evidence as to the defendant's guilt is purely circumstantial, the evidence must lead to the conclusion so clearly and strongly as to exclude every reasonable hypothesis consistent with innocence. In a case of that kind an instruction in these words is erroneous: "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty." It is not enough that the evidence necessarily leads the mind to the conclusion, for it must be such as to exclude reasonable doubt: *Rhodes v. State*, 128 Ind.

189; 25 Am. St. Rep. 429, and note. See, also, the extended note to *Ripsey v. Miller*, 62 Am. Dec. 183.

TRIAL—CRIMINAL LAW—INSTRUCTIONS.—The charge of the court must be considered as a whole in connection with the evidence, and not in disconnected parts: *Gibson v. State*, 89 Ala. 121; 18 Am. Dec. 96; *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320; *Fort v. State*, 52 Ark. 180; 20 Am. St. Rep. 163.

CRIMINAL TRIAL—COUNSEL'S ADDRESS TO JURY.—Statements of facts by counsel not authorized by the evidence should not be permitted: *State v. McCall*, 4 Ala. 643; 39 Am. Dec. 314. See, further, *Cheatham v. State*, 67 Miss. 335; 19 Am. St. Rep. 310, and note, and the extended note to *Cleveland Paper Co. v. Banks*, 48 Am. Rep. 336-339.

TRIAL.—A VERDICT FOR MURDER WHICH DOES NOT FIND THE DEGREE is void: *Johnson v. State*, 30 Tex. App. 419; 28 Am. St. Rep. 930, and note.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

HART v. WASHINGTON PARK CLUB.

[157 ILLINOIS, 9.]

LANDOWNERS, LIABILITY OF.—If the owner or occupier of land, either directly or by implication, induces persons to come upon his premises, he thereby assumes an obligation that such premises are in a reasonably safe condition, so that persons there by his invitation shall not be injured by them or in their use for the purpose for which the invitation was extended.

PUBLIC GROUNDS AND RACECOURSE, LIABILITY OF KEEPER OF.—One in possession of a racecourse and conducting an exhibition of horseracing thereon, inviting the public to attend and charging an admission fee, is under the duty of keeping the grounds in a reasonably safe condition for spectators.

NEGLIGENCE, PRESUMPTION OF.—When a thing is under the exclusive management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care.

NEGLIGENCE IS NOT PRESUMED AS AGAINST THE OWNER OF A RACECOURSE who is giving thereon a public exhibition of racing, from the allegation that a horse ran away and inflicted an injury upon a spectator, where it does not appear that the horse was the property of, or under the control of, the defendant, nor at what place plaintiff was when he received his injury.

Rosenthal, Kurz & Hirschl, for the plaintiff in error.

Cratty Bros., and Jarvis & Cleveland, for the defendant in error.

¹¹ **MAGRUDER, J.** The action below was trespass on the case brought by plaintiff in error against defendant in error. The declaration avers as follows:

“For that, whereas, heretofore, on the day commonly known

as 'Derby Day,' on, to wit, the twenty-fifth day of June, 1893, said defendant, in said county, on the certain racecourse then and there in its possession, gave and conducted a public exhibition of horseracing, and thereto invited the public at large, charging and receiving an admission fee. Plaintiff paid said fee and attended said exhibition, and was then and there, and at all times thereabouts, in the exercise of all reasonable and ordinary care, and lawfully in and upon the ground in defendant's possession and control, set aside by defendant for the use of the spectators at said races. And plaintiff alleges that it then and there became and was the duty of defendant to use all reasonable and ordinary care to keep said grounds in a reasonably safe and suitable condition for the said spectators, and therein defendant made default, and so carelessly and negligently kept said grounds that ¹² a horse drawing a vehicle ran unguarded, unattended, and unhindered, from a cause or causes which, upon diligent inquiry, plaintiff has not been able to learn, but which are to defendant well known, through and among the spectators, and in so doing ran upon and against the plaintiff, whereby he was violently thrown to the ground, and was thereby and then greatly bruised, hurt, and wounded," etc.

The declaration was demurred to; the demurrer was sustained; plaintiff stood by his declaration; judgment was rendered for defendant, and has been affirmed by the appellate court. The present writ of error is sued out for the purpose of reviewing the judgment of the appellate court.

The question is whether the declaration was good on general demurrer. It is urged in favor of the sufficiency of the declaration that proof of the injury as alleged will give rise to a presumption of negligence on the part of the defendant, and so establish a *prima facie* case under the application of the maxim, "*Res ipsa loquitur*." It is claimed that the declaration avers all that is necessary by stating that defendant invited plaintiff into its racing course and accepted an admission fee from him; and that plaintiff was lawfully upon the ground set apart by the defendant for spectators, and while there was in the exercise of ordinary care; and that it was the duty of defendant to exercise reasonable care to keep the space so set apart reasonably safe; and that plaintiff was struck by a horse and vehicle running unattended through such space. It is contended that the space reserved for spectators was not safe when a horse and vehicle thus ran through

it, and that the fact of such running indicated negligence, and devolved upon the defendant the burden of showing how the accident happened and that it had used all reasonable care to prevent such an occurrence.

¹³ On the other hand, it is urged against the sufficiency of the declaration, that it does not state facts sufficient, if proven, to create a reasonable presumption of negligence on the part of the defendant, or to justify an allegation that defendant owed a duty to plaintiff, or to support an averment that the defendant had knowledge of the cause or causes of the running away of the horse. It is claimed that the declaration is objectionable as not stating whether or not the plaintiff was in the grand stand, or in the space occupied by visitors in carriages or other vehicles drawn by horses, or in that occupied exclusively by pedestrians, and in not stating whether or not the horse which ran away belonged to the defendant, or was in the keeping of the defendant. It is contended by the defendant in error that the running away of a horse creates no presumption of negligence except as against those whose duty it is to guard against such an occurrence, and that no fact is alleged in the declaration showing the duty of the defendant in this respect.

If an owner or occupier of land, either directly or by implication, induces persons to come upon his premises, he thereby assumes an obligation that such premises are in a reasonably safe condition, so that the persons there by his invitation shall not be injured by them, or in their use for the purpose for which the invitation was extended: *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596; 32 Am. St. Rep. 218; Campbell on Negligence, sec. 43; 16 Am. & Eng. Ency. of Law, 413; *Davis v. Central Congregational Society*, 129 Mass. 367; 37 Am. Rep. 368.

In *Currier v. Boston Music Hall*, 135 Mass. 414, it was held that the proprietor of a hall to which the public is invited is bound to use ordinary care and diligence to put and keep the hall in a reasonably safe condition for persons attending in pursuance of such invitation; and if he neglects his duty in this respect, so that the hall is in fact unsafe, his knowledge or ignorance of the defect is immaterial.

¹⁴ In the case at bar the declaration avers that the defendant was in possession of the racecourse and conducted an exhibition of horseracing thereon, and invited the public at large to attend and charged an admission fee, and that plain-

tiff paid the fee and attended the exhibition. These facts are sufficient to impose the same obligation upon defendant which rests upon any other owner or occupier of premises who invites people to come upon the same. Out of these facts necessarily arises the duty of defendant to keep the grounds in a reasonably safe and suitable condition for the spectators. Counsel for defendant in error refer to a number of authorities in support of the proposition, that a mere general allegation in the declaration that it became the duty of the defendant to do that which the plaintiff complains of its omitting to do, is not sufficient; and that the sufficiency of the declaration in this regard will depend upon whether the facts stated show that the defendant was bound in law to do that which it is charged with having omitted to do. No fault can be found with the doctrine of the authorities thus referred to. Tested by the rule laid down in them, the declaration here, by averring defendant's occupancy of the grounds and its invitation to the plaintiff to come thereon, states such facts as give rise to the general duty which the defendant is charged with failing to perform.

The question next arises whether the declaration makes such averments as show a breach of the duty arising out of the facts stated; or, in other words, whether negligence can be presumed from the running away of the horse within the space reserved for spectators. There are cases where the maxim, *Res ipsa loquitur*, is applicable. The meaning of this maxim is that, while negligence is not, as a general rule, to be presumed, yet the injury itself may afford sufficient *prima facie* evidence of negligence, and the presumption of negligence may be created by the circumstances under which the injury occurred.

¹⁵ Where negligence is thus presumed from the occurrence of the injury, the defendant is called upon to rebut the *prima facie* case by showing that he took reasonable care to prevent the happening of such injury: Cooley on Torts, marg. pp. 661, 662; 16 Am. & Eng. Ency. of Law, 449. Perhaps it may be more accurate to say, that the presumption of negligence arises, not exclusively from the fact that the accident happened, but that it happened under given conditions and in connection with certain circumstances: 2 Thompson on Negligence, 1228. Negligence has been presumed, so as to throw the burden of explanation upon the defendant, where a plaintiff was passing along a highway under a railway bridge, and a brick fell from one of the pilasters upon

which an iron girder of the bridge rested, and injured him: *Kearney v. London R. R. Co.*, L. R. 5 Q. B. 411; 2 Thompson on Negligence, 1220; where a plaintiff, walking in the street, was struck and injured by a barrel of flour falling from the window of a warehouse belonging to the defendant: *Byrne v. Boadle*, 2 Hurl. & C. 722; where a building adjoining a street fell into the street and injured a plaintiff upon the sidewalk: *Mullen v. St. John*, 57 N. Y. 567; 15 Am. Rep. 530; where the plaintiff, while making an inquiry at the door of a house in which the defendant had offices, received a push from the defendant's servant, who was watching a packing case, propped against the wall of the house and belonging to the defendant, and the packing case then fell upon and injured the plaintiff: *Briggs v. Oliver*, 4 Hurl. & C. 403.

In *Scott v. London etc. Docks Co.*, 3 Hurl. & C. 596, it was said by the court: "There must be reasonable evidence of negligence. But when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want ¹⁶ of care." This passage was quoted with approval in *North Chicago Street Ry. Co. v. Cotton*, 140 Ill. 486. In Addison on Torts, volume 1, section 33, the rule is thus stated: "Where the accident is one which would not, in all probability, happen if the person causing it was using due care, and the actual machine causing the accident is solely under the management of defendant, . . . the mere occurrence of the accident is sufficient prima facie proof of negligence to impose upon the defendant the onus of rebutting it." Upon the basis of these authorities the case of *The William Branfoot*, 48 Fed. Rep. 914, holds that, "when an unusual and unexpected accident happens, and the thing causing the accident is in one's exclusive management, possession, or control, the accident speaks for itself, is itself a witness, *res ipsa loquitur*, and, in a suit by any one having an action therefor, the fact of the accident puts on the defendant the duty of showing that it was not occasioned by negligence on his part."

In the present case it sufficiently appears from the declaration that the racecourse, and the grounds connected therewith, were under the exclusive management and control of the defendant. But it is not alleged that the "runaway"

horse, which caused the injury, was under the management and control of the defendant or its servants. It is matter of common knowledge that these racecourses are visited by invited spectators, who drive into the grounds in their own carriages or other vehicles, under the control of themselves or their own drivers. The averments of the declaration do not negative the idea that the injury may have occurred through the negligence of one of these spectators in failing to properly control his horse. It was the duty of the defendant to provide sufficient barriers and watchmen and hitching posts, but a performance of this duty might not in all cases prevent accidents arising from the carelessness of those coming into the grounds with teams of their own. ¹⁷ Moreover, the declaration does not sufficiently specify in what place the plaintiff was when he was injured, whether in the space reserved for pedestrians or what is called the grand stand, or in the space reserved for spectators visiting the racecourse in their own vehicles. While the question of the sufficiency of the declaration is not altogether free from doubt, we are inclined to think that its allegations are not specific enough either as to the place of the injury or as to the defendant's control over the immediate cause of the injury.

In *Conrad v. Claude*, 93 Ind. 476, 47 Am. Rep. 388, there was a demurrer to the first paragraph of a complaint, alleging that defendants were the owners and managers of enclosed fair grounds, charging an admission fee, and, while an agricultural fair was in progress, allotted a part of the grounds for shooting with a target gun, but gave no notice thereof to plaintiff who attended the fair with his horse and buggy, and, being ignorant of the location or existence of the gun, or that the portion of the ground reserved for target shooting had been so reserved, hitched his horse where others were hitched, and his horse was shot and killed; the demurrer was overruled, but it appeared from the complaint itself that the target shooting was a part of the exhibition or entertainment carried on at the fair, and so under the supervision and control of its managers; and that, although those engaged in the shooting were not strictly servants of the defendants, yet they were acting under the license and permission of the defendants, and bore such a relation to them as made the defendants liable for injuries resulting from their negligence in not properly controlling the management of that part of their exhibition.

In *Unger v. Forty-second Street etc. R. R. Co.*, 51 N. Y. 497, it appeared that the plaintiff was run over in a public street by a team of horses running away with a pole and whiffletree attached to them, and that the horses had become detached from a street-car which they had been ¹⁸ drawing; and it was there held that the fact that the horses were unattended and unfastened in the street was, unexplained, evidence of negligence against the defendant; but it also appeared that the horses belonged to the defendant, the street railroad company, and had broken away from one of its cars while driven by one of its employees.

In *Strup v. Edens*, 22 Wis. 432, plaintiff's daughter was injured by horses running away, and it was said that "the fact that the horses got loose and ran away is some evidence of negligence," but the horses belonged to the defendant and there was evidence tending to show that they were not properly hitched.

So, also, in *Hill v. Scott*, 38 Mo. App. 370, it appeared that the "runaway" horse causing the injury belonged to the defendant, and had been securely hitched before he ran away. It was there said that "a horse does not ordinarily get loose if carefully hitched." While, in the case at bar it might be presumed that the horse injuring the plaintiff would not have run away if he had been carefully hitched, yet the declaration does not state such facts as would lead to the conclusion that the horse belonged to the defendant or was under its control, or that, if it belonged to a visitor to the racecourse, the defendant had neglected such precautions in the way of hitching posts or barriers or watchmen as would affect it with responsibility for the accident. The fact that a horse is running away unattended affords some evidence that the horse has been left unfastened or improperly and negligently secured, but does not necessarily indicate by whom he was so left in the absence of proof as to what person had control of him: *Button v. Frink*, 51 Conn. 342; 50 Am. Rep. 24.

The judgment of the appellate court is affirmed.

REAL PROPERTY—LIABILITY OF OWNER.—The owner of lands is liable in damages to one who using due care comes thereon at the invitation or inducement, express or implied, of such owner, on any business to be transacted with or permitted by him for injuries occasioned by the unsafe condition of the premises, known to him and suffered negligently to exist, and of which the injured party has no knowledge: *Donaldson v. Wilson*, 60 Mich. 86; 1 Am. St. Rep. 487, and note. See, also, the note to *Bedell v.*

Berkey, 15 Am. St. Rep. 375, and the extended note to *McAlpin v. Powell*, 26 Am. St. Rep. 562.

NEGLIGENCE—PRESUMPTION OF, FROM HAPPENING OF ACCIDENT.—A presumption of negligence may arise from an accident, and if the circumstances are of such a nature that it may be fairly inferred from them that the reasonable probability is that the accident was caused by the failure of a party to exercise proper caution, a presumption of negligence arises: *Howser v. Cumberland etc. R. R. Co.*, 80 Md. 146; 45 Am. St. Rep. 332. See the extended notes to *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490; *Huey v. Gahlenbeck*, 5 Am. St. Rep. 794; and *Fleming v. Pittsburg etc. Ry.*, 33 Am. St. Rep. 337.

RYAN v. CUDAHY.

[187 ILLINOIS, 108.]

ESTOPPEL TO DENY JURISDICTION OF BOARD OF TRADE.—One who, in becoming a member of a board of trade, agrees to abide by its rules and regulations, and who voluntarily submits to the trial of a matter referred to a committee without in any manner calling into question the jurisdiction of the committee, is estopped from denying its jurisdiction over the person and subject matter.

JURISDICTION OF A COMMITTEE OF A BOARD OF TRADE IS SPECIAL AND LIMITED, and it is bound to proceed in conformity to the rules under which it was selected. If it fails to conduct the investigation in accordance with the charter and by-laws of the board, its judgment is not binding.

BOARD OF TRADE—JURISDICTION OF COURTS TO SUPERVISE.—Where property rights are involved, courts have power to so far supervise the action of a board of trade as to determine whether it has proceeded according to the rules and regulations provided for its action, and if it has failed in a substantial manner, courts may correct abuses which may result from its unwarranted proceedings.

BOARD OF TRADE—REFUSAL OF COMMITTEE TO HEAR EVIDENCE.—Where the rule of a board of trade requires its committee to hear such evidence under oath as either party may wish to submit touching their claims or dispute, a refusal of such committee to hear such evidence renders its action invalid.

BOARD OF TRADE, EVIDENCE OF THE PRICE OF ARTICLES.—In a controversy between a person who has contracted to sell, and one who has agreed to buy, marketable articles at a designated day respecting the price which ought to be charged to the former for such articles that he is unable to deliver at the time indicated, the committee of the board of trade to whom the decision of the matter is committed should not confine the parties to the evidence of the difference between the contract price and a figure established by a committee of the board of trade on the day of delivery, regardless of the fact whether such figure is real, fictitious, or manipulated by collusion. Especially is this true when the rule of the board declares that in determining the value of the property, its value in other markets, or for manufacturing or consumptive purposes in this market, together with such other facts as may justly enter into the determination of its value, shall be considered,

irrespective of any fictitious price which it may at the time be selling for in this market.

BOARD OF TRADE—WAIVER.—The fact that the seller had put up margins when demanded does not deprive him of the right, when the title to the margins is put in issue, of proving, if he can, that the market value of the article sold was no higher on the day of delivery than when it was sold.

BOARD OF TRADE—JURISDICTION OF COURTS OVER.—A court of equity has jurisdiction to interfere with the action of a board of trade or one of its committees appointed to settle a controversy submitted to it under the rules and regulations of the board when such board or committee has refused to receive evidence offered by one of the parties relevant to the issue submitted for decision.

BILL in equity by Ryan against Cudahy and others to enjoin the indorsement by defendant Hamill, president of the board of trade, of certain certificates in the custody of the defendant Stone as secretary, and ordering their payment of the amount of such certificates to Roloson & Co. in accordance with a decision of the committee of the board of trade of Chicago. The defendants, other than the Merchants' Loan & Trust Company, were members of that board. The bill alleged that the complainant on October 31, 1892, was under contract with various members of the board of trade to deliver on that day short rib middles aggregating one million four hundred and fifty thousand pounds, and that he was unable to comply with his contract because the market was cornered by an unlawful and wrongful combination and conspiracy of members of the board who controlled, substantially, all the short ribs in the Chicago market; that the value of such ribs at the time did not exceed seven and a half cents per pound, though on that day they were forced to the fictitious and arbitrary price of twelve cents; that to accomplish the objects of the conspiracy Cudahy and Wright, defendants, had shipped about fifteen million pounds of ribs to southern points, after slitting and mutilating them so as to render them undeliverable under the rules of the board of trade; that the defendants composing the firm of Norton & Worthington and the defendants composing the firm of Roloson & Co. had made large purchases from the complainant when they were without his knowledge acting as brokers for the defendants Cudahy and Wright. The complainant, under a rule of the board, had from time to time deposited margins with the defendant Loan & Trust Company on account of transactions with Roloson & Co., which deposits of margins were represented by eleven certificates of deposit, and trans-

actions with Norton & Worthington, also represented in margins by certificates of deposit amounting to eighteen thousand dollars. A dispute having arisen respecting these margins, the president of the board of trade appointed a committee, before which complainant appeared and offered to prove that the legitimate market value of short ribs delivered on October 31st, as well as their value in other markets and their value for consumptive purposes in Chicago. This evidence was rejected by the committee, which thereupon decided that the certificates of deposit representing margins were payable to Roloson & Co.; and to prevent the transfer of these certificates the present suit was brought. A demurrer to the bill was sustained in the trial court, and, on appeal to the appellate court, the decision of the lower court was affirmed.

Barnum, Humphrey & Barnum, for the appellant.

W. J. Hynes, Francis A. Riddle, James L. High, and A. W. Green, for the appellees.

¹¹³ CRAIG, J. By an act of the legislature approved February 18, 1859 (Private Laws, 1859, p. 13), the persons composing the board of trade of the city of Chicago were created a body politic and corporate, under the name and style of the "Board of Trade of the City of Chicago," and by that name they were authorized to sue and be sued, receive and hold property, real and personal, adopt a common seal, and "make such rules, regulations, and by-laws from time to time as they may think proper or necessary for the government of the corporation hereby created, not contrary to the laws of the land." Section 4 of the act provides as follows: "The said corporation is hereby authorized to establish such rules, regulations, and by-laws for the management of their business and the mode in which it shall be transacted as they may think proper." Section 7 provides: "Said corporation may constitute ¹¹⁴ and appoint committees of reference and arbitration and committees of appeals, who shall be governed by such rules and regulations as may be prescribed in the rules, regulations, or by-laws for the settlement of such matters of difference as may be voluntarily submitted for arbitration by members of the association or other persons not members thereof. The acting chairman of either of said committees, when sitting as arbitrators, may administer oaths to the parties and witnesses, and issue subpoenas and attachments compelling the attendance of witnesses, the same as

justices of the peace, and in like manner directed to any constable to execute."

In pursuance of the act under which the board of trade became an incorporated body, the board adopted rules and by-laws, which were in force when complainant became a member, and still remain in force. Section 1 of rule 10 provides that each person, before becoming a member of said board, shall sign "an agreement to abide by the rules, regulations, and by-laws of the association, and all amendments that may be made thereto." Section 1 of rule 20, among other things, provides that "on time contracts purchasers shall have the right to require of sellers, as security, a deposit of ten (10) per cent, based upon the contract price of the property bought, and further security, from time to time, to the extent of any advance in the market value above said price. Sellers shall have the right to require as security from buyers a deposit of ten (10) per cent on the contract price of the property sold, and, in addition, any difference that may exist or occur between the estimated legitimate value of any such property and the price of sale. All securities shall be deposited with the treasurer of the association, or with some bank duly authorized by the board of directors to receive such deposits." By section 6 of rule 20 of the board it is provided that in case of failure between the contracting parties to adjust their respective claims upon margin deposits within three business days after ¹⁴⁵ the maturity of all contracts upon which the deposits are applicable, "the matter in dispute shall, upon the application of either party to such contracts, be submitted to a select committee of three disinterested persons, members of the association, to be appointed by the president, which committee shall, without unnecessary delay, summon the parties before them, and hear such evidence, under oath, as either may wish to submit touching their claims to the deposit, and shall by a majority vote decide and report to the president of the board, in writing, in what manner and to whom the deposit is payable, either wholly or in part; whereupon the president shall indorse on either the original or duplicate certificate an order for the payment of such deposits in accordance with the decision of said committee, and such order shall be a sufficient warrant to the party holding the deposit to pay the same in accordance with such order." Section 1 of rule 23 provides: "In case any property contracted for future delivery is not deliv-

ered at maturity of contract, the purchaser may, if he shall so elect, consider the contract forfeited, or he may purchase the property on the market for account of the seller by 1:15 o'clock of the next business day, notifying him at once of such purchase, or he may require a settlement with the seller at the average market price on the day of maturity of contract, and any damages or loss due to the purchaser by reason of such purchase or declared settlements shall be due and payable by the seller immediately."

It appears from the allegations of the bill that the complainant, Ryan, sold Roloson & Co. six hundred thousand pounds of short ribs for delivery in October, 1892, at seven dollars and sixty cents per hundred pounds. After Ryan had sold the ribs for delivery in October, during the months of September and October, 1892, in compliance with the demands or calls for margins to secure the performance of his contracts for the sale and delivery of the quantities of short ribs sold by him, he deposited certain amounts of money with the ¹¹⁶ Merchants' Loan & Trust Company of Chicago. The sums deposited for the purpose of securing the performance of his contracts for the sale and delivery of the short ribs sold to R. W. Roloson & Co. amounted to twenty-six thousand five hundred dollars. It is charged in the bill that Roloson & Co. and others entered into a combination to corner the market of short ribs for October delivery, and that they did corner the market, and established, or pretended to establish, the price of short ribs on October 31st at twelve cents per pound, which price was not real, but fictitious. It is also alleged in the bill that "a fair, legitimate, and natural market price and value of short ribs in Chicago on October 31, 1892, irrespective of the fictitious price aforesaid, did not exceed seven and one half cents per pound. On the next day, November 1, 1892, the same ribs sold at seven dollars and seventy-five cents per hundred pounds, which were sold, or pretendedly sold, on said board the day before, in pursuance of said conspiracy and combination, at twelve cents a pound, in order to establish that as a market price, and to swell the damages as against your orator and other sellers from whom deliveries were due on October 31, 1892. The fair, legitimate, and natural price of said ribs in Chicago throughout the entire months of September and October, 1892, did not exceed seven dollars and eighty-five cents per hundred pounds; that all during and through said months cash sales of such ribs

were made in the Chicago market at from seven dollars and fifty cents to seven dollars and eighty-five cents per hundred pounds, and that while the advance of prices on such sales during said two months did not exceed twenty cents on one hundred pounds, the advance on option sales during the same period, ending October 31, 1892, was four dollars and fifty cents per hundred pounds, under the manipulation of said prices by the parties engaged and interested in said corner. Such sales of short ribs on said board as purported to be made by parties thereto on October 31, 1892, at twelve cents per pound were insignificant in number and quantity, and were purely colorable, and were made for the purpose of establishing a ¹¹⁷ fictitious price to govern the measure of damages on contracts unfulfilled by 'short' sellers, and were in some instances sales for that purpose by one broker to another broker of the same principal engaged and interested in, or taking advantage of and thereby becoming a party to, said corner." It is further alleged that "disputes, differences and disagreements, have arisen and exist between your orator and Roloson & Roloson, touching and relating to the respective claims of your orator and Roloson & Roloson to the margins deposited as aforesaid, and the margin certificates of such deposits, and to whom said deposits are payable either wholly or in part, and relating also to the true market price and value, on October 31, 1892, of the respective amounts of short ribs covered by the respective contracts between your orator and R. W. Roloson & Co., the performance of which contracts by your orator was recited in said certificates of deposit to be thereby secured"; that a committee was appointed by the president of the board to adjust the differences; that the following notice was served on complainant:

"BOARD OF TRADE OF CITY OF CHICAGO,

"SECRETARY'S OFFICE,

"CHICAGO, Nov. 9, 1892.

"Messrs. T. J. Ryan & Co.

"GENTLEMEN: You are hereby notified to meet a committee of this board, appointed under the provisions of section 6 of rule 20 of the rules of the board, in the directors' room on Monday next, the 14th instant, at eleven o'clock in the forenoon.

"Respectfully,

"GEORGE F. STONE, Sec."

A postponement was had from the 14th to November 16th, when the parties met before the committee for a hearing.

It is also alleged in the bill that on the hearing before the committee complainant "offered to prove, and could ¹¹⁸ have proved, by the sworn testimony of said witnesses, in answer to said questions, all and singular, the matters and allegations of fact hereinbefore in this bill contained and set forth, and particularly offered to prove, and could have proved, by said witnesses, the fair, natural, and legitimate market value of the quantities of short ribs deliverable on October 31, 1892, by your orator upon his contracts of sale of six hundred thousand pounds to R. W. Roloson & Co., and further offered to prove, and could have proved, by said witnesses, the value of short ribs on October 31, 1892, in other markets, and their value for consumptive purposes in the Chicago market, and other facts that might and should and do justly enter into a determination of the real market value of such short ribs in Chicago, irrespective of any fictitious price such ribs might have sold for in the Chicago market on the thirty-first day of October, 1892; but each and all of said offered evidence the committee rejected, and refused to allow the complainant to introduce any of the same."

Under the act of incorporation the legislature, in clear terms, conferred the authority on the board to establish such regulations and adopt such rules or by-laws as it might deem proper for the transaction of the business of its members, and, under the authority conferred, section 6 of rule 20 provides for the appointment of a committee clothed with authority to determine in what manner and to whom a margin deposit is payable. The language of the rule, as respects the duty of the committee to hear the evidence of the respective parties, is plain and unambiguous. It declares: "Which committee shall, without unnecessary delay, summon the parties before them, and hear such evidence, under oath, as either may wish to submit touching their claims to the deposit." The complainant, when he became a member of the board, agreed, in writing, to abide by the rules, regulations, and by-laws of the association. He voluntarily submitted to a trial of the matter referred to the committee, without in any ¹¹⁹ manner calling in question the jurisdiction of the committee of the person or subject matter. Under such circumstances, having selected his tribunal, he is estopped from

denying the jurisdiction of the committee of the person and subject matter. But the committee appointed under section 6 of rule 20 to determine to whom the margin deposit belonged or should be paid may be regarded as a tribunal of limited jurisdiction, and they are bound to proceed in conformity to the rules under which they were selected, and, if they failed to conduct the investigation in accordance with the charter and by-laws of the board of trade under which they were appointed, the complainant ought not to be bound by their judgment. It seems plain that where property rights are involved, as is the case here, the courts have the power to so far supervise the action of a tribunal like the one in question as to determine whether they have proceeded according to the rules and regulations provided for their action, and, if they have failed in a substantial manner, correct abuses which may result from their unwarranted procedure: *Commonwealth v. Pike etc. Soc.*, 8 Watts & S. 250; *Commonwealth v. German Soc.*, 15 Pa. St. 254; *Society etc. v. Commonwealth*, 52 Pa. St. 133; 91 Am. Dec. 139; *Commonwealth v. Pennsylvania etc. Inst.*, 2 Serg. & R. 141; *Wood v. Wood*, L. R. 9 Ex. 196.

The rule, as its language declared, required the committee to "hear such evidence, under oath, as either party may wish to submit touching their claims to the deposit." It may be conceded that the committee was not required to hear evidence that had no bearing whatever on the question involved, but any evidence bearing on the claim of either party to the deposit was proper for their consideration. There may be various grounds upon which the claims of the respective parties may be predicated or opposed. The seller might prove that he had delivered the short ribs sold according to the contract; that he had paid the damages of the purchaser; that the contract ¹²⁰ had been rescinded by agreement of the parties; that the claim had been arbitrated and thus adjusted; that there was no difference between the contract price and the real market price on the day of delivery; that the market price claimed by the buyer was not the correct market price of short ribs, but was a false and fictitious price—one established by fraud and corruption. So, too, the purchaser might controvert, by his evidence, each one of the claims made by the seller. Other grounds might be relied upon and evidence introduced in their support. The committee, organized as it was to determine a question between

the two parties, involving as it did over twenty-six thousand dollars, had no right to confine their investigation to the mere difference between the contract price of the short ribs and the price at which sales were made on the board of trade on the day of delivery, closing their eyes to the fact that those sales may have been false, fraudulent, and fictitious—sales brought about by a fraudulent combination, and in violation of a statute of the state. If the committee is to be confined to a mere calculation of the difference between the contract price and a figure established by a combination on the board of trade on the day of delivery, regardless of the fact whether such figure is real, fictitious, or manipulated by a corner, then a tribunal of that character is but a device for legalizing acts prohibited by the criminal laws of the state.

It will be observed that the complainant offered to prove the fair, natural, and legitimate market value of short ribs deliverable on October 31, 1892, and offered to prove their market value in other markets, and their value for consumptive purposes in Chicago, but the committee refused to hear this or other evidence offered by the complainant. This is not a case that has any analogy to one where, during the progress of the trial, a party may offer to prove some particular fact and the court excludes the offered evidence, and may err in that one particular, but ¹²¹ is one where the complainant was allowed no evidence touching his claim to the deposit. He was, in effect, turned away without a hearing. A proceeding of that character cannot be sustained. It may be conceded, to the fullest extent, that Ryan, when he became a member of the board, agreed to abide by all its lawful rules and regulations, and that he is bound by the agreement; but the Rolosons, who are contending for this deposit margin, did the same, and the three members of the board composing the committee are in the same position. No reason is perceived why he should be concluded by the rules and they should not. If the committee and the Rolosons conform to the rules, then it may be insisted that complainant shall also abide thereby; but when they violate the rules it cannot, in justice, be claimed that he shall be bound by a decision resulting from a violation of the rules on their part.

But it is said Ryan should have made a defense under section 7 of rule 20, when he was called upon to put up margins. That section is as follows: "In determining the value of property under this rule, its value in other markets,

or for manufacturing or consumptive purposes in this market, together with such other facts as may justly enter in the determination of its value, shall be considered, irrespective of any fictitious price it may, at the time, be selling for in this market. Such value, for the purposes of this rule, in case of disagreement, shall be determined by the board of directors, and communicated to the parties in interest through the president or secretary." It is true that this rule provides that the value of property may be determined by the board of directors, and, it may be, when Ryan was called upon for margins he might have resisted the call by presenting the question to the board whether there was actually a rise in the market of the article sold. But conceding that to be true, it does not follow that this was his only remedy. The fact that Ryan may have been able to ¹²³ defeat the call for margins does not deprive him of the right, when the title to the margins is put in issue, to prove, if he can, that the market value of the article sold was no higher on the day of delivery than it was when sold.

But while we do not think this section of rule 20 lends any aid to the defendants, it has an important bearing in favor of the complainant. The committee appointed to settle the dispute in question was appointed under section 6 of rule 20. This is section 7 of the same rule, and in giving a construction to rule 20 it is proper to consider all of the sections. No intelligent construction can be arrived at in any other manner. While a dispute as to a margin deposit is to be settled by a committee under section 6 of rule 20, and the market value of the article sold becomes a material question, yet that section is silent as to the nature or character of the evidence which may be introduced before the committee. But section 7 says: "In determining the value of property under this rule"—that is, under rule 20, which was the identical rule under which the value of the property arose in this proceeding—"its value in other markets, or for manufacturing or consumptive purposes in this market, shall be considered, irrespective of any fictitious price it may, at the time, be selling for in this market." The evidence offered by the complainant was not only within the spirit, but within the letter, of this section of the rule.

But it is insisted that a court of equity has no jurisdiction to interfere with the action of the board of trade, or the action of committees appointed to settle controversies submitted to

them under the rules and regulations of the board, and in support of this position reliance is placed on the following cases: *People v. Board of Trade*, 45 Ill. 112; *Fisher v. Board of Trade*, 80 Ill. 85; *People v. Board of Trade*, 80 Ill. 134; *Baxter v. Board of Trade*, 83 Ill. 146; *Sturges v. Board of Trade*, 86 Ill. 441, and ¹²³ *Pitcher v. Board of Trade*, 121 Ill. 412. Language may have been used in some of the cases cited which might, without a close examination of the questions involved in the cases, lead to the conclusion reached by counsel. But upon a careful consideration of the questions involved and decided in each case it will be found that the question presented by this record did not arise in those cases and was not decided. In the first case cited (*People v. Board of Trade*, 45 Ill. 112) it appears from an examination of the case that Page had been suspended from the board for a failure to pay a certain note given by him to another member of the board, and he filed a petition for mandamus to compel the board to restore him to membership. The court, on the case presented, held that the charter gave the board the power of expulsion, and under the power conferred the corporation adopted a by-law providing that if a member fails to comply with a business contract made with another member he shall be expelled. In *Fisher v. Board of Trade*, 80 Ill. 85, it appeared that Fisher, a former member of the board, had been expelled. After the expulsion he filed a bill for an injunction, which, in effect, prayed that complainant should be restored to his position as a member of the board. The court held that if a member was improperly expelled, contrary to the constitution and by-laws, a court of equity cannot restore him. *People v. Board of Trade*, 80 Ill. 134, is also a case where a member had been expelled and sought to be restored to membership by petition for mandamus, and the relief claimed was denied. Expressions may be found in the opinion of the court which may bear the construction that a court would not interfere, in any case, with the action of an organization like the board of trade; but those expressions were not necessary to a decision of the case, and cannot be regarded as authority. There the petitioner had been expelled after he had been offered a full opportunity to make defense in the board, but refused, and the court properly held that he could not ¹²⁴ be restored by mandamus. *Baxter v. Board of Trade*, 83 Ill. 146, was also a case where a member had been expelled, and, following *Fisher v. Board of Trade*,

80 Ill. 85, it was held that a court of equity would not interfere by injunction. *Sturges v. Board of Trade*, 86 Ill. 441, merely followed the rule laid down in *Baxter v. Board of Trade*, 83 Ill. 146, that a court of equity will not entertain a bill—that the remedy, if any, is in a court of law. *Pitcher v. Board of Trade*, 121 Ill. 412, was also a case where a member had been expelled, and a bill was filed to enjoin the board from preventing the complainant from transacting business on the board. The relief was denied in the circuit court, and the judgment was affirmed in this court. But upon looking into that case it will be found that the judgment was predicated, in part, at least, on the fact that the proceedings resulting in the expulsion had been regular, and conformed to the rules of the board. It is there said: "The proceedings against him appear to have been regular, and in accordance with the rules and the provisions of the charter. The expulsion is therefore conclusive. . . . The merits of appellant's expulsion cannot be re-examined by us in this proceeding. The minor irregularities of which he complains were waived by his appearance before the board of directors and the submission of his case for trial by them without objection, either to the manner in which that body was constituted or to the mode of its proceeding."

We have no intention, by anything herein said, to interfere with the disciplinary power of the board over its members.

If the allegations of complainant's bill are true—and they are admitted to be true by the demurrer—we are inclined to the opinion that he made a case by his bill which entitled him to relief.

The judgment of the appellate court and the decree of the circuit court will be reversed and the cause remanded.

ASSOCIATIONS—PROPERTY RIGHTS—JURISDICTION OF COURTS.—Courts will interfere for the purpose of protecting property rights of members of unincorporated associations in all proper cases, and when they take jurisdiction will follow and enforce so far as applicable the rules applying to unincorporated bodies of the same character: *Otto v. Journeyman Tailors' etc. Union*, 75 Cal. 308; 7 Am. St. Rep. 156, and extended note at page 102. See, also, the note to *Connelly v. Masonic Mut. Ben. Assn.*, 18 Am. St. Rep. 301, and the extended notes to *Austin v. Searing*, 69 Am. Dec. 676, and *Hiss v. Bartlett*, 63 Am. Dec. 777.

BISHOP v. AMERICAN PRESERVERS' COMPANY.

[157 ILLINOIS, 2-4.]

EVIDENCE.—SECONDARY EVIDENCE OF A WRITTEN AGREEMENT may be received where it is in the possession of the adverse party who withholds it at the trial after notice to produce the original has been served, or when it is out of the power of the party offering evidence to produce the original, as where the paper is beyond the jurisdiction of the court. The notice to produce the original may be given either to the adverse party or to his attorney.

EVIDENCE, SECONDARY, OF THE CONTENTS OF A WRITING.—Where a witness testifies that the copy of a trust agreement set out in a bill in equity is a true copy as near as he can tell, he being a party thereto and having signed it, and the adverse party admits having a copy in his possession during the trial which he declines to produce, the trial court is justified in receiving evidence of the copy set out in such bill in equity where it further appears that the original has been lost or is beyond the jurisdiction of the court.

TRADE RESTRAINT.—TRUSTS.—An agreement reciting that its signers design to form a trust for the purpose of securing co-operation in the business of manufacturing preserves, and of selling and dealing in the same in home and foreign markets, and which provides that this co-operation shall be secured through the powers conferred upon trustees named in the agreement, to whom are to be assigned all shares of stock held by the signers in various corporations, and who are to purchase stock in other corporations, and the property or business of any firm or individual connected with a similar business, is an illegal contract, because it provides for a combination in restraint of trade.

CORPORATIONS.—THE FORMATION OF A PARTNERSHIP BETWEEN CORPORATIONS is illegal, whether they are domestic or foreign.

TRUSTS.—RIGHT OF PERSON TO ATTACK HIS OWN TRANSFER BECAUSE MADE TO.—Where a corporation sues to recover possession of property, the defendant may resist on the ground that the property being his was transferred to the plaintiff in pursuance of an illegal scheme to form a combination in restraint of trade. In such case, the vendor being left in possession, the court will not aid the vendee to recover it for the reason that the recovery must aid in the enforcement of an unlawful scheme.

CONTRACTS ILLEGAL.—WHEN THE PLAINTIFF CANNOT ESTABLISH his cause of action without relying upon an illegal contract, he cannot recover.

REPLEVIN CANNOT BE SUSTAINED if the plaintiff must rely upon a sale or a contract void as against public policy.

PRINCIPAL AND AGENT.—RIGHT OF AGENT TO DENY TITLE OF PRINCIPAL. The law will not enforce the performance of an agency which tends directly or indirectly to the commission of an illegal act, or an act opposed to public policy, or a control or monopoly of traffic in staple articles of commerce.

REPLEVIN to recover certain stock in trade, machinery, and equipments belonging to, and connected with, the business of manufacturing and selling fruit butters, jellies, preserves, and like products. Among the pleas of the defendant was one

setting out that in March, 1888, it was doing business in Chicago under the name of the Michigan Fruit Butter Company, otherwise known as A. D. Bishop & Co.; that the defendant was then approached with a scheme to form a trust to be called the American Preservers' Trust, whose purpose was to bring into one combination all manufacturers throughout the United States, manufacturing and dealing in fruit butters, jellies, preserves, and like products; that the defendant at first refused to enter into the combination, but was told that unless he did so the trust would ruin his business. An agreement was finally entered into under which defendant executed an assignment or transfer of property, including that in controversy. A corporation was formed in June, 1888, under the laws of West Virginia, called the American Preservers' Company, with a capital of six hundred dollars and being the plaintiff in this suit, and defendant was induced to execute a bill of sale to this corporation, but was after such bill of sale left in possession of the articles described therein. A demurrer was interposed to this plea, but was overruled by the trial court. At the trial plaintiff offered in evidence a copy of the trust agreement which is in words and figures following:

"Whereas, it is designed to form a trust, to be known as the 'American Preservers' Trust,' for the purpose of securing intelligent co-operation in the business of manufacturing preserves, jellies, fruit butters, mince-meat, and all articles of commerce connected therewith or relating thereto, and of selling and dealing in the same in home and foreign markets, and of doing all business relating and incidental thereto:

"Therefore it is mutually agreed by all who may sign this agreement, or become at any time the holders of the certificates of trust herein provided for, as follows:

"*First.* Until otherwise provided, the trust herein created shall be vested in nine trustees.

"*Second.* C. A. Max Wiehle, Max Ams, A. R. Bremer, B. E. Ryan, B. Fenton, and F. R. Jennings are hereby appointed trustees, to hold their office until the first day of April, A. D. 1890, or until their successors are elected and qualified, and the six trustees aforesaid are hereby directed, authorized, and empowered to select and appoint the other three trustees, to hold their office until the said first day of April, A. D. 1890, or until their successors are elected and qualified.

Third. The trustees shall prepare certificates which shall show the interest of each beneficiary in said trust, and deliver them to the persons entitled thereto. The certificates shall be divided into shares of the par value of \$100 each, and shall be known as the 'American Preservers' Trust certificates.' The trustees shall have full power to agree upon and direct the form and contents of said certificates, and the mode in which they shall be executed, attested, and transferred. The certificates shall contain an express stipulation that the holders thereof shall be bound by the terms of this agreement, and by the by-laws herein provided for.

Fourth. No certificate shall be issued except for property, bonds, stock, money, or businesses, as hereinafter provided; and the certificates issued shall represent, as nearly as possible, the value or earning capacity of the property, bonds, stocks, money, or businesses held by the trustees in trust. The certificates shall be the best evidence of the amount of interest of the beneficiaries in the trust. No duplicate certificates shall be issued by the trustees except upon surrender of the original certificates and cancellation of the same, or upon satisfactory proof of the loss thereof, and the giving of a satisfactory bond of indemnity.

Fifth. Each subscriber hereto agrees to assign and transfer, absolutely, to said trustees, as many as he shall own of the shares of the capital stock of the particular corporation or corporations indicated in article 6 of this agreement, whether said corporation now exists or is hereafter to be organized, in consideration of which said trustees do hereby agree to execute and deliver to each subscriber trust certificates, as above specified, equal to the appraised amount of the earning capacity of said stock. The appraised amount shall be determined by the parties in interest and said trustees. The value of the capital stock of any corporation whose stock it is contemplated will be assigned to said trust shall be first agreed upon between said trustees and the stockholders willing to transfer the same, and after it is agreed upon there shall be no discrimination in the purchase price thereof as between stockholders of the same corporation transferring their shares at the same time.

Sixth. This agreement shall take effect within sixty days from the time those holding a majority of the stock in the following corporations, formed or to be formed, to wit: J. O. Schimmel Preserving Company, Buffalo Conserve Company,

Max Ams Preserving Company, A. R. Bremer Preserving Company, Ryan Brothers' Preserving Company, Charm Preserve Company, Indianapolis Preserving Company, have transferred the same to said trustees. Thereafter the said trustees and their successors shall have power to purchase other stocks and bonds of the same companies, or of companies organized for or engaged in conducting the same business or any of the businesses hereinbefore specified, and to purchase the property or business of any company, association, partnership, or individual engaged in any of said businesses, and may issue therefor certificates of trust, equal at par value to the appraised amount of the earning capacity and value to the trust of said stocks, bonds, property, and businesses so purchased, or shall have power to lease the premises of such companies, partnerships, associations, or individuals, paying therefor such rental as they may deem proper, whenever, in their judgment, it is for the best interests of the trust to lease rather than purchase.

"Seventh. All stocks and bonds sold and transferred to said trustees shall be held by them and their successors for the benefit of all the owners of said trust certificates. No stocks so held by said trustees shall be sold or surrendered by said trustees during the continuance of this trust, without the consent of a majority, in number and value, of the holders of trust certificates: *Provided, however,* that said trustees may, from time to time, assign such shares of stock as may be necessary to qualify any person or persons chosen, or desired to be chosen, as directors of any companies the stock of which are held by said trustees. Bonds and other property held by said trustees may be sold by them.

"Eighth. That said trustees shall have power to cause corporations to be formed for the purposes, and with all or any of the powers specified in the purposes, of this agreement: *Provided,* that the stock of such corporation shall be issued for cash or for property at its cash value, and shall be issued to or be purchased by said trustees in the manner provided in section 6 of this agreement.

"Ninth. Said trustees shall receive and safely keep all moneys received from dividends or interest upon stocks, bonds, or moneys held in trust, and shall distribute the same, as well as all moneys received from sales of trust property, by declaring and paying dividends upon said trust certificates, as funds accumulate which are not needed for the uses and

expenses of the trust. The trustees shall, however, keep separate accounts of receipts from dividends and interest, and of receipts from sale of trust property, and in declaring any dividends in which moneys derived from sales of trust property are included shall render the holders of trust certificates a statement showing what amount of the fund distributed was derived from such sales or transfers.

"Tenth. The trustees shall render to the holders of trust certificates, at each annual meeting, a statement of the receipts and disbursements, and of the affairs of the trust for the year. They shall also, whenever demanded by a majority, in value, of the holders of trust certificates, furnish a true and complete inventory and appraisal of all property held in trust, and a statement, as full as possible, of the financial affairs of the various companies whose stocks are held in trust.

"Eleventh. Said trustees shall exercise supervision, so far as their ownership of stock shall enable them to do, over the several corporations or associations whose stock is held by said trustees. As stockholders of said corporation they shall elect, or endeavor to elect, honest and competent men as directors and officers thereof, who may be paid a reasonable compensation for their services. They may elect themselves as such directors and officers, and shall endeavor to procure such judicious and efficient management of such corporations as shall be most conducive to the interest of the holders of trust certificates.

"Twelfth. All of the powers of the trustees can be exercised by a majority vote of their full number, either in person or by proxy, except in the election of officers, as provided in the by-laws: *Provided*, that no proxy to represent a trustee can be given to or be voted by any person other than a trustee. The said trustees may appoint from their own number an executive committee, and may appoint other committees composed wholly or in part of persons not of the board of trustees, and delegate to such committees such of their powers as they may deem advisable. A majority of each committee may exercise all the powers conferred upon such committee. Whenever the trustees, by resolution, shall determine to increase the number of trustees, a copy of said resolution, together with the call for a meeting of certificate holders to vote thereon, shall be sent to every certificate holder whose address is known to the secretary. At least

thirty days' notice of said meeting shall be given. If a majority, in value, of certificate holders at said meeting vote to increase the number of trustees, the board of trustees shall appoint the additional trustees thus created, as in case of a vacancy, and whenever the trustees shall, by resolution, determine to diminish the number of trustees, a copy of said resolution, thirty days prior to the annual meeting, shall be mailed to each certificate holder, and they shall vote on such proposition at said annual meeting, and if agreed to, the trustees, or the number by which it shall be determined to reduce, shall not be elected at said meeting: *Provided*, the board of trustees shall never be reduced to less than five, and not reduced at any annual election by more than three to be at said meeting elected.

"Thirteenth. The trustees may employ and pay all such agents and attorneys as they may find it necessary to employ in the management of said trust.

"Fourteenth. Until after April 1, 1889, no trustee shall receive a salary for his services as trustee. After that date each trustee shall receive a salary, not to exceed the sum of \$6,000 per annum, the amount of which salary shall be fixed, from time to time, by the certificate holders at their annual meetings. This provision is not intended to prohibit any of the trustees, prior to or after April 1, 1889, from receiving salaries, the amount whereof shall be fixed by the board of trustees, for services as president, secretary, treasurer, manager, or in other capacities than a trustee only. The whole or any part of the foregoing provision, to wit, provision 14, may be modified by any by-law now or hereafter adopted by the certificate holders.

"Fifteenth. The board of trustees shall have its principal office in the city of Pittsburgh, subject to change by a vote of the trustees, at which office, or in a place of safe deposit adjacent thereto, the stocks held in trust shall be kept.

"Sixteenth. All powers and duties vested in the trustees herein named shall vest in and be exercised by the successors of said trustees appointed as herein prescribed.

"Seventeenth. Election for trustees to succeed those herein appointed and authorized to be appointed after the expiration of the term for which they have been appointed shall be held annually. At the annual election in 1890 three trustees shall be elected to hold their office for one year, three to hold their office for two years and three to hold their office for three

years. Thereafter three trustees shall be elected annually to take the place of those retiring, to hold their office for three years, except those elected to fill a vacancy from any cause except expiration of term, who shall be elected for the balance of the term of the trustees whose places they are elected to fill. Every trustee shall hold his office until his successor is elected and qualified.

"Eighteenth. For their acts as trustees the trustees shall not be personally liable or responsible, except for willful misconduct or neglect.

"Nineteenth. Trustees shall be elected by ballot, by the owners of trust certificates or their proxies. At all meetings the owners of trust certificates who shall be registered as such on the books of the trustees may vote in person or by proxy, and shall have one vote for each and every share of trust certificates standing in their names; but no such owner shall be entitled to vote upon any share which has not stood in his name thirty days prior to the day appointed for the election. The transfer books shall be closed for thirty days prior to the day appointed for the annual election. A majority of the shares represented at such election shall elect.

"Twentieth. The annual meeting of the owners of said trust certificates for the election of trustees, and for other business, shall be held at the office of the trustees on the Wednesday nearest the 15th day of March of each year, and said meetings may be adjourned from day to day until its business is completed. Special meetings of the owners of trust certificates may be called by a majority of the trustees at such times and places as they may appoint. It shall also be the duty of the trustees to call a special meeting of the holders of trust certificates whenever requested so to do by a petition signed by the holders of twenty-five per cent, in value, of such certificates. The business of such special meetings will be confined to the objects specified in the notice given therefor. Notice of the time and place of all meetings of the owners of trust certificates shall be given by mailing a notice to the address of each certificate holder, so far as known, at least ten days before such meeting, and by public notice in one of the principal papers of the city where the office of the said trust may be located, ten days before said meeting.

"Twenty-first. At any meetings by-laws may be made, amended, and repealed, by not less than two-thirds, in value,

of the holders of trust certificates: *Provided, however*, that said by-laws shall not be inconsistent with any by-laws which have been or may be adopted by the holders of trust certificates, nor with this trust agreement.

"Twenty-second. Whenever a vacancy occurs in the board of trustees, from any cause other than the expiration of the term of office, the remaining trustees may adopt a trustee to fill the vacancy until the next annual meeting, or, at their option, may call a meeting of the owners of trust certificates, for the purpose of electing a trustee to fill the vacancy or vacancies.

"Twenty-third. If, for any reason, at any time, a trustee or trustees shall be appointed by any court to fill a vacancy or vacancies, the trustee or trustees so appointed shall hold their or his office or offices only until his or their successor or successors shall be appointed or elected in the manner above provided for.

"Twenty-fourth. It shall be obligatory upon all trustees to attend each and every meeting of the board of trustees, either in person or by proxy; and in the event of any trustee absenting himself from three successive meetings or failure to be represented by proxy at such meetings, then, in such case, the office held by said trustee shall be considered vacant, and the vacancy be filled as hereinbefore provided.

"Twenty-fifth. Whenever any change shall occur in the board of trustees, the legal title to the stock and other property held in trust shall pass to and vest in the successors of said trustees without any formal transfer thereof; but if, at any time, such formal transfer shall be deemed advisable or necessary, said formal transfer shall be made, and it shall be the duty of the board of trustees to obtain the same, and it shall be the duty of any retiring trustee, or the executor or administrator of any deceased trustee, to make such transfer.

"Twenty-sixth. This trust shall continue for the period of twenty-five years: *Provided, however*, that if, at any time after the expiration of one year, seventy-five per cent of all the holders, in value, of trust certificates, or after the expiration of five years sixty-five and two-thirds per cent of the holders, in value, of trust certificates, shall, at a meeting of certificate holders called for that purpose, vote to terminate the trust, they may, at the same or at a subsequent meeting called for that purpose, decide, by a vote of fifty-one per cent of their

number, the mode in which the affairs of the trust shall be wound up, and whether it shall be sold and the value thereof distributed, or whether part, and if so what part, shall be delivered and what part shall be sold, and whether such sale shall be public or private. To the parties whose property, stock or business shall have been transferred to said trust, shall be given the first privilege of purchasing the stock, property, or business by them transferred. The trustees, who shall continue to hold their offices for that purpose, shall wind up the affairs of the trust in the mode agreed upon by the holders of trust certificates, as aforesaid.

"Twenty-seventh. The trustees shall have power to do whatever is necessary and proper for carrying into execution the foregoing powers and the purposes for which this trust was organized.

"Twenty-eighth. Should any party or parties holding certificates of this trust, or being a lessor, be desirous of operating an establishment controlled by this trust, the party or parties shall make application to the board of trustees for such privilege, stating in said application the kind and estimated time during which he or they may desire to operate such an establishment; also the estimated quantity of goods he or they may desire to produce; then, should said specified establishment be not already in operation, the said privilege may, in their discretion, be granted by the said board of trustees on the following general terms and conditions:

"1. The party or parties to whom such privilege may be granted shall pay monthly into the treasury of the trust a profit on all goods manufactured in such privileged establishment. Said profit shall equal at least the average profit which the trust has derived during such month from all the establishments operated by it for the period of time as covered by such privilege.

"2. The party or parties privileged shall bear all expense incidental to putting that establishment in condition to operate, and furnish all capital needed to operate the same.

"3. The party or parties privileged shall furnish to the trust ample and satisfactory surety for the payment, monthly, of the above-mentioned profits.

"4. The trust shall, at all times, retain control over such establishment, and shall cancel such privilege whenever they may deem proper, or whenever, in the opinion of the trustees,

it has operated to the prejudice of the best interests of the trust.

"*Twenty-ninth.* The trust certificates may be of the following form, but may be changed, from time to time, by the trustees, in accordance with provision 3 of this agreement:

"No. Shares of \$100.00 each. Shares.

"AMERICAN PRESERVERS' TRUST.

"This is to certify that.....entitled to.....shares in the equity to the property held by the trustees of the American Preservers' Trust, transferable only on the books of said trustees on surrender of this certificate. This certificate is issued upon condition that the holder, or any transferee thereof, shall be subject to all the provisions of the agreement creating said trust, and of the by-laws adopted in pursuance of said agreement, as fully as if.....had signed the said trust agreement.

"Witness the hands of the president and secretary of the board of trustees, this.....day of.....A. D. 188., at the city of Pittsburgh.

....., *President.*

....., *Secretary."*

(Back):

"For value received.....hereby sell and transfer to.....shares of the American Preservers' Trust standing in my name on the books of said trust, and.....hereby irrevocably appoint.....attorney to make the necessary transfer upon the books of said trust, in accordance with the regulations thereof and upon the conditions expressed upon the face of this certificate.

"Dated.....188..

"In presence of.....

"*Thirtieth.* The trustees, whenever the value of stock, bonds, property, or business which have accumulated in their hands shall have increased in value, or when money not necessary for the uses of the trust shall have accumulated in their hands, may increase the amount of trust certificates to the extent of such increase or accumulation, and divide the same among the certificate holders." An objection being made to the reception of this agreement in evidence, it was sustained by the trial court, which also excluded all evidence of the defendant, and instructed the jury to find in favor of the plaintiff, which, having been done, the defendant appealed.

Arnd, Evans & Arnd, for the appellant.

Moren, Kraus & Mayer, for the appellee.

304 MAGRUDER, J. Upon the trial of the case below, the plaintiff, the appellee here, introduced in evidence a certificate of incorporation, signed by the secretary of state of West Virginia and dated June 20, 1888, declaring six corpo-

rators therein named to be a corporation by the name of "American Preservers' Company"; and also a bill of sale, executed on July 24, 1888, by the appellant to said company, granting to it, in consideration of the transfer to ^{see} him of three hundred and thirty-one shares of its stock, the goods, effects, and chattels described in an annexed schedule, and his business and the goodwill of the same, with the appurtenances. The plaintiff then examined one B. E. Ryan, the secretary and general manager of said company, and who was also the secretary of the "American Preservers' Trust" and one of the trustees of said trust. Ryan testified that he made demand upon appellant for the property before bringing this suit; that he received the bill of sale from appellant and delivered to him a certificate for three hundred and thirty-one shares of the stock of said company, but, at the same interview and "within an hour or two," took back said shares and delivered to appellant six hundred and sixty-two certificates of trust of the "American Preservers' Trust"; that as secretary of the company he delivered the three hundred and thirty-one shares of stock; that as secretary of the trust he delivered the trust certificates; that he received back the three hundred and thirty-one shares of stock as an officer of the trust; and that, at the same interview and upon receipt of the bill of sale, he then and there appointed appellant manager and custodian of the property described in the bill of sale, with directions to conduct the business and report to him, Ryan, all the purchases and sales and receipts and disbursements. After the examination of Ryan, the plaintiff rested.

The defendant then offered to introduce evidence, oral and written, tending to sustain the averments of his fourth plea. Some of this evidence was rejected when offered, some of it was admitted when offered, but all of it, upon motion of the plaintiff, was finally ruled out, and the jury were instructed to find the issues for the plaintiff. We cannot notice all the objections to specific offers of testimony, nor pass upon the rulings of the court in detail. We deem it sufficient to consider the general ground upon which the action of the trial court was based, and the general theory, which the defendant sought to maintain by his offered and rejected testimony.

^{see} The court below seemed to take the view that the plaintiff was an independent and legally organized corpora-

tion, and that, as the defendant had executed a bill of sale of his property and business to that corporation, and then assumed to act as its custodian and agent in the management of the property and business, he was estopped from denying the plaintiff's title or right of possession.

On the other hand, it was claimed by the defendant below that a combination was formed among all the manufacturers of and dealers in fruit butters, jellies, preserves, and like products in the United States under the name of the "American Preservers' Trust" for the purpose of controlling the manufacture and sale of said products, and preventing competition therein, and raising the market price thereof, and thereby securing a monopoly therein; that this combination was organized, and sought to effect its purpose, under and in pursuance of a written agreement signed by the parties to the combination; that the plaintiff company was formed in accordance with the provisions of this agreement and for the purposes of accomplishing the objects of the trust; that those objects were illegal and against public policy; that the agreement was illegal and void, as providing for a combination in restraint of trade in staple articles of food in general use and demand by the inhabitants of Illinois; and that the transfer of defendant's goods and machinery and business by means of a bill of sale to the plaintiff, and the delivery of the shares of stock to defendant, and the redelivery thereof to the trustees of the combination in exchange for trust certificates, and the appointment of defendant as custodian of the property and agent to carry on the business theretofore exclusively his own, were all parts of the illegal scheme and aids in the accomplishment of the unlawful objects of the trust.

²⁰⁷ We are inclined to think that the claim thus made by the defendant, and which is set up in his fourth plea, would have constituted a good defense to the action if he had been allowed to establish it by proper evidence.

1. A preliminary question arises as to the action of the trial court in excluding the offered copy of the trust agreement. The original agreement was not in the possession of the defendant, and it is claimed that a proper foundation was not laid for the introduction of secondary evidence. Proof of the contents of a document may be established by secondary evidence when it is in the possession of the adverse party who withholds it at the trial, provided that a notice to produce the original has been duly served, where such notice is

requisite: 1 Taylor on Evidence, pt. 2, sec. 440; 21 Am. & Eng. Ency. of Law, 984, 985. Secondary evidence may be offered to prove the substance of a document which it is out of the power of the party to produce; and this rule applies to papers out of the jurisdiction of the court, provided due effort be made to obtain such papers: 1 Wharton on Evidence, sec. 130; 21 Am. & Eng. Ency. of Law, 986. The notice to produce the original may be given either to the adverse party himself or to his attorney: 21 Am. & Eng. Ency. of Law, 989.

In the case at bar, notice to produce the original agreement and the by-laws of the company and of the trust was served upon the attorneys of the plaintiff, including Mr. A. L. Weil, hereinafter named. Subpoena duces tecum was also served upon Ryan, the secretary and manager of the company and secretary and manager of the trust, and upon A. R. Bremer, president of the company and one of the trustees of the trust. Ryan swears that he was present and saw the defendant, Bishop, sign the trust agreement, and that, after it was signed, it was put into the hands of "the custodian of the agreement, the solicitor of the trust, A. Leo Weil, this gentleman here," and that he saw it within a day or two thereafter. Weil, ~~see~~ a resident of Pittsburgh, in Pennsylvania, where the principal office or place of business of the plaintiff was required by its charter to be kept, and whose name was signed to the replications as one of the plaintiff's attorneys, and who assisted in the conduct of the trial, was examined as a witness at the trial, and swore that Bishop signed the agreement; that there were two copies of the agreement; that one was deposited with a safe deposit company in Pittsburgh; that the other was in his possession in accordance with the terms of the agreement; that the trust had been dissolved; that a large number of papers had been left in Pittsburgh when it was dissolved; that he had caused search to be made in his office at Pittsburgh to obtain these papers, and had been unable to find them; and that the by-laws were attached to the trust agreement. Ryan and the defendant do not speak of more than one original agreement as having been signed by the defendant, but, if there was a duplicate original, it sufficiently appears that both were within the control of Weil, who drew the agreement, and was the legal adviser and solicitor both of the plaintiff and of the trust, in which plaintiff was an associate member.

Prior to the trial a bill in chancery had been filed by one

Meyer in the circuit court of Cook county against the president and secretary of the plaintiff, Bremer, and Ryan, and other parties, setting up the trust agreement, and Ryan had filed an answer thereto, admitting the existence of the trust agreement in words and figures as pleaded in the bill. The defendant below, upon the trial, offered in evidence the said bill and answer, as showing a copy of the trust agreement which had been admitted to be correct by the plaintiff, or its officers and managers. This copy was shown to the defendant when he testified, and he swore that he signed the original agreement in the latter part of May, 1888; that Ryan and Weil were present; that he "never saw it but that once": that, when he saw it, it was lying on the table, and Ryan was very ³⁰⁰ particular about it, and ("I think") took it in his hands; that they would not let him make a copy of it; that he could not compare any copy of it with the original without having the original, and never had the original except at that time; that he read it through, but there was a great deal of it, and he could not remember its entire language; that the copy shown him, set out in said bill, "is a copy of the agreement I signed, as near as I can tell." It furthermore appears from the testimony of Mr. Weil that during the trial he had a copy of the trust agreement in his possession, which he had found in the office of the plaintiff company, but he declined to produce it.

We are referred by counsel for appellee to the case of *Dickinson v. Breeden*, 25 Ill. 186. There it was held that where a party, desiring to introduce secondary evidence of the contents of a deed, had knowledge of the grantee's residence, the latter's deposition should be taken to prove the existence of the original, and that it was lost, or so mislaid that it could not be found after diligent search. We cannot see why the facts of the present case do not bring it within the doctrine of *Dickinson v. Breeden*, 25 Ill. 186. The existence of the original trust agreement was established by the testimony of three witnesses; and the original draftsman of the agreement and the custodian to whose possession it had been intrusted, was examined orally as a witness, and swore that he had caused search to be made for it, and that it could not be found. But if the evidence was not conclusive as to the loss or destruction of the original, the defendant showed that it was beyond the jurisdiction of the court and in the possession or under the control of the plaintiff, and that the latter, after

being notified, declined to produce it. We are, therefore, of the opinion that the trial court erred in not receiving in evidence the offered copy, if it would have been material testimony when introduced.

2. It is contended, however, by counsel for appellee, that, "even had a proper foundation been laid and ³¹⁰ proper secondary evidence of the alleged trust agreement been offered, its reception would have established no material fact, and its rejection was not error." Hence, the next matter presented for consideration relates to the pertinency or materiality of the agreement, and of the other excluded evidence offered in connection with it.

There can be no doubt that this trust agreement is an illegal contract, as providing for such a combination in restraint of trade as is forbidden by public policy.

In *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171, where certain firms made an agreement, by the terms of which they attempted to form a combination for stifling competition and controlling the price of grain, cost of storage, and expense of shipment, and thereby monopolizing the entire grain trade of the town and surrounding country, we said: "That the effect of this contract was to restrain the trade and commerce of the country is a proposition that cannot be successfully denied. We understand it to be a well-settled rule of law that an agreement in general restraint of trade is contrary to public policy, illegal, and void."

In *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, we held that an agreement tending to prevent competition and create a monopoly is void by the principles of the common law, because it is against public policy; and that public policy favors competition in trade to the end that its commodities may be afforded to the customer as cheaply as possible, and is opposed to monopolies, as tending to advance market prices to the injury of the general public.

Again, in *More v. Bennett*, 140 Ill. 69, 33 Am. St. Rep. 216, we held that contracts restraining the freedom of trade, or diminishing competition, or regulating the prices of commodities or services, are prohibited by the law; and that all combinations of capitalists or of workmen for the purpose of influencing trade in their especial favor by raising or reducing prices are so far illegal that agreements to ³¹¹ combine cannot be enforced by the courts. To the same effect are *Case of Monopolies*, 6 Coke, pt. 11, p. 84; *Arnot v. Pittston etc. Coal Co.*,

68 N. Y. 559; 23 Am. Rep. 190; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; 8 Am. Rep. 159; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Santa Clara Valley Mill etc. Co. v. Hayes*, 76 Cal. 387; 9 Am. St. Rep. 211; *American Preservers' Co. v. Taylor Mfg. Co.*, 46 Fed. Rep. 152; 9 Am. & Eng. Ency. of Law, 884, 895, 896.

The agreement recites, that it is designed by its signers to form a trust for the purpose of securing co-operation in the business of manufacturing preserves, etc., and of selling and dealing in the same in home and foreign markets. This co-operation, to be secured through the extraordinary powers conferred upon the nine trustees named in the agreement, six of whom are designated by name and authorized to elect three others, could not result otherwise than in a grinding monopoly, controlling all trade in the business specified, and raising or depressing prices therein at the will of the trustees. Such trustees are empowered to organize corporations with all or any of the powers specified in the purposes of the agreement; and the stock of such corporations is to be issued to or purchased by said trustees. For this stock the trustees are to issue certificates of trust. The agreement is to go into effect within sixty days from the time those holding the majority of the stock in seven specified corporations formed, or to be formed, shall transfer the same to the trustees. Each signer of the agreement agrees to assign and transfer to said trustees, absolutely, all the shares which he may own in said corporations formed or to be formed, and is to receive therefor, not money, but trust certificates, equal to the appraised amount of the earning capacity of his stock as fixed by the trustees and the stockholder. The trustees are authorized to purchase in the same way, by the issue of trust certificates, other stocks of the same companies, and also the property and business of any firm or individual engaged in the business of manufacturing and ²¹³ dealing in said products. The trustees are to exercise supervision over the corporations whose stocks are transferred to them, and are empowered to elect themselves directors and officers in such corporations, and procure such management of the same as will be conducive to the interests of the holders of the trust certificates. These trust certificates are divided into shares of the par value of one hundred dollars each, and are prepared by the trustees. They provide that the holders thereof shall be bound by the terms of the trust agreement and of

the by-laws passed in pursuance thereof, and are intended to show the interest of each beneficiary in the trust. The trustees hold the stocks transferred to them in trust for the holders of the certificates, and are to receive and hold the dividends or interest upon said stocks, and are to distribute the same by declaring dividends upon the certificates. The stocks so transferred to the trustees are to be held by them for the benefit of all the owners of the trust certificates. The trust is to continue for twenty-five years, subject to the right of seventy-five per cent of the holders of the certificates to terminate it after the expiration of one year, and of sixty-five and two-thirds per cent of such holders to terminate it at the end of five years; and the trustees cannot sell or surrender any of the stocks held by them during the continuance of the trust, without the consent of a majority in number and value of the holders of the trust certificates.

It will thus be seen that the agreement in question makes provision for welding together all the interests engaged in the business named in the agreement into one giant combination or partnership under the absolute dominion and control of a board of nine trustees. Its illegal purpose is apparent upon its face, and, therefore, under the decisions above referred to it must be held to be void as being injurious to the public interest.

The object of the testimony of the defendant, upon the trial below, was to show that the plaintiff, the American ²¹³ Preservers' Company, was a party to this illegal combination, and that the execution of the bill of sale to it was to enable it to carry out the unlawful designs of such combination. If this testimony as offered had been received, it would have tended to show, not only that the plaintiff company was under the control of this board of trustees, but that it was in a partnership with other corporations. The corporators named in plaintiff's charter and whose names are signed to the agreement therein set out, upon the basis of which they were declared to be a corporation, were trustees in the trust. The court below ruled out testimony, showing that these trustees held stock in more than a dozen different corporations in the different states of the Union, besides the stock in the plaintiff company transferred to it by the defendant and others. The agreement was illegal as providing for a partnership among corporations. It is a violation of law for corporations to enter into partnership. The provisions of the

general incorporation act of Illinois are to the effect that every corporation organized in this state must manage its own affairs separately and exclusively, and cannot enter into any contract or relation by which it is divested of such power of exclusive management, or by which its franchises are vested in a partner or any outside board, with equal power to direct its business: *Whittenton Mills v. Upton*, 10 Gray, 582; 71 Am. Dec. 681; *People v. North River etc. Co.*, 121 N. Y. 582; 18 Am. St. Rep. 843. The appellee here, a foreign corporation, so far as it was doing business in this state through any control which it assumed to exercise over the business transferred to it by appellant, was subject to the same restrictions and duties as corporations formed in this state, and could have no other or greater powers: 1 Starr & Curtis' Annotated Statutes, c. 32, sec. 26, p. 619. It was, therefore, unlawful for it to be operating in this state as a member of a partnership of corporations: *State v. Nebraska Distilling Co.*, 29 Neb. 700; *Mallory v. Hanauer Oil Works*, 86 Tenn. 598; *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 17 Am. St. Rep. 319.

³¹⁴ But it is urged that, even if the trust agreement was illegal in the respects and for the reasons above indicated, yet its illegality could not prevent a recovery in this action of replevin, for the alleged reasons that the motive of parties forming a corporation cannot be inquired into in a collateral proceeding; that the contract evidenced by the bill of sale was an executed one; and that defendant having received the goods as agent of the plaintiff could not assert a claim adverse to his principal.

It is not necessary to discuss the doctrine contended for by appellee, that, where a corporation, as indicated by its articles of association, is legal, and the incorporation is effected in the manner prescribed by law, the intention of the incorporators is immaterial. The purpose of the offered testimony was to show that the sale made to the appellee was an illegal sale, and that the bill of sale upon which appellee relied to show its title and right of possession was executed to accomplish an unlawful object. Such proof was entirely consistent with the de facto existence and legal organization of appellee as a corporation. Appellant offered to prove that he was compelled by Ryan to sign the trust agreement in May, 1888, by the threat that his business would be ruined by the manufacturers and dealers who had agreed to form the trust; and he swore that he had never heard of appellee until the follow-

ing July, when Ryan came to him and told him that he must sign the bill of sale to the company, in order to put the stock into the trust. It may be a serious question whether there was any real sale of the property described in the bill of sale. A sale presumes a vendor on one side and a vendee on the other, each having life and existence and the power and ability to contract, and each acting independently and of his own free choice. But here the vendor, Bishop, and the vendee, the American Preservers' Company, were controlled and directed by an outside force, the trustees named in the trust agreement acting through Ryan, their ²¹⁵ representative. Ordinarily, the vendee becomes owner and does what he pleases with his own, but here the trust agreement in effect directs the vendee upon what terms it shall hold the property transferred to it, and limits the further sale of the same. Ordinarily the vendor fixes the price of what he sells, but here the trust agreement virtually leaves the fixing of the value of what is sold to the trustees. The proof introduced showed that appellant had nothing to do with arranging for three hundred and thirty-one shares of stock in the appellee company as the value of his property and business, nor did he determine that six hundred and sixty-two certificates of trust were a fair equivalent for the stock. All this was settled and arranged beforehand by Ryan: *People v. North River etc. Co.*, 121 N. Y. 582; 18 Am. St. Rep. 843.

But if it be assumed that appellant executed the bill of sale and submitted himself to the control of the trustees or of appellee, voluntarily and of his own free will, then it follows that he was particeps criminis with them in the unlawful venture. He, as well as appellee, was a party to the unlawful contract evidenced by the bill of sale. If appellee had been an individual, instead of a corporation, and appellant had executed the bill of sale for the purpose of defrauding his creditors, it will not be contended that the bill of sale could be relied upon as a basis of recovery by either party.

In *Kirkpatrick v. Clark*, 132 Ill. 342, 22 Am. St. Rep. 531, the action was ejectment by the grantee in a deed against the grantor therein, who was in possession of the premises. The defendant offered to show that the deed had been executed for the purpose of defrauding the defendant's creditors, but the evidence was rejected, and we reversed the case, holding that the ruling was erroneous. In that case, we applied the maxim *In pari delicto potior est conditio defendentis et*

possidentis, and held that, where parties concerned in illegal agreements are in *pari delicto*, the law will not aid either, but will leave them without remedy against each other; and it was also there held that the ³¹⁶ above maxim applied to executed transactions as well as to those which are executory, and would be enforced by courts of law as well as courts of equity. "Whatever the parties to an action have executed for fraudulent or illegal purposes, the law refuses to lend its aid to enable either party to disturb": *Smith v. Hubbs*, 10 Me. 71. See, also, *Craft v. McConoughy*, 79 Ill. 346; 22 Am. Rep. 171; and *Halloran v. Halloran*, 137 Ill. 100.

In the case at bar, the appellant never parted with the possession of the property. After he executed the bill of sale he still continued his business the same as before, though subject to the orders and direction of the trust. The beginning of the action of replevin admits his possession, as replevin does not lie against one not in possession: *Wells on Replevin*, 77; *Hall v. White*, 106 Mass. 599. We see no reason why the doctrine of *Kirkpatrick v. Clark*, 132 Ill. 342, 22 Am. St. Rep. 531, does not apply here, although the action is replevin and not ejectment, and although the property involved is personalty, and not real estate. The bill of sale rests under the ban of the law, as well when executed to carry out the illegal agreement hereinbefore set forth as if it had been made for the purpose of defrauding creditors. The law will not aid the appellee to recover the property, but will leave both it and appellant where they were when the suit was begun.

Counsel for appellee claim that, by the bill of sale, appellee became the owner of the property, and then turned over the possession of it to appellant under an arrangement by which the latter was to manage it for appellee. Under this view of the case, the agreement, thus made after the sale, was as unlawful as the contract embodied in the bill of sale itself, because appellant thereby agreed to aid in carrying out the illegal purpose of the trust agreement. Letters from Ryan to appellant were introduced in evidence, but finally excluded by the court, directing appellant to advance the price on jellies in Chicago so many cents; not to sell at lower prices ³¹⁷ without referring the matter to him (Ryan); not to offer any goods in Indiana; not to go below a certain price, "but in competition with outsiders . . . not (to) hesitate to make any price that will do the business"; to send sched-

ules of the stock on hand and estimates of the fruit needed for the season; how to charge paper given and received in the course of business; and how to make entries on the books, etc. These letters, and other offered proof, showed that appellant was holding the property and managing the business under the direction of the trust and under the instructions of its secretary.

The general rule of law is, that a contract made in violation of a statute is void, and that, when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover: *Miller v. Ammon*, 145 U. S. 421; *Penn v. Bornman*, 102 Ill. 523; *Commissioners of Drainage District v. People*, 138 Ill. 87. In *Shaffner v. Pinchback*, 133 Ill. 410, 23 Am. St. Rep. 624, we held that, where two persons contribute money to be used by one of them for the purpose of betting or wagering the same on horseraces, or if they are partners in the business of betting on horseraces, and the money advanced by the plaintiff to the defendant is in furtherance of such business, the plaintiff cannot recover of the defendant any money so contributed or advanced, upon the ground that betting money on a horserace is gaming and in violation of law, and a contract in aid of the offense of gaming is prohibited by statute and void, and no recovery can be had on it; and we there said that plaintiff and defendant, being jointly engaged in a business which was in violation of law, "were, in respect to such business, in pari delicto, and the law will refuse its aid to assist either, but will leave them in the positions in which they have placed themselves."

Cobbey in his work on the Law of Replevin, section 149, says: "One who has parted with his property under a contract which is against public policy cannot maintain ²¹⁸ replevin for it. The law will leave the parties in the situation in which they have placed themselves."

In *Stout v. Watson*, 19 Or. 251, the action was replevin, and the plaintiff relied upon a bill of sale in the nature of an assignment which was void under the statute as not being for the benefit of all the creditors; and the court held that a motion for a nonsuit made by the defendant at the close of plaintiff's evidence was improperly disallowed, because the plaintiff had no other evidence of title to the property in controversy except the bill of sale, which had been executed in

violation of the statute, or contrary to its provisions, and was therefore void.

In *Hutchins v. Weldin*, 114 Ind. 80, the action was replevin to recover possession of a horse; plaintiff claimed that he was the owner and entitled to the possession of the horse, and that the defendant had possession of it without right and unlawfully detained it; there was evidence authorizing the jury to find that the plaintiff, by an executed contract, had parted with his title to and right to the possession of the horse, but that the contract, although fully executed by the parties thereto, was contra bonos mores and void as against public policy; verdict and judgment below were for the defendant, and the supreme court of Indiana, in affirming the judgment, said: "The law in such a case will leave the parties just where it finds them. If the contract has not been executed it will not be enforced; if it has been executed the law will not extend relief. Where a contract void as against sound morals or public policy has been fully executed by both parties, and suit brought under, upon, or against such contract *potior est conditio defendentis*."

When the issue in an action of replevin is one of title, the plaintiff must prove a title on which he can base a lawful possession: 20 Am. & Eng. Ency. of Law, 1054.

²¹⁹ As to the claim that the relation of agent and principal existed between appellee and appellant, we do not think that the existence of such a relation, if it had been found by the jury to exist, would authorize a recovery by appellee, if the facts offered to be proven by the defendant had been established by his evidence. It may be admitted to be true, as a general principle in the law of agency, that the agent may not dispute his principal's title; but there are exceptions to this general principle: Mechem on Agency, sec. 525. The law will not enforce the performance of an agency which has for its object, or tends directly to promote, the commission of an illegal act, or an act opposed to public policy, such as the creation of fictitious and unnatural values, or the control or monopoly of traffic in the staple articles of commerce, or the prevention of free and natural competition therein. Ordinarily in such case it will assist neither party: Mechem on Agency, secs. 20, 35. In illegal transactions prohibited by law, or morals or public policy, an agent cannot recover either for his services, or for his advances and disbursements, nor will the law assist the principal to recover his property

or its proceeds. The guilt of both is deemed to be equal, and the maxim is, *In pari delicto potior est conditio defendentis*. "Each party is left precisely where he is found at the time of the controversy to bear the burden of his own abandonment of his duty to the law of his country": Story on Agency, 8th ed., secs. 195, 330, 344.

In *Samuels v. Oliver*, 130 Ill. 73, where it appeared that a principal had employed an agent to buy and sell grain with the illegal purpose of controlling the market and price thereof, and this fact was known to the agent, we held that such principal would not be permitted to recover against the agent for moneys received by him in the course of such business; and it was there said: "When the employment of an agent relates to the performance of an immoral or illegal act, . . . neither party can ²³⁰ make the contract the basis of a suit against the other. Advances for illegal purposes fall within the same rule, and cannot be recovered by the principal of the agent or the agent of the principal."

There are cases which hold that, if the contract is founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, it will not be regarded as unlawful. If the promise be unconnected with the illegal act and founded on a new consideration, it will not be tainted by the act. For instance, a principal may recover from his agent money paid to the agent by a third person from whom such money may have been due to the principal upon an illegal transaction, because the contract of the agent to pay the money to the principal is not immediately connected with the illegal transaction. But the law will not assist the principal to recover against the agent where the contract between them grows directly out of the illegal transaction, and the agent has been concerned in the execution of the illegal transaction and participated in it. The maxim above quoted has application as between the immediate parties to an illegal contract. Here the offered testimony was for the purpose of showing that the agent aided and assisted the principal in carrying out the objects of the illegal combination, and was a party to the contract of sale executed in the interest of the illegal transaction, and that the assumed agency, if there was one, had for its object the accomplishment of the unlawful purpose.

We are therefore of the opinion that the action of the

trial court, in refusing to admit the defendant's offered testimony and in excluding that which was admitted, cannot be sustained upon any of the grounds urged in support of it, and that, in the rejection and exclusion of such evidence, said court committed error.

Other points, some of them of much force, are discussed by counsel. These relate to the admitted abandonment ³²¹ of the trust, and defendant's alleged rescission of the contract and attempted withdrawal from the trust, and the trial court's refusal to submit the case to the jury upon such proof as was before them. We do not deem it necessary, however, to discuss the questions growing out of these other matters, or to pass any opinion upon them. For the reasons above indicated, the judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed.

EVIDENCE—SECONDARY—WHEN ADMISSIBLE.—Secondary evidence is admissible if primary is unattainable: *Allen v. State*, 21 Ga. 217; 68 Am. Dec. 457, and note; *Commonwealth v. Jeffries*, 7 Allen, 548; 83 Am. Dec. 712, and note. Secondary evidence of the contents of a writing is admitted on the theory that the original cannot be produced by the party by whom the evidence is offered within a reasonable time, by the exercise of reasonable diligence: *Wiseman v. North Pac. R. R. Co.*, 20 Or. 425; 23 Am. St. Rep. 135, and note. The contents of a paper which is beyond the jurisdiction of the court can be proved by secondary evidence: *Manning v. Maroney*, 87 Ala. 563; 13 Am. St. Rep. 67; *Knickerbocker v. Wilcox*, 83 Mich. 200; 21 Am. St. Rep. 595.

MONOPOLIES.—A combination or trust organized to control the manufacture and sale of all distillery products, and to thus dictate the amount to be manufactured and the selling price, is illegal and void: *Distilling etc. Co. v. People*, 156 Ill. 448; 47 Am. St. Rep. 200, and note.

CORPORATIONS—PARTNERSHIP BETWEEN.—For corporations to enter into partnership is a violation of the law: *People v. North River Sugar Refining Co.*, 121 N. Y. 582; 18 Am. St. Rep. 843, and note. See, also, the note to *Whitenton Mills v. Upton*, 71 Am. Dec. 687.

CONTRACTS—ILLEGAL AS BASIS OF ACTION.—An illegal agreement made by a plaintiff will not defeat him unless his cause of action is founded upon or arises out of such agreement: *Insurance Co. v. Hall*, 51 Ohio St. 270; 46 Am. St. Rep. 571, and note. Where a plaintiff requires any aid from an illegal transaction to establish his demand he must fail; but if the cause of action be unconnected with the illegal act, and is founded upon a distinct consideration, it will not be affected by his former unlawful conduct: *Phalen v. Clark*, 19 Conn. 421; 50 Am. Dec. 253, and note; *Buck v. Albee*, 26 Vt. 184; 62 Am. Dec. 564, and note. See, also, the extended discussion of this subject in the note to *Lemon v. Grosskopf*, 99 Am. Dec. 62.

UNION STOCK YARD AND TRANSIT COMPANY v.
MALLORY, SON & ZIMMERMAN Co.

[157 ILLINOIS, 554.]

IN AN ACTION OF TROVER PLAINTIFF MUST RECOVER UPON THE STRENGTH OF HIS OWN TITLE, and not upon the weakness of his adversary's, and must show not only a conversion of personal property by the defendant, but also that at the time of the conversion plaintiff had a right of property, general or special, in the chattels converted, and the possession or immediate right to the possession thereof.

SALE OF CHATTELS—DELIVERY SUFFICIENT TO COMPLETE.—When a vendor delivers to a purchaser, or a purchaser's authorized agent, an order upon the vendor's bailee to deliver the goods sold to such purchaser or agent, this is a delivery having the same effect in transferring title as an actual delivery.

TROVER.—A CONVERSION is any unauthorized act which deprives a man of his property, permanently or for an indefinite time. A wrongful assumption of the ownership of property may be a conversion of it rendering a demand and refusal unnecessary.

AGENCY.—A GENERAL AGENT is one who is authorized to do all acts connected with a particular business or in a particular place, while a special agent is one authorized to act only in a specific transaction.

AGENCY—ESTOPPEL TO DENY.—He who holds out another as his agent to act for him in a given capacity, and by his habits and course of dealing justifies the inference that such agent is authorized to act as his agent, whether it be in a single transaction or in a series of transactions, will not be allowed to deny the agency to the prejudice of an innocent party who has been led to rely upon the appearance of authority in the agent.

SALES, FRAUDULENT—EFFECT OF.—When a sale of goods is made through the fraudulent representations of the purchaser, or where the fraud in the sale arises from the intention of the purchaser not to pay for the goods, the sale is voidable only and not absolutely void.

THE RESCISSION OF A FRAUDULENT SALE by the vendor must be made before other rights acquired in good faith have intervened.

TROVER—FRAUDULENT SALE.—Though a fraudulent purchase of chattels is made, and because of the fraud the vendor has a right of rescission, and though a conversion of the chattels takes place, the title being still in the purchaser because of the failure to rescind, the vendor cannot sustain an action of conversion.

AGENCY—AUTHORITY IMPLIED FROM PREVIOUS ACTS.—If the question is whether an agent who had purchased cattle for his principal had authority to receive them in his possession, the fact that in previous transactions between the same parties the principal had recognized the authority of his agent to receive cattle purchased is material, and a refusal to receive it in evidence is erroneous.

AGENCY—IMPLIED AUTHORITY—CUSTOM.—A person dealing in a particular market will be taken to have dealt according to the custom and usage of the market, and if he employs another to act for him at such market, he will be held as intending that the business shall be conducted according to the general usage and custom of the market, and this rule is applicable whether he in fact knows of the custom or not.

AGENT—USAGE AS AFFECTING POWERS.—The usages of a particular trade or business are properly admissible for the purpose of interpreting the powers given to an agent.

AGISTERS OF CATTLE ARE BOUND for the exercise of ordinary care.

BAILLEES DELIVERING GOODS TO A WRONG PERSON, though innocently and by mistake, are ordinarily answerable for a conversion.

BAILER.—THE QUESTION WHETHER A BAILER HAD EXERCISED ORDINARY care and diligence in the delivery of property to a person other than the bailor is a question for the jury.

BAILER AT STOCKYARDS.—In the matter of the care and delivery of cattle, a stockyards company is only required to act with reasonable care and diligence, and in accordance with the usages and customs of the Union Stock Yards where the business was transacted.

TROVER to recover for the alleged conversion of cattle by the Union Stock Yards and Transit Company. These cattle were purchased of Mallory, Son & Zimmerman Co. on May 14, 1891, by Samuel Fleischman, purporting to act on a telegraphic order received by him on the preceding day from one Bussell, doing business at Detroit, and the plaintiff corporation made out and delivered to Fleischman an order directing the defendant corporation to deliver the cattle of Bussell. Fleischman, after receiving the order, on the same day, sold the cattle to Holmes & Pattison, and delivered to them the order indorsed "Bussell.—S. Fleischman," and thereupon the cattle were by defendant delivered to Holmes & Pattison. On the next day it was rumored that Fleischman had absconded, and the plaintiff company forwarded to Bussell a bill for the cattle sold. He at once repudiated the transaction, and the plaintiff, on May 23d, notified the defendant that, as it had delivered the cattle to a person other than Bussell, it would be held responsible for them. On June 18th plaintiff made a formal demand for the possession of the cattle, and, such demand being refused, this suit was begun, resulting in a judgment in favor of the plaintiff in the trial court. The defendant therefore appealed.

Winston & Meagher, for the appellant.

Peck, Miller & Starr, for the appellee.

500 **MAGRUDER, J.** This is an action of trover, brought by the appellee, Mallory, Son & Zimmerman Co., an incorporated company of livestock commission merchants, doing business at the stockyards in the city of Chicago, against the appellant, the Union Stock Yard and Transit Company, to recover the value of twenty-seven head of cattle, alleged to have been converted by the appellant. In an action of trover, which is

a possessory action, the plaintiff ^{see} must recover upon the strength of his own title and not upon the weakness of his adversary's title; and he must show not only a tortious conversion of the personal property by the defendant, but also that, at the time of the alleged conversion, he had the right of property, general or special, in the chattels converted, and also the possession, or a right to the immediate possession thereof. There must be a concurrence both of the right of property, general or special, and of the actual possession or the right to immediate possession, and this concurrence must exist at the time of the conversion: *Davidson v. Waldron*, 81 Ill. 120; 83 Am. Dec. 206; *Forth v. Pursley*, 82 Ill. 152; *Owens v. Weedman*, 82 Ill. 409; *Montgomery v. Brush*, 121 Ill. 513; *Frink v. Pratt*, 130 Ill. 327; 26 Am. & Eng. Ency. of Law, 744.

There is evidence in the record tending to show that the title to the cattle had passed out of appellee when the alleged conversion took place, and that both the right of property and the right of possession were in Bussell when the cattle were delivered by appellant to Fleischman, or to Holmes & Pattison at Fleischman's request. On May 13, 1890, which was Sunday, Bussell, in Detroit, telegraphed to Fleischman at the stockyards in Chicago to buy a load of cattle for him. Early on the next morning, Monday, May 14, 1890, Fleischman went to Zimmerman, a member of the appellee company, and told him of the telegram thus received from Bussell. Fleischman and Zimmerman together visited the cattle pens of appellant between 9 and 10 o'clock on that morning, and there looked at several bunches of cattle held for appellee by appellant, and agreed on the price of twenty-seven head of cattle. Zimmerman caused the cattle so selected to be taken by one of his employees to the scales in the yard, and weighed by appellant's weighmaster, who made out the scale tickets showing the number and weight of the cattle, and the names of the seller and of the person to whom they were weighed. The scale tickets are in evidence, and show the names of appellee and of Bussell, ^{see} and are signed by the weighmaster of appellant. Fleischman was present when the cattle were weighed, or when Zimmerman directed them to be carried to the scales to be weighed. The scale tickets were taken to appellee's office, and there appellee made out and signed and delivered to Fleischman an order on appellant to deliver to Bussell the twenty-seven head of cattle. On the

same day Fleischman presented this order to appellant, and appellant delivered to him the cattle. It was not the business of appellant to buy and sell cattle, but the appellant operated the stockyards; and its business is to receive stock and weigh it, and see that it is properly fed and watered. Appellee's business was to sell stock on commission, and sometimes buy it on order, and it had been engaged in that business at the stockyards for some twenty-two years, having dealings with appellant every day in the year except Sunday. Fleischman also had been buying stock for more than a year at the stockyards for Bussell and other parties, and had had dealings with appellee before May 14, 1890.

The testimony of both Zimmerman and Mallory, the former being the salesman of appellee and the latter its treasurer and manager, is that there was a sale of the cattle to Bussell when the delivery order was given to Fleischman, and that appellee then extended upon its books a credit of a few days, or perhaps a week, to Bussell. There was a symbolic delivery of the cattle by appellee to Fleischman, and, therefore, an execution of the contract of sale. When the vendor delivers to the purchaser, or to the purchaser's authorized agent, an order upon the vendor's bailee to deliver the goods sold to such purchaser or agent, there is a constructive delivery of the property; and the delivery of the order vests the purchaser with the indicia of ownership, and has the same effect in transferring the title to the property as the delivery of the property: *McCormick v. Hadden*, 37 Ill. 370; *Burton v. Curyea*, 40 Ill. 320; 89 Am. Dec. 350; *Webster v. Granger*, 78 Ill. 230; *Tuxworth v. Moore*, 9 Pick. 347; 20 Am. Dec. 479; *Carter v. Willard*, 19 Pick. 1. It follows that the title to the cattle passed from appellee to Bussell; and, if the title remained in Bussell at the time of the alleged conversion of the property, then this action was improperly brought in the name of appellee, and cannot be maintained.

If there was a conversion, it must be regarded as having taken place on May 14, 1890, when the cattle were delivered by appellant to Fleischman, and not on June 18, 1890, when appellee made a formal written demand upon appellant for the possession of the property. In trover, demand and refusal do not necessarily constitute the conversion, but are only evidence of it. A conversion is any unauthorized act, which deprives a man of his property permanently or for an indefinite time, and, when such a conversion has taken place,

a demand is not necessary. A wrongful assumption of the ownership of property may be a conversion in itself, and render a demand and refusal unnecessary. Demand and refusal are evidence of conversion when the defendant is in such a condition that he can deliver the property if he will: *Johnson v. Howe*, 2 Gilm. 342; *Bruner v. Dyball*, 42 Ill. 35; *Hiort v. Bott*, L. R. 9 Ex. 86; *Hawkins v. Hoffman*, 6 Hill, 586; 41 Am. Dec. 767, and notes. It is not claimed by appellee that appellant delivered the cattle to Fleischman on May 14, 1890, with any evil intent, or from any improper motive, or that it thereby acted with a want of good faith. If appellant was then guilty of a conversion, it must be because it parted with the cattle through mistake or negligence. It was certainly justified at that time in regarding Bussell as the owner of the cattle and entitled to the possession thereof, and in concluding that the right of property and of possession had both passed from appellee. The trial court refused to instruct the jury, at defendant's request, that, to maintain this action, the plaintiff must recover on the strength of its own title to the cattle, and show in itself either a general or special ~~see~~ property therein, and that, at the time of the alleged conversion, it had not only the right of property in the cattle, but also the right to the immediate possession of the same.

It is claimed, however, that the sale from appellee to Bussell through Fleischman was fraudulent. Fleischman is alleged to have been a special agent and not a general agent of Bussell. A general agent is one who is authorized to do all acts connected with a particular business or in a particular place, while a special agent is one who is empowered to act only in a specific transaction: *Mechem on Agency*, sec. 6; 1 Am. & Eng. Ency. of Law, 349. Fleischman is said to have had no authority to buy cattle for Bussell except when he received an order to buy a particular lot of cattle, and that his authority to make purchases of cattle was limited to the particular order received by him. It is then contended that he received an order by telegraph sent on May 13, 1890, to buy cattle; that on May 14, 1890, he bought a lot of cattle from another party than appellee, and shipped them to Bussell, and drew on Bussell for the purchase money, and that Bussell paid for the cattle so purchased and shipped to him. Appellee contends that Fleischman had exhausted his authority to buy for Bussell when he told Zimmerman that he had an order from Bussell, and that he obtained the

cattle from appellee without having any authority from Bussell to do so, and without having any intention to pay for the same, and that his conduct in thus obtaining the cattle from appellee and subsequently selling them to Holmes & Pattison, instead of shipping them to Bussell, was a fraud on appellee.

Whether the purchase of the cattle from appellee was made by Fleischman before or after the other purchase was made by him may be considered doubtful under the evidence, if it were proper to consider the evidence. If he bought of appellee under the order received by him and before his authority was exhausted, then it cannot be ⁵⁶³ said that there was any fraud in the original purchase of the cattle from appellee, but only in the subsequent disposition of them to Holmes & Pattison.

It may be conceded, however, that the question whether the sale of the cattle by appellee to Bussell was fraudulent or not was a question of fact to be determined by the jury under proper instructions, and that the judgment of the appellate court establishes the fraudulent character of the sale as between appellee and Bussell or Fleischman. Bussell denies that he gave Fleischman any authority to buy this particular lot of cattle from appellee. One who holds out another as his agent to act for him in a given capacity, and by his habits and course of dealing justifies the inference that such other is authorized to act as his agent, whether it be in a single transaction or in a series of transactions, will not be heard to deny the agency to the prejudice of an innocent party who has been led to rely upon the appearance of authority in the agent: *Mechem on Agency*, secs. 83, 84. Whether or not Bussell's conduct toward Fleischman was such as to justify appellee in dealing with Fleischman as having authority to act for Bussell is a question which seems to be immaterial except so far as it concerns the validity of the sale, because this is not a suit by appellee against Bussell. Nor does the question here arise whether or not Holmes & Pattison were bona fide purchasers of the goods from Fleischman, as this is not a suit against Holmes & Pattison. This suit is brought by appellee against the appellant, its bailee or agister, charging the latter with having improperly delivered the goods to Fleischman when the delivery order directed them to be delivered to Bussell.

Where a sale of goods is made through the fraudulent

representations of the purchaser, or where the fraud in the sale arises from the intention of the purchaser not to pay for the goods, the sale is voidable only, and not absolutely void: 8 Am. & Eng. Ency. of Law, 791, ^{see} 822, 823; Benjamin on Sales, book 3, c. 2, sec. 433. The sale being voidable, it results that the vendor may rescind it if he so elects. But this rescission must be made before other rights acquired in good faith have intervened. If, before the vendor exercises his election, the vendee makes a transfer to an innocent third person for a valuable consideration, such third person will hold the property as against the original vendor: *Brundage v. Camp*, 21 Ill. 330; *Fawcett v. Osborn*, 32 Ill. 411; 83 Am. Dec. 278; *Butlers v. Haughwout*, 42 Ill. 18; 89 Am. Dec. 401; *Chicago Dock Co. v. Foster*, 48 Ill. 507; *Doane v. Lockwood*, 115 Ill. 490; *Farwell v. Hanchett*, 120 Ill. 573; 2 Schouler on Personal Property, secs. 408, 409; Benjamin on Sales, sec. 433; 26 Am. & Eng. Ency. of Law, 786, and notes.

In the case at bar it is indisputably shown that the appellee exercised no election to rescind the sale before the cattle were delivered to Fleischman upon the order given to him by appellee. "The title of the fraudulent purchaser is subject to be divested, at the election of the seller, within any reasonable time after the fraud is discovered": *Doane v. Lockwood*, 115 Ill. 490. Here the fraud was not discovered until after the alleged conversion took place. This being so, the title was still in Bussell at the time of the conversion, and had not become revested in appellee by rescission. We are, therefore, inclined to hold that the jury should have been instructed upon this subject in accordance with defendant's request as above indicated.

It is said, however, that the point as to the existence of the title in Bussell at the time of the conversion is merely technical; and that it is immaterial whether appellant should be made to respond for the value of the cattle to appellee or to Bussell. Without conceding that there is any force in this suggestion, we will notice some of the other errors assigned.

By the fifth instruction given for the plaintiff the jury were told that "proof of the fact, if it be a fact, that ^{see} Bussell had on former occasions recognized Fleischman as his agent in making purchases of cattle for him is not sufficient to charge him or justify the Union Stock Yard and Transit Company in delivering cattle to Fleischman for Bussell when they had an order from the plaintiff to deliver to

Bussell himself, without proof that, at the time of the transactions in question, the plaintiff had knowledge of such former recognition." The court refused to give the fifth instruction asked for the defendant, which is as follows: "The jury are instructed that a person dealing at a particular market will be taken to have dealt according to the custom and usage of that market, and if he employs another to act for him in carrying on business dealings at such market, he will be held as intending that the business should be conducted according to the general usage and custom of such market; and this is the rule, whether he in fact knows of the custom or not."

It is assigned as error that the court gave the fifth instruction asked by the plaintiff, and refused the fifth instruction asked by the defendant. In connection with these instructions it may be noted that the defendant below offered in evidence six orders on appellant for the delivery of cattle to Bussell, signed by different commission merchants at the stockyards, and delivered to Fleischman, which orders were indorsed in the handwriting of Fleischman in the same manner in which the order for the twenty-seven cattle signed by appellee was indorsed, and upon the presentation of which orders to appellant the cattle therein named had been delivered to Fleischman or to Pattison & Holmes. The court refused to admit the orders in evidence, and this refusal is assigned as error. The object of introducing these orders was to show that Fleischman had been in the habit of presenting to appellant orders directing cattle to be delivered to Bussell, and of indorsing the orders, and receiving the cattle and shipping them or selling them; ⁵⁶⁸ and that it was the usual custom at the stockyards to transfer the title to the cattle by indorsement of the delivery orders, and that cattle were delivered upon such orders to the party therein named or to his known agent. The ground upon which the court refused to admit the orders was, that the plaintiff was not shown to have had knowledge of them; and the necessity of such knowledge by the plaintiff is also set up in the given instruction No. 5.

The instruction was correct in requiring knowledge of the orders by the plaintiff, so far as they bore upon the question whether or not Fleischman was Bussell's agent to purchase the cattle, and had authority to make the contract of sale with appellee. Upon this subject counsel for appellee cite

the case of *Maxey v. Heckethorn*, 44 Ill. 437. There, Heckethorn sued Maxey and Howard for cattle alleged to have been purchased by one Hewitt as Maxey's agent. It was sought to hold the defendants there liable on the ground that, in previous transactions, they had recognized Hewitt as their agent or as Maxey's agent, and it was held that Maxey's recognition of previous acts of purchase for him by Hewitt was not sufficient to charge Maxey and Howard, in the absence of proof that the plaintiff, before he sold to Hewitt, was cognizant of the facts. Unless the previous transactions were brought home to the knowledge of Heckethorn, he could not claim that he sold the stock to Hewitt as Maxey's agent because of said transactions. So, here, it may be said that Bussell could not be held liable to appellee for the purchase of the cattle by Fleischman as his agent, because Bussell had recognized previous purchases of cattle made for him by Fleischman, unless it was shown that plaintiff had knowledge of such previous purchases. Appellee could not be held, without such knowledge, to have relied upon such previous purchases as showing Fleischman's agency. But all this has reference to the right or authority of Fleischman to make a contract with appellee for the purchase of the cattle; it ^{see} concerns only the validity of the contract of sale. But, so far as appellant is concerned, the question is not whether Fleischman was Bussell's agent to buy the cattle of appellee, but whether, after the purchase of the cattle was made, Fleischman had authority to receive them as Bussell's agent. Appellant had nothing to do with the purchase of the cattle. When the delivery order was presented appellant had a right to suppose that appellee had made a valid sale of the cattle to Bussell, and had determined that Fleischman had proper authority from Bussell to buy them. The only question for appellant to consider was this: The cattle having been sold to Bussell and he being the rightful owner, has Fleischman authority to receive them for Bussell, and ought they to be delivered to Fleischman for Bussell. It is easy to see that the agency of Fleischman is to be looked at in two aspects: 1. Was Fleischman Bussell's agent to buy the cattle? This was a question for appellee to settle. 2. After the cattle were bought, was Fleischman Bussell's agent to receive the cattle? This was a question to be determined by appellant. If, in previous transactions with appellant, Bussell had recognized Fleischman as his agent to receive cattle al-

ready bought by him, appellant might be justified in dealing with Fleischman as Bussell's agent for such purpose. In such case the knowledge of appellee as to transactions previously had with appellant showing Fleischman's agency to receive cattle already bought was not material. The knowledge of appellee was only material as to previous transactions tending to show Fleischman's authority as agent to make contracts for the purchase of cattle. There is thus a plain distinction between the question of Fleischman's agency to buy cattle as related to the validity of the sale thereof and the question of Fleischman's agency as to the delivery to him of cattle which had already been bought. Whether Fleischman was a general or special agent, the evidence tends very ⁵⁷⁰ conclusively to show that when he had an order from Bussell to buy cattle, and after he had bought them in pursuance of such order, he had full authority to receive them from the stockyards company upon the presentation to that company of a proper delivery order. We are, therefore, inclined to think that the fifth instruction given for plaintiff was erroneous, in so far as it makes the justification of appellant in delivering the cattle to Fleischman dependent upon appellee's knowledge of Fleischman's agency, and that the six orders in question should have been admitted in evidence; and that the fifth instruction asked by defendant below should have been given. The latter instruction conforms exactly to the ruling made by this court in *Samuels v. Oliver*, 130 Ill. 73. The usages of a particular trade or business are properly admissible for the purpose of interpreting the powers given to an agent: *Phillips v. Moir*, 69 Ill. 155; *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427.

The liability of the appellant was that of bailee or agister. Agisters of cattle are only bound for the exercise of ordinary care: *Umlauf v. Bassett*, 38 Ill. 96; Story on Bailments, 443. The degree of care exercised is a question of fact for the jury: *Mansfield v. Cole*, 61 Ill. 191. The ordinary rule is that, if a bailee deliver goods to the wrong person, although innocently or by mistake, he is liable as for a conversion: Schouler on Law of Bailments, 119; *Alabama etc. R. R. Co. v. Kidd*, 35 Ala. 209. And if one man, who is intrusted with the goods of another, puts them into the hands of a third person contrary to orders, he is liable: *Parker v. Lombard*, 100 Mass. 405. But it is not a conversion if the bailee, being intrusted with the possession merely, transfers the pos-

session according to the directions of the person from whom he received it: *Parker v. Lombard*, 100 Mass. 405. Nor will trover lie where the conversion is with the knowledge or consent of the plaintiff: *Tousley v. Board of Education*, 39 Minn. 419. Where the property is to be delivered by an ordinary ⁵⁷¹ bailee, and not by a carrier, the liability is only for proper diligence and care in the preservation and delivery of the property; and the question whether the defendant has been negligent in the delivery of the property is a question of fact for the jury: *Price v. Oswego etc. Ry. Co.*, 50 N. Y. 213; 10 Am. Rep. 475; Benjamin on Sales, sec. 437; *Heugh v. London etc. Ry. Co.*, L. R. 5 Ex. 51; *McKean v. McIvor*, L. R. 6 Ex. 36; *Clough v. London etc. Ry. Co.*, L. R. 7 Ex. 26.

The trial court refused to give the seventh instruction asked by the defendant below, which told the jury that, in the matter of the care and delivery of the cattle, the defendant was only required to act with reasonable care and diligence, and in accordance with the usages and custom of carrying on business at the Union Stock Yards. We think that this instruction should have been given.

For the errors herein mentioned, the judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed.

TROVER—PLAINTIFF'S TITLE.—In trover, as in ejectment, the plaintiff must recover on the strength of his own title and not on the weakness of that of his adversary: *Davidson v. Waldron*, 31 Ill. 120; 83 Am. Dec. 206, and note. See the extended note to *Hoeller v. Skull*, 1 Am. Dec. 585.

TROVER—CONVERSION—WHAT IS.—Any distinct act of dominion wrongfully exerted over one's property in denial of his right or inconsistent therewith is, and may be treated as, a conversion: *Carpenter v. American Building etc. Assn.*, 54 Minn. 403; 40 Am. St. Rep. 345, and note. See, also, the extended notes to *Bolling v. Kirby*, 24 Am. St. Rep. 795-797, and *Hale v. Ames*, 15 Am. Dec. 151.

SALES—DELIVERY BY ORDER.—A usage to sell flour in store by order, and to pass it by the transfer of the order from hand to hand without actual delivery of the flour, is reasonable and lawful: *Pleasants v. Pendleton*, 6 Rand. 473; 18 Am. Dec. 726, and note. Where one has a large number of barrels of flour in a warehouse, and sells the entire quantity to several separate purchasers, giving each his delivery order upon his warehouseman, if the purchasers all surrender their several orders to the warehouseman without separation, but voluntarily leave the flour standing on the books to the credit of each for his proper number of barrels, the delivery to each purchaser is complete: *Horr v. Barker*, 11 Cal. 393; 70 Am. Dec. 791.

AGENCY—GENERAL—WHO IS—AUTHORITY.—A general agency exists where there is a delegation to do all acts connected with a particular trade, business, or employment: *Great West Min. Co. v. Woodmas etc. Min. Co.*, 12 Col. 46; 13 Am. St. Rep. 204, and note; *Loudon Sav. etc. Society v. Hagerstown Sav. Bank*, 36 Pa. St. 498; 78 Am. Dec. 390, and note; *Walker v. Skipwith*, Meigs, 502; 33 Am. Dec. 161.

AGENCY—AUTHORITY—USAGE OR CUSTOM—EFFECT ON AUTHORITY OF AGENT.—An agency to manage property implies authority to do with the property what has previously been done with it by the owners, or others, with their express or implied consent, or to do with it what is usual and customary to do with property of the same kind in the same locality: *Duncan v. Hartman*, 143 Pa. St. 595; 24 Am. St. Rep. 570, and note.

BAILMENT—DELIVERY BY BAILEE TO WRONG PERSON—LIABILITY.—A misdelivery of property by any bailee to an unauthorized person is of itself a conversion for which the bailor may maintain an action of trover: *Hall v. Boston etc. R. R. Co.*, 14 Allen, 439; 92 Am. Dec. 783. See, also, *Hubbell v. Blandy*, 87 Mich. 209, 24 Am. St. Rep. 154, and note, and *Tumbler v. Koelling*, 60 Ark. 62; 46 Am. St. Rep. 146.

AGISTMENT—CARE REQUIRED OF AGISTERS.—An agister of animals is not an insurer of their safety, and is liable for their loss only on proof of negligence or want of ordinary care on his part: *Rey v. Toney*, 24 Mo. 600; 69 Am. Dec. 444, and note; *Winston v. Taylor*, 23 Mo. 82; 75 Am. Dec. 112, and note.

CASES
IN THE
SUPREME COURT
OF
IOWA.

DOUGLASS v. MOSES.

[80 IOWA, 40.]

SALES—EXPRESS WARRANTY—INSTRUCTION.—It is proper to instruct the jury in an action upon an express warranty in the sale of a horse that the plaintiff cannot recover, and that the verdict must be for the defendant, if no representations were made by the defendant at the time of the sale, and the plaintiff looked the horse over, and took him upon his own judgment, without asking any questions.

DEFINITIONS.—A “ridgling” is “the male of any beast, half gelt.”

SALES—TIME AT WHICH EXPRESS WARRANTY MAY BE MADE.—An express and binding warranty of personal property may be made after payment of part of the purchase money and before the delivery of the property and payment of the remainder of the purchase price.

THE MEASURE OF DAMAGES FOR THE BREACH OF AN EXPRESS WARRANTY in the sale of a horse is the difference between the actual value of the horse at the time of the sale and what he would have been worth if he had been as represented or warranted.

ACTION to recover damages for breach of an alleged warranty of a horse sold by the defendant to the plaintiff. There was a judgment for the defendant and the plaintiff appealed.

T. Todd and W. N. Treichler, for the appellants.

Wheeler & Moffit, for the appellee.

40 **ROTHROCK, J.** 1. The claim made in the petition is that the plaintiffs purchased a horse of the defendant 41 for which they paid one hundred and fifty dollars, and that the purchase was effected by reason of a warranty by the defendant that the horse was a gelding, and that he was sound and gentle, when in fact he was not a gelding, and had not been fully castrated, but had one testicle remaining, and that said

horse was not sound and gentle. There are averments in the petition that the statements made as to the horse being a gelding and sound and gentle were false and untrue; but there is no averment that the defendant knew that the statements were false. The action, then, was for a breach of an express warranty. It was tried as an action for a breach of an express warranty, and will be so considered here.

The court properly charged the jury as to what constituted an express warranty; the appellants complain of a part of the charge, because it directed the jury that, "if no representations were made at the time of sale by the defendant, but the plaintiffs looked him (the horse) over and took him upon their own judgment, without asking anything about the horse, then they cannot recover in this action, and your verdict will be for the defendant." This instruction embodies what is denominated in the law as the rule of caveat emptor. It is urged that the instruction is erroneous, because it precluded the jury from considering the fraudulent concealment of defects in the horse, and the breach of an implied warranty. It is enough to say of these objections that the case made by the petition is upon an express warranty, and the rule contended for by counsel has no application to the case.

2. It is claimed that the verdict is contrary to the evidence. It is conceded that the horse was what is known as a "ridgling," which is defined to be "the male of any beast, half gelt." The purchase of the horse was made at ⁴² the city of Cedar Rapids. Neither the plaintiffs nor the defendants resided at that place. The plaintiffs were buyers and shippers of horses, and their place of business was West Branch in Cedar county. The defendant had the horse at a feed stable. The horse was examined by the plaintiffs, and a price was agreed upon and five dollars was paid, and the animal was delivered the next morning, at which time the plaintiffs paid to the defendant one hundred and forty-five dollars. There is evidence to the effect that before the five dollars was paid the defendant stated that the horse had been gelded, and that he was sound, all right, and safe; and the evidence shows beyond all question that on the next morning, and before the one hundred and forty-five dollars was paid, the defendant, in answer to inquiries by the plaintiffs, stated in positive terms that he had the horse gelded some months before that. It is true that the defendant in his testimony as a witness denied that he made the statement that the

horse had been castrated before the five dollar payment was made. But he did not deny the testimony of three witnesses that, before the one hundred and forty-five dollar payment was made, he stated in the most positive terms that the horse had been castrated. He not only did not deny that he made such statements, but the evidence shows without dispute that he then knew that the statement was false. It is claimed in behalf of the appellee that, when the five dollars was paid, there was a completed sale, and there could be no warranty after that time and before the balance of the purchase money was paid. The case of *First Nat. Bank v. Reno*, 73 Iowa, 145, is cited in support of the above proposition. It is scarcely necessary to say that the cited case has no application to the question now under consideration. That was a case where, after part payment of the purchase money had been made, a creditor of the seller caused an execution to be levied upon the property, and the controversy ⁴³ was between the purchaser and the creditor. If this was a completed sale of the horse as between the parties upon the payment of the five dollars, it would have been the right of the defendant to have compelled the plaintiff to pay the balance of the purchase money, notwithstanding a breach of warranty. That a binding warranty may be made after payment of part of the purchase money, and before the delivery of the property, see *McGaughey v. Richardson*, 148 Mass. 608.

3. It is claimed by the appellee that, conceding there was an express warranty, and a breach thereof, as alleged in the petition, the jury were warranted from the evidence in finding that the whole price paid by plaintiffs did not exceed the actual value of the horse in the condition he was at the time of the sale. But that is not the measure of damages. The court correctly instructed the jury that the measure of damages "would be the difference, if any, of the actual value of the horse at the time of the sale, and what he would have been worth if he had been as represented or warranted, as shown by the evidence." This instruction was the law of the case, and if the jury had followed it they would have returned a verdict for the plaintiff for not less than fifty dollars. The defendant testified as a witness that the difference in value was from fifty dollars to seventy-five dollars. Other witnesses placed it at a greater sum. There was no witness who gave the difference in value at less than from twenty

dollars to fifty dollars. Some of them fixed the difference at one hundred and fifty dollars. We have said that the instruction as to the measure of damages was the law of the case, and that it was correct. It has been the law of this state for more than thirty years: *Likes v. Baer*, 8 Iowa, 368; *Lacey v. Straughen*, 11 Iowa, 258; *Gates v. Reynolds*, 13 Iowa, 1; *Callanan v. Brown*, 31 Iowa, 333.

⁴⁴ We think the court should have sustained the motion for a new trial on the ground that the verdict was contrary to the evidence.

Reversed.

SALES—CAVEAT EMPTOR.—In a sale of personalty, where there is no express warranty, and the purchaser inspects for himself the particular goods sold, the rule of caveat emptor applies, provided the seller is not guilty of fraud: See note to *Kircher v. Conrad*, 18 Am. St. Rep. 733. The monographic note to *Barnard v. Duncan*, 90 Am. Dec. 426, shows when the rule of caveat emptor fails of application.

SALES—EXPRESS WARRANTY—MEASURE OF DAMAGES.—It is essential to the validity of a warranty that it should be made at the time of sale, or, if made afterward, that it be upon a new consideration: *Towell v. Gatewood*, 2 Scam. 22; 33 Am. Dec. 437. A warranty of goods, made by a vendor after he has completed the sale of them, if unsupported by a new consideration, is void: *Summers v. Vaughan*, 35 Ind. 323; 9 Am. Rep. 741. Thus, where, after a contract for the sale of a horse was made, and as the purchase money was about to be paid, the seller, in reply to a question asked by the purchaser, said that the horse was sound, the affirmation was held not to be a warranty of quality, having been made after the contract was entered into, and not having been intended as such: *Erwin v. Maxwell*, 3 Murph. 241; 9 Am. Dec. 602. The measure of damages, when a thing sold with a warranty does not answer the warranty, is the difference between the actual value and the value that the article would have possessed if it had conformed to the warranty: Note to *Shearer v. Park Nursery Co.*, 42 Am. St. Rep. 122.

RIEPE v. ELTING.

[39 IOWA, 82.]

APPELLATE PROCEDURE—OBJECTIONS NOT REVIEWABLE.—Objections to rulings on evidence not made in the court below will not be considered on appeal.

HIGHWAYS—RIGHT OF TRAVELERS TO USE PART OF.—A person has a right to use a public highway in a lawful manner for lawful purposes, but one not desiring a given part of it for his own use cannot prevent others from making a proper use of it.

HIGHWAYS—PRESUMPTION OF NEGLIGENCE FROM TRAVELER BEING ON WRONG SIDE.—If a collision occurs between the horse or vehicle of a person on the wrong side of the road and that of a person coming toward him, the presumption is that it was caused by the negligence of the per-

son who was on the wrong side of the road, but his presence there may be explained and justified.

HIGHWAYS—COLLISION—TRAVELER'S BEING ON WRONG SIDE OF ROAD IS PRIMA FACIE NOT CONCLUSIVE EVIDENCE OF NEGLIGENCE.—The fact that a horseman traveling on a public highway on a dark night turns to the left to avoid a collision with a vehicle rapidly approaching him from the opposite direction is, in an action by him to recover the value of his horse killed by such collision, merely prima facie evidence of negligence on his part, and not conclusive, though the statute provides that persons meeting each other on public highways shall give one-half of the same by turning to the right, and that any one who violates such provision shall be liable for all damages resulting therefrom.

APPEAL.—INSTRUCTIONS NOT OBJECTED TO in the court below will not be considered on appeal.

JURY TRIAL.—INSTRUCTIONS.—It is not error to refuse instructions which so far as they are correct and applicable, have been substantially embraced in the charge given.

HIGHWAYS.—EVIDENCE OF CARE ON PART OF TRAVELER.—If a traveler on a highway yields the way for the benefit of another, it is evidence of care, rather than of negligence, though he turns to the left instead of to the right.

HIGHWAYS—COLLISION—TURNING TO LEFT—SUBMITTING QUESTION OF NEGLIGENCE TO JURY—EVIDENCE TO SUPPORT VERDICT.—If two horsemen on a dark night meet a vehicle coming rapidly toward them on a public highway, and, in order to avoid a collision, one turns to the right and the other to the left, both leaving the traveled part of the road, and being nearly twenty feet apart, but a shaft of the vehicle runs into the horse which turned to the left, causing injuries resulting in its death, and suit is brought to recover the value of the horse, the question of defendant's negligence as to driving in the darkness at a high rate of speed, and that of the rider's contributory negligence in turning to the left, is properly submitted to the jury, and a verdict for the plaintiff will not be set aside on appeal, as being unsupported by the evidence.

ACTION to recover the value of a horse whose death was alleged to have been caused by the defendant's negligence. There was a judgment for the plaintiff and the defendant appealed.

S. L. Glasgow, for the appellant.

Seerley & Clark, for the appellee.

²² **ROBINSON, C. J.** The death of the horse was the result of a collision with a horse and a road cart driven by the defendant. In the evening of the twenty-second day of March, 1890, John and Fred Riepe, sons of the plaintiff, left the town of Sperry for their home, riding horses. The road which they traveled led westward, and was crossed at the distance of a half mile by another, called the "Wapello road." From the place of crossing the traveled portion of the Sperry road

led in a direction north of east until, at a point about one hundred feet east of the crossing, it was within a few feet of the fence on the north side of the road. The accident occurred south of that point. The young men were walking their horses, John being on the north and Fred on the south side of the traveled portion of the road. As they approached the place described, the defendant drove on the Wapello road from the south until he reached the Sperry road, and then turned eastward. It was so dark that objects could be seen but a short ²⁴ distance away, but John and Fred heard the approaching horse and cart, and turned out of the traveled part of the road to permit them to pass. John, who was riding a horse of a light bay color, turned to the right, while Fred who was riding the horse in controversy, the color of which was black, turned to the left or southward. When his horse was eight or ten feet south of the traveled part of the road it was struck in the side by a shaft of the cart, receiving an injury which caused its death the next day. The plaintiff claims that the defendant was driving at a high and reckless rate of speed at the time of the accident, and that the collision was the result of his negligence. The defendant denies that he was negligent, and claims that he was using due care, and driving at a moderate rate of speed when the accident occurred; that the night was so dark that at first he saw only John and his horse; and that, in endeavoring to avoid them, he turned southward, when a shaft of his cart struck the horse in question, which he then saw for the first time; that he had no reason to look for any one on that side of the road; and that Fred violated a statutory requirement, and was negligent in being there.

1. A witness was asked, concerning the defendant, a question as follows: "What are his habits in regard to being a reckless driver?" The defendant objected to the question as being incompetent, irrelevant, and immaterial. The objection was overruled, but the question was not answered. The witness was then asked, "Did you know the habits of Mr. Elting in reference to fast and reckless driving prior to March 22, 1880?" and answered without objection, "I can't just say." He was then told to "answer the question," and in response said, "I have seen him drive faster than I would allow a team of mine driven." The witness was then told to "answer the question 'yes' or 'no,'" and stated as follows: "Well, I haven't seen him drive ²⁵ just reckless. I have

seen him drive faster than I would myself, or would allow a team of mine driven. That is as near as I can say." The additional abstract shows that the only objection made to this testimony was that interposed to the first question, and that was not answered. No objection was made to any of the questions answered. If it be conceded that the objection made should be regarded as applying to the second question, it is evident that, if the question was erroneous, no prejudice could have resulted from the answer which it sought, which was either "Yes" or "No." The answers given were not responsive to the question, but they were not objected to, nor was any effort made to have them excluded. The defendant claims that the evidence was immaterial, but he has not preserved any right to object to it at this time, and for that reason the objection he makes cannot be further considered.

2. Section 1000 of the code contains provisions as follows: "Persons meeting each other on the public highways shall give one-half of the same by turning to the right. All persons failing to observe the provisions of this section shall be liable to pay all damages resulting therefrom, together with a fine not exceeding five dollars, but no prosecution shall be instituted except on complaint of the person wronged." The defendant asked the court to instruct the jury that if they found "from a fair preponderance of the evidence that the son of the plaintiff, on meeting the defendant upon the highway in question, turned to the left instead of to the right, then and in that case the son of the plaintiff did not use reasonable care and diligence, and was guilty of negligence, and your verdict shall be for the defendant, unless you should further find, from a fair preponderance of the evidence, that the defendant, well knowing this fact, ^{or} recklessly and wantonly drove upon and against the horse in question, and caused the injury complained of." There was no evidence that the defendant knew that the son had turned to the left until the moment of collision; hence there was no evidence that the defendant, knowing that fact, had recklessly and wantonly driven against the horse which was injured. The evidence showed without conflict that the son did turn to the left, and the theory of the instruction asked is, therefore, that the fact that the son turned to the left was in law conclusive evidence of negligence, which would defeat a recovery by the plaintiff. The court refused to instruct the jury as asked.

Numerous authorities have been called to our attention which define and illustrate what is known as the "law of the road." Some of them are referred to in Elliott's Roads and Streets, 618, et seq.; 1 Thompson on Negligence, 281, et seq.; and 2 Shearman and Redfield on Negligence, sec. 649. In the sections of 2 Shearman and Redfield on Negligence cited, it is said that, "it is the universal custom in America for travelers, vehicles, and animals under the charge of man to take the right hand of the road when meeting each other, if it is reasonably practicable to do so; and this rule is enforced by statute in many states, so far as it relates to travelers in vehicles or on horseback. The statutes upon this subject generally prescribe that travelers shall pass on the right of the center of the road. This means the center of the lawfully worked part of the road. No one is bound to leave that part of the road while there is room upon it, even though the smooth part be entirely on one side of the road." A statute of Massachusetts requires every traveler reasonably to "drive his carriage or other vehicle to the right of the middle of the traveled part of the road" upon meeting a carriage or other vehicle: *Parker v. Adams*, 12 Met. 418; 46 Am. Dec. 694. A statute of New Hampshire ⁸⁷ requires that all persons meeting each other on any road within the state, traveling with carriages, shall reasonably turn to the right of the center of the traveled part of such road. It was said in *Brooks v. Hart*, 14 N. H. 309, that the object of the statute was "to facilitate and render safe the public travel, and to prevent all interruptions thereof by prescribing the duty of each traveler in reference to every other, and by pointing to each the part of the way over which he may in safety travel without meeting with other obstacles to impede his progress, or from which he might otherwise suffer detriment." A statute of Kentucky provides that "all vehicles of every kind, meeting, shall give to each other one-half of the macadamized part of the road, each passing to the right": *Johnson v. Small*, 5 B. Mon. 27.

Our attention has not been called to any decision which construes a statute in all respects like that of this state, but we may well consider what may be termed the "common law" of the road, and decisions construing it, and statutes which are designed to regulate and make safe, and free from interruption, travel upon public ways. The terms "highway" and "road," as used in the statute of this state, include bridges, and may include streets of towns: Code, sec. 45,

subd. 5, pp. 952, 953. Bridges need not be more than sixteen feet in width: Code, sec. 1001. But highways are from forty to sixty-six feet in width: Code, sec. 921. The streets of a town may be much wider. The appellant contends that he was entitled, not merely to one-half of the traveled portion of the traveled highway, but to one-half of the whole of it at the place of meeting. The language of the statutes is that "persons meeting each other on the public highways shall give one-half of the same by turning to the right," and we are of the opinion that in a proper case a person so meeting another would be entitled to one-half ^{or} of the full width of the roadway. We are not prepared to say, however, that in all cases where two persons approach each other on a public highway with the intent of passing, it is the duty of each to use only that part of it which is on his right of the center, and that, if either should pass the other on the left of such line, he would violate and thus incur the penalty of the statute. It is only when one meets another that he is required to turn to the right. He has the right to use any part of the highway which is unoccupied, and which is not desired for the use of another: *Dunham v. Rackliff*, 71 Me. 347; *Johnson v. Small*, 5 B. Mon. 27; *Parker v. Adams*, 12 Met. 418; 46 Am. Dec. 694; *Aston v. Heaven*, 2 Esp. 533; *Daniels v. Clegg*, 28 Mich. 42. Among the definitions of the word "meet" given by Webster are the following: "To come together by an approach from an opposite direction; to come upon or against; to come together by mutual approach; to come face to face; to join." As used in the statute under consideration, the phrase "persons meeting each other" does not mean merely persons passing each other while going in opposite directions, but it implies a coming together in such manner that there would be an actual collision, or an apparent danger of one, if they should pursue their course without change of direction. If one person travel along one side of a highway, and another passes along the other, there is no "meeting" within the meaning of the statute, and no violation of its provisions, and that would be true even though each person should be on the left side of the highway. To hold otherwise would be to ignore the evident purpose of the statute. Although a violation of it is made a criminal offense, yet no prosecution can be instituted except on the complaint of the person wronged. But a person is not wronged unless his right to use the highway is in some way interfered with by

another. All persons have the right to use public highways ²² in a lawful manner for lawful purposes, but a person not desiring a given part of a highway for his own use cannot prevent others from making a proper use of it.

It frequently happens that the traveled and only practicable part of a highway is on one side of its center. Where that is the case, if the theory of the appellant be true, every one who passes along the left of the center is liable to a fine at the instance of each person going in the opposite direction whom he passes, even though such person is not in any manner interfered with, but, at his own election, travels along the outer side of the highway, leaving ample room for the passage of persons and vehicles going in the opposite direction. It is scarcely necessary to say that the statute was not intended to impose fines in cases of that kind. In this case, had the defendant continued in the traveled part of the highway, there would have been no meeting, within the meaning of the statute, and, therefore, no violation of its provisions. What the son of the plaintiff did was to try to avoid meeting the defendant, and it cannot be said, as a matter of law, that, having failed in this attempt, he was negligent in making it. In the case of *Johnson v. Small*, 5 B. Mon. 27, it appeared that the plaintiff's team, in ascending a hill, was occupying the left part of the road, when a stage suddenly appeared, descending the hill, but a short distance from him. He could not have crossed the road in time to avoid a collision, and it was held, in effect, that he was not negligent, and that he could recover for injuries which were caused by the stage. In *Wrinn v. Jones*, 111 Mass. 360, it appeared that a collision occurred between the teams of the plaintiff and the defendant on a bridge. The trial court instructed the jury that the mere fact that the defendant was on the left side of the bridge when the accident occurred was not evidence of negligence; that he had a right to ²³ travel on all parts of the bridge, the only obligation imposed upon him being to reasonably turn to the right; and that instruction was approved, the supreme judicial court of Massachusetts holding that the whole question of fact was rightly submitted to the jury. In *Clay v. Wood*, 5 Esp. 44, it was said that a person whose property was injured while on the wrong side of the road might, nevertheless, recover damages, if there was ample room for the party who caused the accident to pass in safety, and that the question was for the jury to determine. The

general rule seems to be that, where a collision occurs between the horse or vehicle of a person on the wrong side of the road and that of a person coming toward him, the presumption is, that it was caused by the negligence of the person who was on the wrong side of the road, but that his presence on that side may be explained and justified: 2 Shearman and Redfield on Negligence, sec. 650; Elliott on Roads and Streets, 620. We conclude that the fact that the son of the plaintiff was on the left of the center of the road when the accident in question occurred was at most only prima facie evidence of negligence. The instruction under consideration was, therefore, properly refused.

3. Complaint is made of the fifth paragraph of the charge. We find, however, that no objection was made to it when it was given, and that the giving of it was not assigned as error. It will not, therefore, be further considered. Numerous other questions have been discussed, which are not of sufficient importance to be considered in detail. It is insisted that the court erred in refusing certain instructions asked by the defendant in addition to the one we have considered. We, find, however, that so far as they are correct and applicable to this case, they were substantially given in the charge. The court failed to state, in connection with each reference to the evidence required to justify a verdict for ^{the} plaintiff, that it must be a preponderance of the evidence, but it was not necessary to do so. The jury were charged that the burden was upon the plaintiff to prove, by a fair preponderance of the evidence, certain facts to entitle him to recover, and it was not necessary to repeat that statement. Other objections to the charge are made, but we do not find them to be well founded.

4. It is said that the verdict is not sustained by sufficient evidence, for the reason that it does not show that the accident was the result of the carelessness or negligence of the defendant, but does show it was wholly caused by the carelessness of the son of the plaintiff, and that the accident was without fault on the part of the defendant. Although there was much conflict in the evidence, the jury were authorized to find that the son of the plaintiff was not in any respect negligent in turning to the left, and that he was diligent in seeking to avoid the accident. They were also justified in finding that the defendant drove at a high and dangerous

rate of speed, without using due care to prevent collision with persons who might be traveling on the road.

It is the well-known usage in this state, general, if not universal, for pedestrians and horsemen to yield all of the traveled way to vehicles, and for light vehicles to yield in like manner to heavy ones. The usage is not confined to this state, but prevails in others. In the case of *Washburn v. Tracy*, 2 D. Chip. 136; 15 Am. Dec. 661, decided by the supreme court of Vermont in the year 1824, it was said: "It is ordinarily the duty of a person on horseback to give the traveled path to one who is traveling in a wagon or other vehicle, sanctioned by common consent and immemorial usage." In *Grier v. Sampson*, 27 Pa. St. 192, it was said: "It is the general custom of the country for persons meeting on ⁹³ a highway to pass on the right; but, when a horseman or a light vehicle can pass on the left of a heavily laden team, it is their duty to give way, and leave the choice to the more unwieldy vehicle." See, also, to the same effect, *Beach v. Parmeter*, 23 Pa. St. 196. Custom cannot control a statute, and it cannot be said that in this state it is the duty of pedestrians and horsemen to yield the traveled way to vehicles, nor for persons driving teams lightly loaded to yield to those more heavily loaded; but to do so is not only not unlawful, but to perform an act which is recognized by an enlightened public as meritorious, and to be commended. In fact, such a practice is demanded by public opinion. When a person yields the way for the benefit of another, it is an evidence of care, rather than of negligence. In this case the brothers were riding together. They were made aware of the approach of the defendant before they could see him, by the noise of his horse and cart. They testify that the defendant approached them very rapidly. The existing darkness seemed to make it advisable for them to leave the traveled way in order to avoid accident, and general usage sanctioned their doing so as an act of courtesy. The space between the traveled portion of the road and the north fence was from eight to ten feet in width. Fred could have turned to the right, as John did, and perhaps would have passed the defendant safely if he had done so; but, in view of the darkness and the narrowness of the space on that side, it cannot be said as a matter of law that he was negligent in turning to the left. He not only turned in that direction, but went so far

that there was a space of nearly twenty feet between his horse and that of his brother through which the defendant could have driven. It is not probable that the defendant saw Fred and the horse he was driving in time to prevent the accident, but he was chargeable with knowledge of the fact that persons sometimes ride ²² black horses in dark nights, and that horsemen commonly leave the traveled way to vehicles they meet. He cannot relieve himself from liability by showing that the collision was not intended by him. Whether Fred, under all the circumstances in the case, was negligent in turning to the left, and whether the defendant was negligent in driving in the darkness at a high rate of speed, were questions for the jury to determine. We are of the opinion that the evidence to sustain their conclusions is ample.

The judgment of the district court is affirmed.

ROTHROCK, J., dissenting. I do not concur in either the reasoning or the conclusion of the foregoing opinion. The evidence in the case shows beyond all dispute that if the plaintiff's son had not left the traveled part of the road by turning to the left, the horse would not have been injured. This fact is made absolutely certain by the other fact that one of the riders did turn to the right, and the defendant did not drive within twenty feet of him. Now, it may be conceded that there may be circumstances which would excuse persons from turning to the right. As held in *Earing v. Lansingh*, 7 Wend. 185, this rule of the road must be strictly observed, unless obstacles, insuperable or extremely difficult to overcome, intervene. There is not one word of evidence which even tends to excuse the young man for turning to the left. It surely is the law of this case that there is no liability unless there is good reason for violating the statute. It is a general rule that when one is injured while violating a statutory provision or some legal duty, it is incumbent on him to show that, although he was chargeable with a violation of law or breach of duty, his act did not contribute to produce the injury of which he complains. I do not think it is important to determine by technical definitions what is meant by the word "meet." It seems to ²⁴ me it can have no other meaning, as it is used in the statute, than persons approaching and about to pass each other on a public highway. It is said in *Elliott on Roads and Streets*, 620, that "one who violates the law of the road by driving on the

wrong side of the way assumes the risk of all such experiments, and must use greater care than if he had kept on the right side of the road. If a collision takes place, the presumption is generally against the party on the wrong side. Especially is this true when the collision takes place in the dark." I doubt if any authority can be found in conflict with this rule. I cannot understand why it is necessary to discuss the matter of usage in meeting upon the public highway. In some states custom and usage obtains, in the absence of statute. But the statute of this state defines the rights and prescribes the duty of travelers in this respect without reference to the means of locomotion. It appears to me that the plaintiff's son had no semblance of excuse for violating the law by turning to the left; and not only this, but, if he had not turned at all, the horse would not have been injured. In this state of the case, the instruction asked by the defendant should have been given, because the evidence conclusively showed, without conflict, that the plaintiff was not entitled to recover.

GRANGER, J., concurs in this dissent.

APPEAL—EVIDENCE—INSTRUCTIONS.—Objections not made in trial court will not be considered on appeal: *Coad v. Home Cattle Co.*, 32 Neb. 761; 20 Am. St. Rep. 465; but are deemed to be waived: *Fleming v. Springfield*, 154 Mass. 520; 26 Am. St. Rep. 268; note to *Kochler v. Ball*, 83 Am. Dec. 457. This applies to instructions: *Higgins v. Carlton*, 23 Md. 115; 92 Am. Dec. 666; *Thatcher v. Mills*, 14 Tex. 13; 65 Am. Dec. 95; *State v. Morgan*, 7 Ired. 387; 47 Am. Dec. 329; as well as to objections to the admission of evidence: *Crossen v. White*, 19 Iowa, 109; 87 Am. Dec. 420. It is not error for the court to refuse to give an instruction fully covered in the general charge: *Gibson v. Minneapolis etc. Ry. Co.*, 55 Minn. 177; 43 Am. St. Rep. 482, and note.

Rights of Travelers in Road and the Presumption of Negligence from Being on the Wrong Side Thereof.

USE OF HIGHWAYS, GENERALLY—DUTIES AND LIABILITIES OF DRIVERS. It is not the purpose of this note to treat of the right of travelers on a highway to recover for injuries received from defective highways, streets, or sidewalks, further than to illustrate topics under consideration, but to treat simply of the rights of travelers on streets or roads as compared with those of vehicles, or the drivers thereof, while such persons are upon or using a public thoroughfare. To proceed then, it may first be stated that the primary object of streets and highways is to furnish a passageway for travelers in vehicles or on foot; and while they may be put to numerous other uses, such uses must be enjoyed in subordination to this primary object: *People v. Squire*, 107 N. Y. 593; 1 Am. St. Rep. 893. In order to avoid collision and to secure travel upon highways from interruption, it is

necessary that there should be some certain rule for travelers to follow when they meet or wish to pass each other. The rules which have been adopted for the purpose of securing the safety and convenience of persons meeting and passing each other upon highways constitute what is termed the law of the road: Note to *O'Malley v. Dorn*, 73 Am. Dec. 404. One using a public way must do it so as not to injure others: *Quirk v. Holt*, 99 Mass. 164; 96 Am. Dec. 725. A traveler has a right to expect that all portions of a highway are in a safe condition for ordinary use: *Saylor v. Mon. teau*, 11 Wash. 328, 333; *Lutton v. Town of Vernon*, 62 Conn. 1. If he meets with any obstruction or comes upon a dangerous place, he may proceed so far as he can do so consistently with reasonable care, which is generally a question for the jury: *Harris v. Township of Clinton*, 64 Mich. 447; 8 Am. St. Rep. 842; *Wellman v. Borough*, 167 Pa. St. 239; *Vale v. Bliss*, 50 Barb. 358. But if danger is known and can be easily avoided, peril voluntarily and unnecessarily assumed by the traveler, especially on a dark night, may constitute such contributory negligence as will preclude recovery for an injury received: *Winner v. Oakland Township*, 158 Pa. St. 406; *Harris v. Township of Clinton*, 64 Mich. 447; 8 Am. St. Rep. 842; *Conk v. Atlanta*, 94 Ga. 613; *Mueller v. Ross Township*, 162 Pa. St. 339; *Winkham v. St. Clair Township*, 91 Mich. 15; *Welsh v. Town of Argyle*, 89 Wis. 649. Drivers of carriages must take care to avoid driving against a foot passenger who is crossing the road, and, on the other hand, foot passengers in crossing the road are bound to take due caution in avoiding vehicles. It follows, therefore, that in order to sustain an action for injury sustained by the negligent driving of the defendant, the injury must have been caused by the negligence of the defendant only, without the negligence of the plaintiff contributing in any way to the accident. "It is the duty of a person," said Pollock, C. B., in *Williams v. Richards*, 3 Car. & K. 81, "who is driving over a crossing for foot-passengers at the entrance of a street to drive slowly, cautiously, and carefully; but is also the duty of a foot passenger to use due care and caution in going upon such crossing so as not to get among the carriages and thus receive injury." It is the duty of those having charge of highways to keep them reasonably safe for travel by night as well as by day, and the public have a right to presume that they are so: *Lutton v. Town of Vernon*, 62 Conn. 1. Hence, it is not negligence per se for a traveler to undertake a journey upon a highway on a very dark night, nor does the fact that he allows his horses to choose their own way constitute such negligence: *Rector v. Pierce*, 3 Thomp. & C. 416. But, while no one is precluded from a highway by his knowledge of its defects, such knowledge must be considered in passing on his case, which must increase in proportion to his knowledge of the risk: *Foster v. Swope*, 41 Mo. App. 137; *Winner v. Oakland Township*, 158 Pa. St. 406. A traveler on a highway is bound to have his harness and carriage in good condition, and is liable for any damage that may result from his failure in this respect. It is negligence on his part not to have good tackle: *Cotterill v. Starkey*, 8 Car. & P. 691; *Welsh v. Lawrence*, 2 Chit. 262; *Murdock v. Inhabitants of Warwick*, 4 Gray, 178; *Smith v. Smith*, 2 Pick. 621; 13 Am. Dec. 464; *Johnson v. Small*, 5 B. Mon. 25.

WHEN ONE MAY TRAVEL UPON ANY PART OF THE ROAD.—It is a general rule that one may travel upon any part of a highway not occupied at the time by another; or, stated in different language, one may travel in the middle or on either side of the traveled road, where no person is passing

or about to pass in an opposite direction: *Palmer v. Barker*, 11 Me. 338; *Foster v. Goddard*, 40 Me. 64; *Dunham v. Rackliff*, 71 Me. 345; *Johnson v. Small*, 5 B. Mon. 25; *Daniels v. Clegg*, 28 Mich. 32; *Wriess v. Jones*, 111 Mass. 360; *Brooks v. Hart*, 14 N. H. 307; *Simmonson v. Stellenmerf*, 1 Edm. Sel. Cas. 194; *Bolton v. Colder*, 1 Watts, 360; *Ashton v. Heaven*, 2 Esp. 533.

"A party having before him the entire road, free from carriages or other obstructions, and having no notice of any carriage behind him in season to stop or to change his course or position, is at liberty to travel upon such parts of the way as suits his convenience or pleasure, and no blame can be imputed to him. This is properly inferable from the statute": *Foster v. Goddard*, 40 Me. 64, per Tenney, J. Hence, if a stagecoach is overturned by accident or misfortune in a highway, and a passenger is thereby injured without any negligence or default of the driver, the owner of the coach is not liable, there being no other carriages at the time on the road, though the accident might not have happened had the driver been traveling on the left side of the road instead of the right: *Ashton v. Heaven*, 2 Esp. 533.

BEARING TO THE LEFT OR RIGHT.—It is a general but not always a binding rule in England, when vehicles meet on a highway and the drivers wish to pass each other, that each party must keep to the left: *Wade v. Carr*, 2 Dowl. & R. 255. Elliott, in his work on Roads and Streets, page 618, says that the rule is thus stated in an old rhyme:

"Tis a law of the road,
Though a paradox quite,
If you keep to the left,
You'll always be right."

This is called in the reports the law or rule of the road, and was introduced for general convenience. If carriages are being driven on a narrow road, or where accidents may happen, the rule ought to be adhered to; and in driving at night the rule ought to be strictly adhered to, and never departed from, as it is the only mode by which accidents can be avoided: *Cruden v. Fentham*, 2 Esp. 685.

In this country, however, the reverse is the rule, and each party, upon meeting, must, except in some special cases, bear or keep to the right, instead of to the left as in England. Each is bound to pass to the right of the center of the traveled road. Each of them, in passing, must use ordinary care and caution. If one of them, by omitting to use such care and caution, is injured in his person or property, he is without legal remedy; and if he injures the other, he will be liable to him in damages: *Palmer v. Barker*, 11 Me. 338; *Kennard v. Burton*, 25 Me. 39; 43 Am. Dec. 249; *Wood v. Luccomb*, 23 Wis. 287; *Simmonson v. Stellenmerf*, 1 Edm. Sel. Cas. 194; *Wriess v. Jones*, 111 Mass. 360; *Daniels v. Clegg*, 28 Mich. 32; *Brooks v. Hart*, 14 N. H. 307; *Shockley v. Shepherd*, 9 Houst. 270; *Walkup v. May*, 9 Ind. App. 409.

The statutory rule that travelers meeting must seasonably turn to the right does not apply when one vehicle is passing along one street and another is passing into that street from a cross-street: *Lovejoy v. Dolan*, 10 Cush. 495; *Morse v. Sweeney*, 15 Ill. App. 486. Nor does it apply to a highway formed by the junction of two streets which cross each other diagonally: *Norris v. Saxton*, 158 Mass. 46; nor when deep snow is on the ground: *Smith v. Dygert*, 12 Barb. 613. Neither has it any application to the meeting of railroad cars with common vehicles in the streets of a city: *Hegan v. Eighth Avenue R. R. Co.*, 15 N. Y. 380, where

the plaintiff's cart was struck by the defendant's car as he was turning off the track to the left, and where it was held that that fact did not of itself put the plaintiff in the wrong. So, where there is no statute regulating the manner in which persons shall drive when they meet at the junction of two streets, the rule of the common law applies, and each person must use reasonable care to avoid a collision adapted to the place and the circumstances: *Garrigan v. Berry*, 12 Allen, 84; *Morse v. Sweetie*, 15 Ill. App. 486. The circumstance that one party is driving a light team and the other a heavily loaded wagon should also be considered in determining the respective duties of the parties, as the former is bound to yield the way to the latter: *Wright v. Jones*, 111 Mass. 360. Again, under a statute making it the duty of persons meeting and passing each other upon the public highway "to drive to the right of the middle of the traveled part of the road or bridge, when practicable, it is the duty of one who cannot, without difficulty or danger, turn to the right on account of his vehicle being heavily loaded, or by reason of some other cause, to stop a reasonable time at some convenient part of the road to enable the other person to pass, and without any request from him": *Kennard v. Burton*, 25 Me. 39; 43 Am. Dec. 249. The statute relating to persons "traveling with carriages," etc., has no application where a collision occurs between two teams which have been left in the highway unattended: *Brouk v. Hanson*, 153 Mass. 17. If one negligently fails to give his share of the road, and a collision and damage occur thereby, or if damage occurs in the effort to avoid a collision, he must answer for his negligence: *Walsh v. May*, 9 Ind. App. 409; *Shockley v. Shepherd*, 9 Houst. 270. But it is held in *Brember v. Jones* (N. H., decided March 17, 1893), that a failure to turn to the right of the traveled part of a highway, which the statute makes it one's duty to do on meeting another, so that the latter may "pass with his vehicle without interference," does not make the former liable for a collision if the latter could have avoided it by the exercise of ordinary care.

If a person driving on a highway meets another driver who does not turn out as required by statute, thus compelling the former to drive upon the side of the road, and he is injured by colliding with a post in the highway standing outside of, but near to, the traveled part thereof, he cannot recover against the town for alleged defects in the highway caused by the town's negligence, though he can maintain an action against the other driver. In such a case the negligence of a responsible agent, intervening between the defendant's negligence and the injury suffered, breaks the casual connection between the two. If, however, the intervening act or negligence is a natural or probable result of the original negligence, the latter will be regarded as the proximate cause of the injury: *Mahogany v. Ward*, 16 R. I. 479; 27 Am. St. Rep. 753. If a traveler cannot safely turn to the right on meeting another vehicle, the law will not hold him guilty of negligence for not undertaking impossibilities: *Johnson v. Small*, 5 B. Mon. 25, 28. If a heavily loaded team cannot pass a lighter one, it should stop a reasonable time for the other to pass: *Kennard v. Burton*, 25 Me. 39; 43 Am. Dec. 249; *Brooks v. Hart*, 14 N. H. 307; but ordinary care does not necessarily require one to stop a buggy for a heavier vehicle to pass: *Wood v. Luscomb*, 23 Wis. 287. The rule requiring persons meeting on a highway to keep to the right of the center of the worked part of the road does not apply in the winter season, when the depth of the snow renders it difficult or impossible to ascertain where the center of the worked part of the road is.

In such a case the center of the road is the center of the beaten or traveled track, without reference to the worked part of the road: *Smith v. Dygers*, 12 Barb. 613. Under a statute requiring all persons meeting each other on any turnpike road or public highway to drive their carriages to the right of the center of the road, they must keep to the right of the center of the worked part of the road. It is not the center of the smooth or most traveled part of the road which is the dividing line, but the center of the worked part, although the whole of the smooth or most traveled part may be upon one side of that center: *Earing v. Lansingh*, 7 Wend. 185. The "traveled part of the road," mentioned in the statute, refers to that part which is worked for traveling, and is not confined simply to the part of the road mostly used in traveling: *Daniels v. Clegg*, 28 Mich. 32. A statute requiring drivers of vehicles to turn to the right when they meet on the highway does not absolutely bar one who turns to the left from the right from recovering for an injury caused by a defect of the highway on that side, though such turning to the left would be a strong circumstance for the court to consider in determining whether the party acted with reasonable care: *O'Neill v. Town of East Windsor*, 63 Conn. 150. One may, from motives of courtesy, or for other reasons, waive his right to have another observe the rule of the road to turn to the right upon meeting each other, but is not bound to do so. The fact, however, that he does waive this right, and drives into a dangerous place in the highway, whereby he is injured, affords no excuse to a wrongdoer who caused the dangerous place to exist. Hence, the injured party, if free from negligence, and otherwise entitled to recover, may recover from such wrongdoer: *Atlanta Street R. R. Co. v. Walker*, 93 Ga. 462, showing that the rule of the road "exists for the benefit of travelers, and not for the behoof of one who has wrongfully caused a bad condition of the road or street." The proper mode of applying a statute giving treble damages to the driver of a vehicle who is injured by the neglect of any person meeting him on the highway to turn to the right is for the jury to bring in a verdict for single damages, and for the court to render judgment for treble the amount; but the plaintiff is not entitled to the statutory threefold damages unless it sufficiently appears that the verdict was founded upon a violation of the statute by the defendant: *Brockett v. Tuttle*, 59 Conn. 1.

CUSTOM AND STATUTES.—In England the law of the road has been established by custom; but in the United States it has generally been established by statutory enactment. The design of such laws is to prevent travelers when going on the road in opposite directions from obstructing each other, or so interfering as to produce injury or expose them to danger: *Palmer v. Barker*, 11 Me. 338. The statutes as to this matter generally provide that, when parties driving vehicles meet on a highway, each shall turn or bear to the right, so that the other may pass in safety. There is no doubt that a person traveling with a vehicle in a highway has a right, when meeting another with a vehicle, to presume that the latter will comply with a statute requiring persons coming from opposite directions to turn to the right of the traveled part of the road: *Daniels v. Clegg*, 28 Mich. 32; *Wood v. Lucas*, 23 Wis. 287. Such a statute enacts a general rule by which the use of highways shall be regulated to avoid injuries, and to prescribe duties and fix liabilities. But, while such a statute prescribes a general rule, it does not undertake to define what may be the duties and liabilities of travelers under all possible circumstances. Hence, one cannot remain stubbornly and doggedly upon the right of the traveled part of the highway, and wantonly

produce a collision, which a slight change of position would have avoided: *O'Malley v. Dorn*, 7 Wis. 236; 73 Am. Dec. 403; *Parker v. Adams*, 12 Met. 415; 46 Am. Dec. 694; *Smith v. Gardner*, 11 Gray, 418. Any violation of the statute will undoubtedly subject the offender to the penalty imposed by the law: *Simmonson v. Stellenmerf*, 1 Edm. Sel. Cas. 194; and if his disregard of its provisions caused the collision and injury, he might be made liable for the loss sustained in consequence of his illegal act: *Johnson v. Small*, 5 B. Mon. 25, 27; but a liability for the penalty prescribed by the statute does not fasten upon the defendant such a liability for damages arising from the collision that he is precluded from setting up the defense that the accident was caused by the plaintiff's own neglect: *Simmonson v. Stellenmerf*, 1 Edm. Sel. Cas. 194. The rule, therefore, in an action to recover damages caused by a collision on a highway is that the burden of proof is upon the plaintiff to show, not only negligence and misconduct on the part of the defendant, but also ordinary care and diligence on his own part: *Daniels v. Clegg*, 28 Mich. 32; *Kennard v. Britton*, 25 Me. 39; 43 Am. Dec. 249; *Parker v. Adams*, 12 Met. 415; 46 Am. Dec. 694; *Brooks v. Hart*, 14 N. H. 307; *Spooford v. Harlow*, 3 Allen, 176. The fact that the plaintiff was on the wrong side of the road at the time of the accident, or that he was violating some other provision of law, as by letting his horse and wagon stand in the center of the street, will not preclude a recovery for damages caused by the collision if it was not directly occasioned by any fault of his own: *Spooford v. Harlow*, 3 Allen, 176; *Neenow v. Uttech*, 46 Wis. 581. But he would, of course, be chargeable for any injury flowing exclusively from his conduct in being on the wrong side of the road, or in violating any other provision of law. If, by reason of placing himself in such a position, he cannot accord to others, having occasion to use the highway, their legal rights, it would be legal negligence. As said in *Brooks v. Hart*, 14 N. H. 307, 312: "If a party, in traveling, voluntarily goes upon the prohibited side of the way, and from the size or character of his team or vehicle, or state of the road, should be unable to surrender, to such as he might meet, the portion of the way to which they were entitled, the fact that he could not yield the way might not, and probably would not, furnish a legal excuse exonerating him from liability for an injury sustained by one in passing, who was in nowise in fault. The wrong would consist in placing himself where he might be the occasion of the injury which has resulted—that is, on the prohibited side of the way. It would be legal fault in him to be found there occupying that part of the way belonging for the time to another, as against him. His inability to leave the part of the way voluntarily occupied would not form a valid excuse exonerating him from liability for the injury sustained by another by reason of such occupancy. But the traveler, whose part of the way is trespassed upon by another, cannot, for that reason, carelessly and imprudently rush upon the party or his team or vehicle, and, if he sustain an injury, recover damages therefor. He may probably attempt to pass, if such attempt would be reasonably safe and prudent. If otherwise, he must delay, and seek redress for the detention, if damage result therefrom. But if, in a prudent attempt to pass, he sustain injury, we see no reason to doubt that the law would give redress."

In *Parker v. Adams*, 12 Met. 415, 46 Am. Dec. 694, an action was brought to recover damages alleged to have been sustained by the plaintiff by reason of the negligence and carelessness of the defendant's servant, and it was contended that it might be maintained by virtue of the provision of the statute requiring every traveler meeting another on a highway to season-

ably drive his carriage or other vehicle to the right of the middle of the traveled part of the road, so that the respective carriages or other vehicles might pass each other without interference; and the further provision that every person offending against the preceding provision should be liable to any party for all damages sustained by reason of such offense. It was insisted that the defendant being on the wrong side of the road, in violation of the provisions of the statute, was at all events liable for all damages occasioned thereby, notwithstanding any negligence on the part of the plaintiff. But this position was considered by the court to be untenable, and Dewey, J., said: "The defendant in the case at bar was in no more fault from being on the wrong side of the road than the party who obstructs the highway in violation of law, or the town which has, in direct violation of the statute, neglected to keep the highway in safe and convenient repair. In both those cases, the parties have acted in violation of law, and are liable to be prosecuted criminally therefor; but a responsibility to a private person does not necessarily result therefrom. The traveler on the public highway is not, with foolhardiness, as it is sometimes termed, to rush into danger because his fellow-traveler or the town has wrongfully given him the opportunity to receive an injury. On the contrary, he must use ordinary care and prudence to avoid an injury that might otherwise result from the defaults of others. The rule which I have stated applies with full force to an obstruction, or exposure to a collision, occasioned by another's traveling on the wrong side of the road. And it is of practical importance that it should be so, as, from the very nature of the case, travelers will frequently be found upon the side of the road interdicted by the statute. The traveler may well occupy any part of the road if no other person is occupying any portion of it. When, by reason of meeting another traveler, the occasion requires it, he must seasonably turn to the right. The law imposes this duty; but his disregard of that duty will not justify the traveler who may be on the proper side of the road, in voluntarily or carelessly permitting himself to be injured, either in his person or property, and then seeking to recover damages therefor of his fellow-traveler, who was wrongfully on the left of the center of the road."

NEGLIGENCE.—It is the duty of both parties who meet each other with vehicles on a highway to exercise ordinary care to avoid collision or injury: *Chaplin v. Hawes*, 3 Car. & P. 554; *Turley v. Thomas*, 8 Car. & P. 103; *Wayde v. Carr*, 2 Dowl. & R. 255; *Palmer v. Barker*, 11 Me. 338; *Brooks v. Hart*, 14 N. H. 307; *Spofford v. Harlow*, 3 Allen, 176; *Washburn v. Tracy*, 2 D. Chip. 128; 15 Am. Dec. 661; *Baker v. Fehr*, 97 Pa. St. 70; *Walkup v. May*, 9 Ind. App. 410. And a person lawfully using a public highway has a right to assume that a fellow-traveler will exercise ordinary care and prudence, and to govern his own conduct in determining his use of the road accordingly. This assumption he may rely on, not to justify carelessness on his own part, but to warrant him in pursuing his business in a convenient manner: *Harpell v. Curtis*, 1 E. D. Smith, 78; *Daniels v. Clegg*, 23 Mich. 32; *Baker v. Fehr*, 97 Pa. St. 70; *Byrne v. Knickerbocker Ice Co.*, 24 Jones & S. 337; *Wood v. Luscomb*, 23 Wis. 287. The cause of action of the party injured arises from the negligence of the other, and, as in other actions for negligence, it is incumbent upon him to prove negligence upon the defendant's part as the proximate cause of the injury, and freedom from contributory negligence upon his own part. The plaintiff must prove that the injury complained of was caused solely by the fault of the defendant or his servants. If any other cause contributed to produce the injury he

cannot recover: *Bigelow v. Reed*, 51 Me. 325; *Walkup v. May*, 9 Ind. App. 409, 410; *Baker v. Fehr*, 97 Pa. St. 70; *Daniels v. Clegg*, 28 Mich. 32. What is negligence and what is ordinary care must be submitted to the jury if there is any dispute or reasonable doubt as to the facts claimed to establish the alleged negligence, or as to the just inferences to be drawn therefrom. If, however, the facts are admitted or ascertained, it is the province of the court to declare the law thereon: *Baker v. Fehr*, 97 Pa. St. 70. The burden of proof in an action to recover damages, caused by a collision on a highway, is upon the plaintiff to show, not only negligence and misconduct on the part of the defendant, but also ordinary care and diligence on his own part: *Daniels v. Clegg*, 28 Mich. 32. In determining the question of defendant's negligence in such cases, it is not error to instruct the jury that "they must bring to bear upon the question their own knowledge and judgment," with the added qualification that they must examine all the testimony, all the circumstances, and then apply their own judgment and good sense: *Neanow v. Uttech*, 46 Wis. 581. The true question in respect to negligence is, not whether the party "exercised his best judgment under the circumstances," but whether he exercised "such care as the great majority of mankind observe in the transactions of human life": *Neanow v. Uttech*, 46 Wis. 581. If two alternatives are presented to a traveler upon the highway as modes of escape from collision with an approaching traveler, either of which might fairly be chosen by an intelligent and prudent person, the law will not hold him guilty of negligence for taking either. It is not a question of law, except in extreme cases and where the facts are undisputed, which alternative he should select, but a question for the jury whether in making his selection he acted with ordinary care: *Larabee v. Sewall*, 66 Me. 376.

A party is not entitled to redress for an injury sustained in meeting and passing another on the highway, if his own negligence contributed to the injury, though the other party failed to use ordinary care: *Washburn v. Tracy*, 2 D. Chip. 128; 15 Am. Dec. 661; *Brooks v. Hart*, 14 N. H. 307; *Kennard v. Burton*, 25 Me. 39; 43 Am. Dec. 249; *Bigelow v. Reed*, 51 Me. 325; *Belton v. Baxter*, 54 N. Y. 245; 13 Am. Rep. 578; *Woolf v. Beard*, 8 Car. & P. 373; *Simmonson v. Stellenmerf*, 1 Edm. Sel. Cas. 194; *Walkup v. May*, 9 Ind. App. 410; *Parker v. Adams*, 12 Met. 415; 46 Am. Dec. 694; *Wood v. Luscomb*, 23 Wis. 287. On the other hand, although the party injured failed to use ordinary care, yet, if such failure did not contribute to produce the injury, he may recover: *Kennard v. Burton*, 25 Me. 39; 43 Am. Dec. 249. The doctrine of contributory negligence does not apply where one without his own fault is, through the negligence of another, put in such apparent peril as to cause in him terror, loss of self-possession, and bewilderment, and who, in attempting to escape, puts himself, by reason of such confusion of mind, in a more dangerous position, and is injured. Thus, if a fire marshal going to a fire is driving immoderately when he turns around a corner, and the driver of a vehicle is going at a moderate rate of speed, and a collision occurs at the intersection of the two streets, and the only fault attempted to be imputed to the driver is that at the moment he saw the marshal coming around the corner he failed to turn his horses to one side so as to avoid the collision that followed, and the evidence shows that the driver was frightened, his putting himself in a more dangerous position is not, in law, such contributory negligence as will prevent him from recovering for the injury resulting from the collision: *Morse v. Sweeney*, 15 Ill. App. 486.

If negligence, in case of collision between travelers on the highway, is not

a necessary inference from the facts in evidence, it is proper to submit the question to the jury, and is improper to take it from them: *Rand v. Syme*, 162 Mass. 163; *Neanow v. Utterh*, 46 Wis. 581; *Wrinna v. Jones*, 111 Mass. 360; *Kendall v. Kendall*, 147 Mass. 482; *Fox v. Sackett*, 10 Allen, 535; 37 Am. Dec. 682; *Simmonson v. Stellenmeyer*, 1 Edm. Sel. Cas. 194; *Palmer v. Barker*, 11 Me. 338; *Broschart v. Tuttle*, 59 Conn. 1; *Wood v. Luscomb*, 23 Wis. 287; *Griggs v. Fleckenstein*, 14 Minn. 81; 100 Am. Dec. 199; *Byrne v. Knickerbocker Ice Co.*, 24 Jones & S. 337; *Wayde v. Carr*, 2 Dowl. & R. 255; *Lloyd v. Ogleby*, 5 Com. B., N. S., 667. Where persons are knocked down on a highway by another's horses, and are injured or killed, the judge is not warranted in leaving the case to the jury unless there is proof of well-defined negligence on the part of the defendant. Some evidence merely of negligence on his part is not sufficient. If the evidence given is equally consistent with there having been no negligence on the part of the defendant as with there having been negligence, it is not competent for the judge to leave it to the jury to find either alternative. Such evidence must be taken as amounting to no proof of negligence. Thus, in an action for injuries sustained through being run over by a vehicle driven by a servant of the defendant, evidence that he might have seen the plaintiff in time to pull up, if he had not been looking at his horses owing to the want of a "skid" in going downhill, was held sufficient evidence of negligence on the defendant's part; and, though there was some negligence on the part of the servant in crossing the road, it was held that the defendant was liable if his servant, by the exercise of reasonable care, could have seen the deceased, and avoided the accident: *Springett v. Ball*, 4 Fost. & F. 472. But, upon the facts in *Cotton v. Wood*, 8 Com. B., N. S., 568, a nonsuit was ordered. There the deceased endeavored to cross the road, and had crossed the line of direction in which the defendant's omnibus was proceeding, when, alarmed at the approach of some other vehicle, she turned back and endeavored to regain the pavement on the side from which she had started, and, in so doing, was knocked down by the defendant's horses and killed. The night was dark, and it was snowing fast, but the streets were well lit by gas lamps. The omnibus was proceeding at an ordinary pace and was on its proper side. The driver saw the woman cross the road clear of his omnibus, but at the moment she attempted to recross he had turned his head to speak to the conductor, and was not aware of the danger of the deceased until it was too late. Hence, the nonsuit.

BEING ON WRONG SIDE OF THE ROAD AS EVIDENCE OF NEGLIGENCE.—A person driving a carriage is not bound to keep on the regular side of the road; but, if he does not, he must use more care and keep a better lookout to avoid collision than would be necessary if he were on the proper part of the road: *Pluckwell v. Wilson*, 5 Car. & P. 375. In England, the law or usage of the road is not the criterion of negligence with respect to negligent driving. Hence, if the defendant's carriage is on the wrong side of the road, and in attempting to pass on the near instead of the off side, in that country, the plaintiff sustains damages, it is for the jury to decide the question of negligence without regard to the law of the road: *Wayde v. Carr*, 2 Dowl. & R. 255. In this case the defendant's carriage was on the wrong side of the road, and the driver, in attempting to pass a hackney coach which interposed between the carriage and the plaintiff's gig, on the near instead of the off side, injured the plaintiff. The court said that "whatever might be the law of the road, it was not to be considered as inflexible and imperatively governing a case of this description. In the crowded

streets of a metropolis, where this accident happened, situations and circumstances might frequently arise where a deviation from what is called the law of the road would not only be justifiable, but absolutely necessary. The question in this case is a question of negligence. Of this the jury were the best judges; and independently of the law of the road it was their province to determine whether the accident arose from the negligence of the defendant's servant." If parties meet on a sudden, the party on the wrong side should be held answerable for the injury that may happen, unless it clearly appears that the party on the right side had ample means and opportunity to prevent it: *Chaplin v. Hawes*, 3 Car. & P. 554; and if the driver of a carriage sees a horseman coming furiously on its wrong side it is the duty of the driver of the carriage to give way and avoid an accident, although in so doing he goes a little on what would otherwise be his wrong side of the road: *Turley v. Thomas*, 8 Car. & P. 103.

The mere act of driving on the wrong side of a highway is not conclusive evidence of negligence in an action to recover damages for a collision between vehicles, for, notwithstanding the driver's statutory duty to turn to the right when meeting another vehicle, he has the right to be upon any part of the highway, and his negligence must necessarily arise out of his effort, or want of effort, to avoid a collision when another team meeting him is about to pass: *Brooks v. Hart*, 14 N. H. 307; *Meservey v. Lockett*, 161 Mass. 332; *Smith v. Gardner*, 11 Gray, 418; *Wright v. Jones*, 111 Mass. 360; *Lloyd v. Ogleby*, 5 Com. B., N. S., 667; *Simmonson v. Stellenmerf*, 1 Edm. Sel. Cas. 194; *Wood v. Luscomb*, 23 Wis. 287. Though one is on the left or wrong side of the road, another in passing, or attempting to pass, cannot carelessly or imprudently rush upon him or his vehicle, and if he does so and occasions damages the left-hand man may sustain an action therefor: *Brooks v. Hart*, 14 N. H. 307; *Spofford v. Harlow*, 3 Allen, 176; *Smith v. Gardner*, 11 Gray, 418; *Parker v. Adams*, 12 Met. 415; 46 Am. Dec. 694.

Such cases rest upon the principle that, though the plaintiff is violating the law, his right of recovery to the action is independent of his unlawful act. "A party," says Chapman, J., in *Spofford v. Harlow*, 3 Allen, 176, "may be acting in violation of some particular statute and still be under the general protection of the law. A third person has no right merely because he is thus in fault to run into him and injure him carelessly and recklessly": See, also, *Parker v. Adams*, 12 Met. 415; 46 Am. Dec. 694.

If a traveler, however, is driving fast in the night-time, and on the wrong side of the road, it is no excuse for him that he did not have time, after discovering an approaching carriage, to turn out: *Simmonson v. Stellenmerf*, 1 Edm. Sel. Cas. 194. But an action for an injury received from a collision of carriages passing on a public road cannot be maintained by a party who was guilty of negligence at the time of the collision, although the other party was also guilty of negligence, and was on the wrong side of the road: *Parker v. Adams*, 12 Met. 415; 46 Am. Dec. 694. Ordinarily, if a traveler is upon that part of the traveled way appointed to him by the statute, and, while using ordinary care and prudence, sustains an injury by a collision with the vehicle of another, who refuses to turn out, and who is found with his vehicle upon that part of the way to which he has not the statutory right, the individual who has thus sustained an injury has a cause of action against the other: *Brooks v. Hart*, 14 N. H. 307; *Shockley v. Shepherd*, 9 Houst. 270. Under the decisions and statutes requiring travelers to turn to the right upon meeting each other on a public highway, the most that can be said when a party is found upon the wrong side of the road is that it is only

prima facie evidence of negligence, and not conclusive: See principal case; *Smith v. Gardner*, 11 Gray, 418; *Wynn v. Jones*, 111 Mass. 360; *Lloyd v. Ogleby*, 5 Com. B., N. S., 667. In *Meservey v. Lockett*, 161 Mass. 332, it is held that the act of driving on the left of the center of a road sixty feet wide is not an act of negligence in itself, and does not even tend to show negligence or a violation of the law of the road on the part of the driver as against another person crossing the road on foot who is accidentally injured by him.

HORSEMAN AND FOOTMEN—LIGHT AND HEAVY VEHICLES.—It is a rule sanctioned by common consent and immemorial usage that a horseman should yield the traveled part of the road to a wagon: *Washburn v. Tracy*, 2 D. Chip. 128, 136; 15 Am. Dec. 661, 664. A traveler on horseback, meeting another horseman or a vehicle on a public highway in this country is not required to turn out in any particular direction to avoid a collision. All that is required is prudent care under existing circumstances: *Dudley v. Bolles*, 24 Wend. 465. But in England the rule of the road as to keeping the proper side applies to saddle horses as well as carriages; and if a carriage and a horse are to pass, the carriage must keep its proper side, and so must the horse. Yet, if the driver of a carriage is on his proper side, and sees a horse coming furiously on its wrong side of the road, it is the duty of the driver of the carriage to give way and avoid an accident, although in doing so he must go a little on what would otherwise be his wrong side of the road: *Turley v. Thomas*, 8 Car. & P. 103. A horseman cannot compel a teamster having a heavy load to turn out of the beaten track if there is sufficient room to pass: *Beach v. Parmeter*, 23 Pa. St. 196. And this principle is also applied as between light and heavy vehicles: *Beach v. Parmeter*, 23 Pa. St. 196; *Grier v. Sampson*, 27 Pa. St. 183.

A footman has the right to use a carriageway as well as the sidewalk, and walking in the carriageway is not prima facie evidence of want of ordinary care, nor will negligence be inferred from that fact alone: *Coombs v. Parvinton*, 42 Me. 332; *Boss v. Litton*, 5 Car. & P. 407. Even a paralytic has the right to walk in the road, and is entitled to have persons driving carriages along the road exercise reasonable care to avoid injuring him: *Boss v. Litton*, 5 Car. & P. 407. The rights of footmen in the public streets are equal with those of persons mounted on horseback or driving in carriages: *Stringer v. Frost*, 116 Ind. 477; 9 Am. St. Rep. 875, and monographic note thereto discussing the rights of foot passengers. A footman has a right to cross the road, and if one driving along the road runs up against him because he cannot pull up in time for the reason that his reins break, this is no defense, as the driver is bound to have proper tackle: *Cotterill v. Starkey*, 8 Car. & P. 691. A foot passenger in crossing the street of a city has no prior right of way over a passing vehicle. Both are bound to exercise ordinary care to avoid collision: *Belton v. Baxter*, 54 N. Y. 245; 13 Am. Rep. 578; *Barker v. Savage*, 45 N. Y. 191; 6 Am. Rep. 66; 1 Sweeny, 238. It is as much the duty of foot passengers attempting to cross a street or road to look out for passing vehicles as it is the duty of drivers to see that they do not run over foot passengers: *Cotton v. Wood*, 8 Com. B., N. S., 568, 571. It is negligence per se for a foot passenger to attempt to cross a public thoroughfare ahead of vehicles of any kind, including street-cars, especially where two of them are near and rapidly approaching each other from different directions, notwithstanding any nice "calculations" that may be made as to the chances of injury: *Belton v. Baxter*, 54 N. Y. 245; 13 Am. Rep. 578. But in cases of collision between footmen and vehicles in roads

or streets the question of due care should doubtless be submitted to the jury as a general rule: *Kendall v. Kendall*, 147 Mass. 482; *Slee v. City of Lawrence*, 162 Mass. 405. The former of the two cases was a collision between a traveler and a sleigh. The rule as to carriages being on the proper side of the road does not apply to carriages and foot passengers, for, as regards a foot passenger, a carriage may go on either side of the road: *Cotterill v. Starkey*, 8 Car. & P. 691.

PASSING IN THE SAME DIRECTION.—Where two persons are traveling in the same direction, and one wishes to pass the other, the English rule is that the foremost traveler must turn or bear to the left, and the other shall pass on the off side: *Wayde v. Carr*, 2 Dowl. & R. 255. But in this country the foremost one is not bound to turn out for the other if there is room for the latter to pass on either side: *Bolton v. Colder*, 1 Watta. 360. If there is not enough room to pass, the foremost traveler shall yield an equal share of the road, on request made, if that is practicable. But if it is not practicable, then he must defer passing until more favorable ground is reached. If the leading traveler then refuses to comply with the request to permit the other to pass him, he will be answerable for such refusal: *Bolton v. Colder*, 1 Watta, 360; *Clifford v. Tyman*, 61 N. H. 508. "When a driver," says Morgan, J., in *Asegno v. Hart*, 25 La. Ann. 235, 13 Am. Rep. 133, "attempts to pass another on a public road, he does so at his peril; at least, he must be responsible for all damages which he causes to the one whom he attempts to pass, and whose right to the proper use of the road is as great as his, unless the latter is guilty of such recklessness or even gross carelessness as would bring disaster upon himself": See, also, *Foster v. Goddard*, 40 Me. 64; *Clifford v. Tyman*, 61 N. H. 508.

BICYCLES.—A bicycle is a vehicle within the meaning of the law, and may be lawfully ridden upon the public highway for convenience, recreation, pleasure, or business: *Thompson v. Dodge*, 58 Minn. 555; *Mercer v. Corbin*, 117 Ind. 450; 10 Am. St. Rep. 76; *Holland v. Bartch*, 120 Ind. 46; 16 Am. St. Rep. 307; *Taylor v. Goodwin*, L. R. 4 Q. B. Div. 228; *State v. Collins*, 16 R. I. 371. In *State v. Yopp*, 97 N. C. 477, 2 Am. St. Rep. 305, it was decided that a statute forbidding the use of a bicycle, tricycle, or other nonhorse vehicle upon a highway, without express permission of the road superintendent, was constitutional. But the holding in that case was based upon the theory that particular vehicles, such as bicycles, from their peculiar appearance, and their unusual manner of use, frighten horses, and thereby imperil passengers traveling in horse vehicles over the highway, and that the legislature has power always to provide reasonable regulations with respect to highways, to insure safety and comfort to passengers going over them in the usual modes of conveyance. While this power of the legislature is undoubted, the theory of the decision is unsound. Horses undoubtedly often get frightened at new and strange objects on the highway, but this danger is only temporary, as it was with street-cars when they first came into use; and unless there is something very peculiar in the appearance of a North Carolina bicycle, horses there as well as elsewhere will soon become accustomed to the use of such a vehicle, and fail to "scare" at it. This condition of things is recognized elsewhere, as bicycles are regarded as vehicles entitled to the rights of the road: *Holland v. Bartch*, 120 Ind. 46; 16 Am. St. Rep. 307; *State v. Collins*, 16 R. I. 371; and the rider of a bicycle is placed upon an equality with, and governed by, the same rules as persons riding or driving any other vehicle: *Holland v. Bartch*, 120 Ind. 46; 16 Am.

St. Rep. 307. As a vehicle, a bicycle cannot be lawfully used upon a sidewalk: *Holland v. Barick*, 120 Ind. 46; 16 Am. St. Rep. 307; *Mercer v. Corbin*, 117 Ind. 450; 10 Am. St. Rep. 76. A bicycle is a "carriage or vehicle" within the meaning of a statute which requires any person traveling on a highway with a carriage or vehicle to turn to the right on meeting another person so traveling: *State v. Collins*, 16 R. I. 371. The rider of a bicycle using it on a sidewalk is liable for an injury to a footman, though it was not intended: *Mercer v. Corbin*, 117 Ind. 450; 10 Am. St. Rep. 76. A person riding a bicycle on a highway at such speed as to endanger the lives or limbs of passers-by may be convicted of furiously driving a carriage under the English statute: *Taylor v. Goodwin*, L. R. 4 Q. B. Div. 228. But riding a bicycle in the center of a highway at the rate of fifteen miles an hour, toward and within twenty-five feet of the heads of horses attached to a carriage, is not actionable negligence. To make it such, it must be charged and shown to have been done at a time or in a manner or under circumstances evidencing a disregard for the rights of others: *Holland v. Barick*, 120 Ind. 46; 16 Am. St. Rep. 307. If an accident happens to a bicycle rider failing to observe conditions open to his observation, and which he could have seen had he looked, he is guilty of such carelessness that he cannot recover for the injuries received: *Sutphen v. Town of North Hempstead*, 80 Hun. 409. The rider of a bicycle undoubtedly has a right to securely place it against the curb on the side of the street, and one driving along the street would, upon general principles of highway law, be bound to avoid it. A person driving a horse on a highway has no rights superior to those of a person riding a bicycle: *Thompson v. Dodge*, 58 Minn. 555. The use of bicycles or tricycles may be prohibited in city parks: *In re Wright*, 63 How. Pr. 345; and one may be prohibited from riding them over public bridges, if it is likely to frighten horses and imperil the lives of passengers on the bridge: *Twilley v. Perkins*, 77 Md. 252. But the use of a bicycle on a bridge in a city does not violate an ordinance prohibiting its use on a sidewalk of the city: *Swift v. Topeka*, 43 Kan. 671.

FAST DRIVING—RUNAWAYS—UNATTENDED TEAMS—IMPEDING TRAVEL. Driving horses on a public highway at the rate of a mile in four minutes has been held unlawful and negligent; and if injury results from immoderate driving, the author of it will be liable for it. Neither are highways intended for racecourses, and where they are used for trials of speed, and injury is occasioned thereby, a jury may give exemplary damages: *Kennedy v. Way*, Bright. N. P. 186. Such damages may also be recovered for willfully bringing a horse and vehicle into a collision with, and cruelly wounding and injuring, the plaintiff's horse: *Lewis v. Bulkeley*, 4 Daly, 156. A party is not, of course, liable for an injury caused by inevitable accident: *Goodman v. Taylor*, 5 Car. & P. 410; note to *Brown v. Collins*, 16 Am. Rep. 334. But, to avoid responsibility on the ground of inevitable accident, it must appear that the collision was inevitable, and that the defendant was without fault: *Center v. Finney*, 17 Barb. 94. An ordinance of a city as to immoderate driving has the same force and effect of a statute, and is as binding upon the fire department as upon the drivers of ordinary vehicles. The law does not recognize any privileged class, such as members of the fire or police department of a city, as possessing rights so superior to those of other citizens that they may negligently cause injury to persons lawfully using the streets. Hence, if a fire marshal drives a one-horse vehicle belonging to the fire department at an immoderate speed when turning the corner of a street, and neg-

lightly runs into and kills a horse belonging to another, he is liable: *Mores v. Swernie*, 15 Ill. App. 486, 492.

Negligence is not presumed against the owner or driver of a horse from the fact that the horse, attached to a cart, ran away while in charge of the driver, and, notwithstanding his efforts to control him, ran over and injured a person in the street: *O'Brien v. Miller*, 60 Conn. 214; 25 Am. St. Rep. 320, and note, showing that the driver of a team along a street is not an insurer against accidents. But in an action for an injury occasioned by defendant's horses while running away, the fact that they got loose after being hitched would be some evidence of negligence on his part: *Strup v. Edens*, 22 Wis. 432. If a horse becomes unmanageable by fright, and turns around and runs away, breaking a wheel and dragging the buggy upon a stone-heap in the public road, and throwing the driver out, the township is liable to him in an action for negligence, if his injury was caused in part by the fright of the horse, the broken wheel and dragging axle, and in part by the negligence of the supervisors of the township; but if the injury was caused simply by the fright of the horse, the broken wheel and the dragging axle, and not by the carelessness and negligence of the township supervisors, the township would not be liable. The question of negligence in such a case is for the jury: *Wagner v. Jackson Township*, 133 Pa. St. 61. The liability of cities and towns for injuries caused by horses becoming frightened at objects in the street is discussed at length in the monographic note to *Mores v. Town of Richmond*, 98 Am. Dec. 603-612. If a horse attached to a carriage is found running on a sidewalk in a city, it has been said that the law presumes negligence on the part of the owner, and that, unless such presumption is overcome, he will be held liable for injuries caused by the neglect of his servant in allowing the horse to run away: *Hummell v. Westor*, Bright. N. P. 133.

It is negligence for a man to leave his horse and cart standing in the street, and he will be liable for any injury that may result therefrom, though it be occasioned by the act of a passer-by in striking the horse: *Illidge v. Goodwin*, 5 Car. & P. 190; and he is liable in damages for an injury caused by his violation of a city ordinance prohibiting him from leaving his horse unhitched in the street: *Bott v. Pratt*, 33 Minn. 323; 53 Am. Rep. 47. But in *Griggs v. Fleckenstein*, 14 Minn. 62, 100 Am. Dec. 199, it is held that whether it is negligence to leave a horse unhitched in a street is a question for the jury to determine from all the circumstances, including the disposition and trustworthiness of the horse. In *Fox v. Sackett*, 10 Allen, 535, 87 Am. Dec. 682, the injury to the plaintiff was caused by a collision with the defendant's wagon, which had been left standing in the road. At the time of the collision the plaintiff, who had seen the wagon in the daytime, was driving a gentle horse, on a dark evening, at a slow trot along the road. He was a good driver, but he was looking out on his side for a blanket which he had lost, and his companion was looking for the same on the other side, and neither of them saw the wagon. The decision was that the plaintiff could not, as a matter of law, be considered so negligent as to preclude a recovery, but that the question should be left to the jury. Where a collision occurs between two teams left unattended in a public street, a prima facie case of negligence calls for evidence on the other side to meet it, and, if evidence of equal weight is introduced so that the two sides "are in even balance," the plaintiff must fail: *Broull v. Hanson*, 158 Mass. 17. Persons have a right to travel on public streets and roads,

stopping only for necessary purposes, and then only for a reasonable time. They must also travel so as not to impede, unnecessarily or unreasonably, the exercise of the same right by others. If they do not exercise such right in a reasonable manner, they are guilty of a nuisance: *Turner v. Holtsman*, 54 Md. 148; 39 Am. Rep. 361; *Rez v. Cross*, 3 Camp. 224; *Rez v. Jones*, 3 Camp. 230; *People v. Cunningham*, 1 Denio, 524; 43 Am. Dec. 709. A traveler may pass on the left side of the road or across it for the purpose of turning up to a house, store, or other object on that side of the road; but he must not interrupt or obstruct another lawfully passing on that side, and if he does, he acts at his peril, and must answer for the consequences of his violation of duty. In such a case he must pass before or wait until the person on that side of the way has passed on: *Palmer v. Barker*, 11 Ma. 333; *Fales v. Dearborn*, 1 Pick. 345. A person driving a vehicle across the street must see that he does not interfere with others in the proper exercise of their right of passing: *Fales v. Dearborn*, 1 Pick. 345. It is not, however, the duty of a traveler, under all circumstances, to keep to the right of the center of the road, or to look behind him or sideways, before crossing from one side of the road to the other. But if he has reason to believe that a vehicle is behind him or at his side, it is his duty not to obstruct it, and to use reasonable care, in passing from one side of the road to the other, not to injure it or its occupants. In the event of a collision or accident, it is for the jury to say whether the circumstances were such that the person driving in advance should, in the exercise of reasonable care, have looked behind or sideways: *Rand v. Syme*, 162 Mass. 163; *Broschart v. Truitt*, 59 Conn. 1. A street-car company is entitled to the unrestricted use of its rails for the progress of its cars, within the limit of speed allowed them by law, and the driver of any other vehicle, being unnecessarily on the track, is bound to exercise greater care than if upon the common pavement, to see that an approaching car is not impeded. Hence, if a collision occurs by reason of his negligence or willfulness in being on the track, he should not have damages against the company, although its servants were also in fault: *Wilbrand v. Eighth Avenue R. R. Co.*, 3 Bosw. 314. So, in an action for injuries sustained in driving upon a street obstructed by ice and snow, where the plaintiff avers that the accident was occasioned because in turning from one street into another, it was necessary to pass around a street-car standing upon its track in the latter street, and that in doing so his horses were frightened by the sudden starting of the car, and drew his buggy over the ice and overturned it, it should be assumed, in the absence of any other averment on the subject, that the car had merely stopped to take on or discharge a passenger, and that it was not, therefore, necessary for the plaintiff to drive around it: *McDonald v. Toledo*, 63 Fed. Rep. 60.

FUNERAL PROCESSIONS—UNUSUAL MACHINERY.—That portion of a highway on which a funeral procession is formed is, for the time being, in the lawful occupation of the family having the funeral; and when they assign a hackman a place in the procession, he has a right to use reasonable force to prevent its occupancy by another: *Goodwin v. Avery*, 26 Conn. 585; 68 Am. Dec. 410.

A person transporting unusual machinery over a highway should employ a sufficient number of men to warn travelers of the danger of their horses taking fright at it, and, if necessary, to assist such travelers in passing it: *Bennett v. Lovell*, 12 R. L. 166; 34 Am. Rep. 628. The use of a steam-engine as a means of locomotion on a highway is not necessarily a nuisance.

Those using horses cannot exclude those using steam-engines, as improved modes of locomotion are admissible. The question to be determined in such a case is, whether or not the engine has been so negligently used as to give a right of action: *Macomber v. Nichols*, 34 Mich. 212; 22 Am. Rep. 522.

SHENANDOAH NATIONAL BANK v. MARSH.

[89 IOWA, 273.]

A PROMISSORY NOTE IS NEGOTIABLE, though it contains a provision for the payment of an attorney's fee, if the note is placed in the hands of an attorney for collection.

NEGOTIABLE INSTRUMENTS—DEFENSES.—A negotiable promissory note purchased by the plaintiff before due, for value, and without notice of defendant's equities, is not open to the defense of fraud in procuring the note, or that it was without consideration.

DEFINITIONS.—THE WORDS "COLLECT" AND "FOR COLLECTION," as applied to an indebtedness, mean that which may lawfully be done by the holder of the obligation to secure its payment or liquidation after its maturity.

ACTION on a promissory note. There was a judgment for the plaintiff, and the defendant appealed.

Stuart & Bartholomew, for the appellant.

Mitchell & Penick, for the appellee.

273 KINNE, J. The plaintiff's action is brought upon a promissory note, which reads:

"CHARITON, IOWA, July 16, 1890.

"On January 16, 1891, for value received, we jointly and severally promise to pay A. H. Warren, or order, one hundred and fifty-one dollars, payable at the First National Bank of Chariton, Iowa, with interest at the rate of eight per cent per annum from date until paid, and ten per cent attorney's fees, if placed in attorney's hands for collection. The interest on this note is payable annually, and this entire note to be due when there is interest due and unpaid. All delinquent interest to draw ten per cent interest from the time delinquent. **274** Jurisdiction is conferred upon any justice of the peace. The makers and indorsers hereof waive demand and protest.

MARTHA MARSH."

The defendant pleads fraud practiced in procuring the note, and that the same is without consideration. The plaintiff, in a reply, denies the allegations in the answer, and avers that it purchased said note in good faith, before ma-

turity, for a valuable consideration, and without notice or knowledge of any defect in the note or defense thereto. After the evidence was all in, the court sustained the plaintiff's motion to discharge the jury, and enter judgment for the plaintiff for one hundred and forty-three dollars and forty-five cents, the sum the plaintiff had paid for the note, "upon the ground alone that said note was negotiable, and the evidence without conflict showed that the plaintiff was an innocent purchaser thereof before maturity, and hence the defense of fraud or want of consideration in the execution of the note could not be asserted or maintained by the defendant as against the plaintiff."

The record shows that it was conceded by the parties that the evidence tended to show that the note was procured from the defendant by means of fraud on part of Warren, the payee therein, and that it was without consideration. It appeared from the evidence, without conflict, that the note was purchased by the plaintiff from Warren, in the regular course of business, prior to its maturity, without notice or knowledge that it had been procured through fraud or was without consideration, or that there was any other defense thereto; that the purchase was made in good faith, and that the plaintiff paid Warren one hundred and forty-three dollars and forty-five cents for it.

Several errors are assigned, but the only point pressed in argument is that the note was non-negotiable, and hence open to the defense pleaded. The note contains ²⁷⁵ the following provision: "And ten per cent attorney's fees, if placed in attorney's hands for collection." It is contended that this provision renders the sum payable at the maturity of the note uncertain, and that thereby one of the elements of negotiability, certainty as to the amount due, does not exist. It seems to be conceded in the argument that if the facts of this case bring it within the rule established in *Sperry v. Horr*, 32 Iowa, 184, the judgment below should be affirmed, unless we are prepared to overrule the *Sperry* case. The provision in the note in the *Sperry* case reads: "If not paid when due, and suit is brought thereon, I hereby agree to pay collection and attorney's fees therefor." It was held in that case that as the provision quoted related to the remedy, and only became operative in case suit should be brought, it could in no way render uncertain the sum due upon the note at its maturity.

It is urged that the provision in the note in this suit contemplates that the note may be placed in an attorney's hands for collection at any time before, as well as after, maturity; hence that the amount due at maturity would be dependent, to a certain extent, on the fact that it was or was not thus placed in the hands of an attorney for collection before its maturity; that an element of uncertainty as to the amount due at the maturity of the note is thus introduced which does away with its negotiability. If the appellant's construction of this clause is correct, then one taking such a note to-day, which is not due for five years, may, by at once placing it in an attorney's hands, to be by him held until paid or until maturity, and collected if not then paid, compel the maker to pay ten per cent in addition to the face of the note, even though he may in fact pay it before it matures. We do not think the language used, considered in connection with the provisions of the entire note, warrants such interpretation. ²⁷⁶ Ordinarily, we understand the word "collect," as applied to an indebtedness, to mean that which may lawfully be done by the holder of the obligation to secure its payment or liquidation after its maturity. The words "for collection," as used in the note, convey the same meaning as the words "to collect." We think it is clear that, under a provision like that under consideration, no attorney's or collection fees could be claimed, even in the absence of the statutory provisions prohibiting it, for any work, labor, or service of the attorney holding such a note, which was done or rendered with regard to it prior to its maturity.

Under this construction of the language used the case is clearly within the holding in *Sperry v. Horr*, 32 Iowa, 184. But it is said that that holding is against the weight of authority generally, and hence it should not be adhered to. It must not be forgotten that the fact that there is a conflict in the decisions touching the question as to whether a provision like that in the *Sperry* case would render an instrument non-negotiable, was considered in that case. The doctrine announced in that case has been the law of this state for over twenty years, innumerable contracts have been made on the faith of it, and the decision is supported by an abundance of authority: *Stoneman v. Pyle*, 35 Ind. 103; 9 Am. Rep. 637; *Seaton v. Scovill*, 18 Kan. 433; 26 Am. Rep. 779; *Gaar v. Louisville Banking Co.*, 11 Bush, 180; 21 Am. Rep. 209; *Heard v. Dubuque etc. Bank*, 8 Neb. 10; 30 Am. Rep. 811; *Dietrich*

v. *Bayhi*, 23 La. Ann. 767; *Overton v. Matthews*, 35 Ark. 147; 37 Am. Rep. 9; *Farmers' Nat. Bank v. Rasmussen*, 1 Dak. 60; 1 Daniel on Negotiable Instruments, 4th ed., sec. 62 a; *Hubbard v. Harrison*, 38 Ind. 323; *Nickerson v. Sheldon*, 33 Ill. 372; 85 Am. Dec. 280; *Schlesinger v. Arline*, 31 Fed. Rep. 648; *Montgomery v. Crossthwait*, 90 Ala. 553; 24 Am. St. Rep. 832; *Bank of Commerce v. Fuqua*, 11 Mont. 285; 28 Am. St. Rep. 461; *Dorsey v. Wolff*, 142 Ill. 589; 34 Am. St. Rep. 99; *Pate v. First Nat. Bank*, 63 Ind. 254; *Maxwell v. Morehart*, 66 Ind. 301; *Proctor v. Baldwin*, 82 Ind. 370; *Wilson Sewing Machine Co. v. Moreno*, 7 Fed. Rep. 806; *Howenstein v. Barnes*, 5 Dill. 482; *Adams v. Addington*, 16 Fed. Rep. 89; Tiedeman on Commercial Paper, sec. 28 b; 1 Randolph on Commercial Paper, secs. 205, 206; 2 Parsons on Notes and Bills, 146, 147; 2 Am. & Eng. Ency. of Law, 324; *Benn v. Kutzschan*, 24 Or. 28; *Washington v. First Nat. Bank*, 64 Tex. 4; *Farmers' Nat. Bank v. Sutton Mfg. Co.*, 8 Cir. Ct. App. 1; 52 Fed. Rep. 191.

Our statute expressly provides that attorney or collection fees shall "be allowed by the court and taxed as a part of the costs": Acts of the 18th General Assembly, c. 185; *Kelso v. Fitzgerald*, 67 Iowa, 266; *Spiesberger v. Thomas*, 59 Iowa, 606; *McCormick v. Lundburg*, 74 Iowa, 558. It was said in the case last cited: "The attorney's fee which, under the terms of the note, might be taxed against the plaintiff on the action for the enforcement of the note, does not pertain to the debt evidenced by it, but is in the nature, rather, of costs." The collection fee, then, in the case at bar, can in no event form a part of the debt proper; it pertains only to the remedy; it is made by law a part of the costs. It follows, then, that such a provision cannot be said to render uncertain the amount due upon the note at its maturity. That is fixed and certain, and cannot be affected by any provisions which relate only to the remedy in case the debt is not paid at maturity. The contract must be construed in the light of the statutes applicable thereto, and with reference to which it will be presumed the parties to the contract acted. The note being negotiable, and purchased by the plaintiff before due, in the usual course of business, for value, and without notice of the equities of the defendant, the case was properly taken from the jury.

The judgment below is affirmed.

NEGOTIABLE INSTRUMENTS—EFFECT OF STIPULATION TO PAY ATTORNEY'S FEES.—A stipulation in a negotiable instrument to pay all attorney's fees in case of a suit thereon does not destroy its negotiability: *Note to First Nat. Bank v. Slaughter*, 39 Am. St. Rep. 89.

NEGOTIABLE INSTRUMENTS—FRAUD IN PROCURING — RECOVERY.—The holder of a negotiable instrument who acquires it bona fide, without notice, in the usual course of business, for a valuable consideration and before maturity, takes the paper unaffected by fraud in its origin: *Notes to Famous Shoe etc. Co. v. Crosswhite*, 46 Am. St. Rep. 429; *First Nat. Bank v. Slaughter*, 39 Am. St. Rep. 89.

MILLINGTON v. LAURER.

[39 IOWA, 222.]

EXECUTIONS—EXEMPTION—PERSONAL EARNINGS OF ARTIST.—Under a statute exempting from execution the earnings of a resident debtor who is the head of a family, the personal earnings of an artist for painting pictures are exempt from execution.

APPEAL—JUDGMENT ALLOWING EXEMPTION EXCESSIVE BY INSIGNIFICANT AMOUNT—NO REVIEW.—A judgment holding the personal earnings of an artist for painting pictures exempt from execution will not be disturbed on appeal because the amount of exemption thereby secured to the debtor includes a nominal sum for the cost of materials.

EXEMPT PERSONAL EARNINGS—RIGHTS OF ASSIGNEE.—A debtor may lawfully assign his personal earnings within ninety days from the time the services were rendered, even to a nonresident of the state, and the debtor's right to have them exempt from seizure for the payment of his debts passes to the assignee.

EXEMPTION LAWS SHOULD BE LIBERALLY CONSTRUED—THE PRIMARY OBJECT OF EXEMPTION LAWS is not merely to protect the earnings of the debtor from seizure by means of attachment and execution, but to preserve them for the benefit of his family against any appropriation for the payment of his debts not authorized by law to which he does not consent.

MAXIM.—One cannot accomplish by indirect means what he is prohibited from doing directly.

SETOFF OF JUDGMENT AGAINST ASSIGNED CLAIM FOR PERSONAL SERVICES NOT ALLOWED.—A judgment existing against a debtor when he assigned his claim for personal services, and held by the defendant in an action upon the assigned claim, cannot be pleaded by way of setoff or counterclaim against the assigned demand.

ACTION to recover for the painting of two pictures. There was a judgment for the plaintiff and the defendant appealed.

Woodward & Cook, and F. E. Hasner, for the appellant.

H. W. Holman, for the appellee.

323 ROBINSON, C. J. In March, April, and May, 1891, F. C. Merrill painted for the defendant two pictures at the
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agreed price of one hundred dollars. On the ninth day of June, 1891, Merrill assigned his account for the painting to the plaintiff, a nonresident of this state. In the year 1873 one Mason recovered in the circuit court of Buchanan county a judgment against Merrill for the sum of one hundred and forty-two dollars and ten cents and interest thereon at ten per cent per annum, and six dollars and sixty cents costs. That judgment is unpaid. It was assigned to James Dalton, and by him assigned to the defendant in December, 1886. The defendant admits that Merrill painted for him the pictures for the price stated, but claims that by agreement between them the price was to be applied in paying the judgment, and avers that he has always been, and is now, ready to so apply it. He also pleads the judgment by way of counterclaim, and alleges that he owned it at the time the claim for the painting was assigned to the plaintiff. The plaintiff denies that there was any agreement to apply the price of the painting on the judgment, and alleges that the price was the personal earnings of Merrill, exempt to him from execution, for the reason that he was the head of a family, and a resident of this state when the painting was done, and that the claim therefor was assigned to the plaintiff within ninety days from the time it was earned. The district court rendered judgment in favor of the plaintiff for one hundred dollars with interest and costs.

1. Section 2546 of the code is as follows: "In case of the assignment of a thing in action, the action by the assignee shall be without prejudice to any counterclaim, defense, or cause of action, whether matured or not, if matured when pleaded, existing in favor of the defendant and against the assignment." Under this provision, any defense which the defendant had to the ³²⁴ claim in controversy while it was owned by Merrill is available against the plaintiff. Merrill denied the alleged agreement with the defendant to apply the price of the pictures on the judgment, and the district court was authorized to find that no agreement of that kind was made.

We are required to determine whether the evidence justified the district court in finding that the judgment against Merrill, owned by the defendant, was not a defense to the claim in suit when it was assigned to the plaintiff. Section 3074 of the code provides that the earnings of a debtor, who is a resident of this state and the head of a family, "for his

personal services, or those of his family at any time within ninety days next preceding the levy, are . . . exempt from execution and attachment." Merrill was a resident of this state and the head of a family when the pictures were painted, and also when the claim for their price was assigned. It is said by the appellant that the price of the pictures was not due for the personal services of Merrill because his agreement required him to furnish the canvas, paints, and other materials which were used in producing the pictures. The evidence shows that the cost of all the materials used for that purpose was about one dollar and a half, or little more than nominal. It was so insignificant that we would not interfere with the action of the district court in holding in effect that for the purposes of this case the amount due for the pictures was due for the personal services of Merrill. The statute does not distinguish between the earnings of an artist, a mechanic, or a common laborer, but exempts them alike, when other conditions essential to the exemption exist: *McCoy v. Cornell*, 40 Iowa, 458.

Since the amount in controversy was due for the personal services of Merrill, he had the right to transfer the claim for it, and the exemption from seizure for ³³⁵ the payment of his debts passed with it to his assignee: *Waugh v. Bridgeford*, 69 Iowa, 335; *Pearson v. Quist*, 79 Iowa, 54. The fact that the assignee was a nonresident of this state is wholly immaterial. The exemption was for the benefit of the debtor's family, and to hold, when exempt property is transferred, it becomes subject, in the hands of the assignee, to the payment of the assignor's debts, would in many cases destroy the value of the exemption by preventing the family of the debtor from deriving any benefit from it. The district court was authorized to find that the assignment in this case was made within ninety days from the time when the money was earned.

2. The remaining question to be determined, and the one of chief importance, is whether the judgment owned by the defendant constituted a defense to the claim of Merrill at the time it was assigned to the plaintiff. If it did, the plaintiff took the claim subject to that defense, and, as it is less than the amount due on the judgment at the time of the assignment, the defendant should succeed. The determination of the question depends upon the proper construction to be given our statute. It is the well-established rule, in this and

most other states, that laws exempting the property of debtors from seizure for the payment of their debts are to be liberally construed, to the end that the purpose for which they were enacted may be accomplished: *Reynolds v. Haines*, 83 Iowa, 342; 32 Am. St. Rep. 311. It has been held, in an action by the debtor to recover of his judgment creditor for exempt property which was taken on execution to satisfy the judgment, that the judgment creditor cannot set off his judgment against the claim of the debtor for such property, on the ground that to allow such an offset would in most cases result in a palpable evasion of the law: *Wilson v. McElroy*, 32 Pa. St. 82; Thompson on Homestead and Exemption, 326 sec. 893; *Curlee v. Thomas*, 74 N. C. 51. In *Howard v. Tandy*, 79 Tex. 450, it was held that money in the hands of the sheriff, which had been realized for damages caused by the seizure and sale of exempt property under an execution against the owner of the property, could not be applied on an execution against such owner, in favor of the judgment creditor against whom he had obtained the judgment for damages. It was said that to permit such an application would in effect render nugatory the exemption laws of the state. In *Below v. Robbins*, 76 Wis. 600, 20 Am. St. Rep. 89, it was held that a judgment for the wrongful conversion of property exempt from sale under execution was likewise exempt. In *Collier v. Murphy*, 90 Tenn. 300, 25 Am. St. Rep. 698, it was held that a judgment could not be set off in an action brought by the judgment debtor for wages due him which were exempt from execution, attachment, and garnishment. It was said that the language of the statute which created the exemption, strictly construed, would protect the wages only from "execution, attachment, or garnishment," yet the whole spirit of the act was such that it was intended to protect the wages from all manner of legal seizure. A statute of Nebraska exempts the wages of certain persons "from the operation of attachment, execution, and garnishment process" for sixty days. It was held under that statute, that in an action for wages protected by it, an indebtedness from the employee to the employer, which existed and was due and payable before the wages were earned, could not be set off against them: *Deering v. Ruffner*, 32 Neb. 845; 29 Am. St. Rep. 473. Some of the cases cited arose under statutes which were the same in legal effect, so far as they relate to the question under consideration, as the statute of this state,

and all will serve to illustrate the rules of interpretation which are commonly applied to ³²⁷ statutes exempting property of debtors from seizure for the payment of their debts. Section 3072 of the code exempts from execution in certain cases the books and instruments of a physician. It was held in *Reynolds v. Haines*, 83 Iowa, 342, 32 Am. St. Rep. 311, that the money due under a policy of insurance for such books and instruments which had been destroyed was also exempt. Where there is no special declaration to the contrary, the homestead of every family, whether owned by the husband or wife, is exempt from judicial sale: Code, sec. 1988. It has been held that, where a portion of a homestead is taken by judicial process for the right of way of a railway, the value thereof paid by the railway company is exempt from execution, at least for a reasonable time: *Kaiser v. Seaton*, 62 Iowa, 463; *Mudge v. Lanning*, 68 Iowa, 641. It will be noticed that the interpretation given to the statute is not in all cases the one which a literal following of its provisions would seem to require, but force and effect are sought to be given to the obvious legislative intent. It is clear that the money due to Merrill could not have been appropriated under an execution or attachment issued against his property. That is conceded, and is according to the letter of the statute. But the primary object of the statute is, not merely to protect the earnings of the debtor from seizure by means of the processes technically known as "attachment" and "execution," but to preserve them for the benefit of his family against any appropriation for the payment of his debts not authorized by law to which he does not consent. It was said in *Banks v. Rodenbach*, 54 Iowa, 695, that an employer cannot purchase claims against a laborer, and set them off against his earnings.

It is claimed by the appellant in this case that he gave to Merrill the contract for the painting because he owned the judgment, and adopted that method of collecting a part of it. But Merrill did not assent to ³²⁸ that plan, and claims that he knew nothing of it, but supposed, when the agreement was made and the work was done, that the judgment was owned by Dalton. The defendant could not have appropriated the money in controversy by means of an execution, the ordinary method of enforcing a judgment, but seeks to accomplish what he is prohibited from doing directly by indirect means. This the law will not permit.

We conclude that the judgment of the district court is right, and it is therefore affirmed.

EXEMPTIONS.—Laws exempting property from sale under execution should be liberally construed: *Ferguson v. Speith*, 13 Mont. 487; 40 Am. St. Rep. 459, and note; *Collier v. Murphy*, 90 Tenn. 300; 25 Am. St. Rep. 698. Such laws apply to all persons who support themselves and families by the labor of their hands, without regard to the grade or character of such labor: *Brown v. Hebard*, 20 Wis. 326; 91 Am. Dec. 408, and monographic note on exemption of earnings or wages from execution and attachment. The manifest purpose of the legislature in exempting personal earnings or wages is to keep the exemption clear of any kind of coercive process of the law. Hence, if it is a demand which cannot be reached by attachment or execution, there cannot be set off against it a claim in no way springing out of the contract relations between the parties, but arising out of a distinct and independent transaction, as where an assigned judgment is attempted to be set up against it: *Collier v. Murphy*, 90 Tenn. 300; 25 Am. St. Rep. 698. *Mulliken v. Winter*, 2 Duvall, 256, 87 Am. Dec. 495, also, showing that no setoff is allowed in a suit for the price of exempt property. Property exempt from execution may be disposed of by its owner in any way: Note to *Brown v. Hebard*, 91 Am. Dec. 424; and, as no setoff is allowed in a suit by the owner for its value, it follows that no setoff will be allowed in such a suit by his assignee. Exemption laws, generally, apply to all classes of persons, whether residents or nonresidents of the state. And unless the statute restricts the exemption to residents, it will be held to apply to nonresidents as well as to residents: See monographic note to *Mumper v. Wilson*, 2 Am. St. Rep. 240, on extraterritorial effect of exemption laws.

MAXIM.—The law will not take notice of trifles: *McConkie v. New York etc. R. R. Co.*, 20 N. Y. 495; 75 Am. Dec. 420; *Kullman v. Greengbaum*, 92 Cal. 403; 27 Am. St. Rep. 150, showing when the maxim, *De minimis non curat lex*, may be properly applied.

HEUSER v. SHARMAN.

[89 IOWA, 355.]

SUBROGATION IS THE ACT of putting one person in the place of another, or the substitution of another person in the place of the creditor, to whose rights he succeeds in relation to the debt.

THE RIGHT TO SUBROGATION was formerly limited to transactions between principal and surety, but this rule has been modified, and the right is now considered, not as founded on contract, but as the creation of equity, and is enforced solely for the protection of persons who, by paying the debts of others, should in good conscience be substituted in the place of the original creditor.

SUBROGATION—WHEN THIRD PERSON IS ENTITLED TO.—If a third person pays a debt at the instance of the debtor, upon an agreement with the latter that he shall be entitled to the benefit of the security held by the creditor, equity will compel the debtor to do justice, and will substitute such third person to all the rights of the creditor whose claim he has discharged.

SUBROGATION—MONEY ADVANCED BY THIRD PARTY TO PAY MORTGAGE ON HOMESTEAD LIEN.—If a third person advances money to take up a homestead mortgage, made by a husband and wife to secure their joint indebtedness, upon an agreement with the husband that it shall be assigned to him as security, and the husband, instead of purchasing the mortgage and so assigning it, inadvertently makes, in form, a payment thereof, and it is satisfied and discharged of record, and the wife refuses to join in a new mortgage which the husband offers to execute, a court of equity will decree that such third party's claim be established as a lien upon the mortgaged property, and that the same be foreclosed with the same effect as if the mortgage had been assigned according to agreement.

ACTION in equity to set aside and cancel the satisfaction and discharge of a bond and mortgage on certain real estate, and to obtain a decree declaring the plaintiff to be the owner of said instruments, and that said mortgage be a valid lien on the mortgaged property. It was prayed that upon the restoration of the mortgage to the record, and the cancellation of the discharge of the bond, the mortgage be foreclosed. After a hearing upon the merits, there was a decree dismissing the petition, and the plaintiff appealed.

Cummins & Wright, for the appellant.

Kauffman & Guernsey, for the appellee.

*** ROTHROCK, J. The facts material to a determination of the questions involved are not in dispute, and are as follows: J. P. Sharman, and the defendant, Marion Sharman, are husband and wife, and for a long time prior to the execution of the mortgage in controversy in this suit they had a homestead, consisting of a dwelling-house situated on a lot in the city of Des Moines. The title to the property was in the defendant, Marion Sharman. On the twenty-sixth day of September, 1885, the said Sharman and wife executed and delivered to the New England Loan & Trust Company a mortgage upon said homestead to secure the payment of a note or bond, signed by both of the mortgagors, for the sum of eight hundred dollars, with interest at the rate of seven per cent per annum, payable semi-annually. The note became due October 1, 1890. The plaintiff is a resident of the city of St. Louis. In the month of March, 1890, and for some time before that, J. P. Sharman was in that city. He was without means to pay the principal or interest of the mortgage debt, and being fearful of a foreclosure of the mortgage, and to prevent a loss of the homestead, he applied to the plaintiff for assistance. The plaintiff was a long time ac-

quaintance of Sharman and his wife, and after repeated solicitations on the part of Sharman, she procured a bank draft in an amount sufficient to pay the mortgage debt, and indorsed the draft to the Des Moines Savings Bank, and delivered it to Sharman, with the express agreement that Sharman should forward the draft to the bank, and purchase the note and mortgage for the plaintiff, and have them properly assigned to her as security for her loan. The draft ³⁵⁷ was forwarded by Sharman to the bank, inclosed in a letter, of which the following is a copy:

"ST. LOUIS, March 29, 1890.

"*Mr. Simon Casady,*

"DEAR SIR: Enclosed a draft for eight hundred and twenty-eight dollars, to be paid the New England Loan & Trust Company; and take up mortgage which they hold against me. Will you be kind enough to take up the mortgage and insurance papers, and forward the same to my address? The mortgage is payable at the New England Loan & Trust Company's office. As I cannot be in Des Moines to transact the business myself, I trust you will look after it for me.

"J. P. SHARMAN,

"3128 Lafayette Ave."

The note and mortgage was not owned by the New England Loan & Trust Company when the above letter concerning the remittance of the draft was received by the bank. Soon after their execution the loan and trust company assigned them to the Brattleboro Savings Bank of Vermont, but it was the custom of the loan and trust company to receive payment, and give notice to the holders of notes and mortgages sold by it. The notice was given, and the holder of the mortgage and note sent them to the loan and trust company, and the latter, after canceling the note and mortgage, and cutting out the signatures thereto, and releasing the mortgage of record, sent the note and mortgage to J. P. Sharman, at St. Louis. The plaintiff discovered at once that her agreement with Sharman had not been carried out, and that the transaction in form amounted to a payment instead of an assignment of the mortgage. Sharman acknowledged that it was not right, and he signed a new bond and mortgage to the plaintiff, and the same was sent to the defendant, Marion Sharman, for her signature, together with a letter from her husband explaining the whole matter. ³⁵⁸ The papers were returned with the information that Marion Shar-

man refused to execute them. The defendant continues to hold the property as a homestead, and, at the time the plaintiff parted with her money, J. P. Sharman was insolvent, and he still remains in that financial condition. The plaintiff advanced her money in the full belief that its repayment was to be secured by an assignment of the mortgage; and she intended to extend the time of payment to accommodate Sharman and his wife, who were long-time acquaintances and friends.

The question to be determined upon the foregoing facts is, whether the plaintiff is entitled in equity to have her claim established as a lien upon the property, and a decree foreclosing the same, with the same effect as if the mortgage had been assigned to her.

1. It is important at the outset of the consideration of the question to make plain the exact status and relation of the parties to the transaction at the time it occurred, and their present relation to the controversy. J. P. Sharman and his wife, the defendant herein, were jointly and severally liable for the payment of the debt for which their homestead was mortgaged. They were not only joint obligors; they were both principal debtors. One was not a surety for the other. The plaintiff's money was applied in payment of the debt, and, as the mortgagors are insolvent, the effect is that they have used the plaintiff's money to discharge the lien upon the homestead, and are just that much benefited, without making any recompense to the plaintiff; and, if the wife is permitted to hold the homestead discharged from the claim of the plaintiff, she has acquired a right as against the plaintiff without the plaintiff's consent. If the lien of the plaintiff is established, the defendant suffers no injury because she would be in precisely the same condition that she was before the plaintiff paid off the mortgage. These propositions, ²⁵⁰ which at once arise in the mind, appear to us to present the strongest equitable considerations in favor of the claim of the plaintiff.

Is there any equitable principle which requires us to hold that the plaintiff has no right, except a right of action, against J. P. Sharman for failing to perform his contract by procuring an assignment of the mortgage? It does not appear to us that the fact that the property is a homestead in any manner affects any right to a lien which the plaintiff might have if there were no homestead right. The homestead was charged

with the payment of the mortgage, and, if the plaintiff has an equitable right to a lien, it must be worked out through the mortgage; in other words, it must be in the nature of subrogation to the rights of the mortgagee. The primary meaning of "subrogation" is the act of putting one person in the place of another, or the substitution of another person in the place of the creditor, to whose rights he succeeds in relation to the debt. Formerly the right of subrogation was limited to transactions between principals and sureties, as, when a surety paid the debt of his principal to the creditor, the surety was entitled to have the full benefit of all mortgages or collateral securities for the debt, both of a legal and equitable nature. It has always been held that a party who, on his own motion, discharges the debt of another, without any agreement with either the debtor or creditor in relation to how he shall be reimbursed, is regarded as a mere volunteer, or, as some of the cases express it, an intermeddler, and is not entitled to the benefit of the mortgage or collateral security held by the creditor. While this may be said to be the rule now observed in courts of equity, yet the ancient doctrine of subrogation has been very much modified in recent decisions. It has been held that the right of subrogation is not founded on contract, but is the creation of equity, and enforced ^{solely} solely for the protection of persons who, by paying the debts of others, should in good conscience be substituted in the place of the original creditor. But now it is held by many of the courts that where a third person pays the debt at the instance of the debtor, and upon an agreement or understanding with the debtor that he shall be entitled to the benefit of the security held by the creditor, equity will compel the debtor to do justly, and will substitute the person who discharges the debt to all the rights of the creditor whose claim the third person has discharged: *Crippen v. Chappel*, 35 Kan. 495; 57 Am. Rep. 187; *Detroit etc. Ins. Co. v. Aspinall*, 48 Mich. 238; *Levy v. Martin*, 48 Wis. 198; *Cobb v. Dyer*, 69 Me. 494; *McKenzie v. McKenzie*, 52 Vt. 271; *Emmert v. Thompson*, 49 Minn. 386; 32 Am. St. Rep. 566; *Baker v. Baker*, 2 S. Dak. 261; 39 Am. St. Rep. 776. Without reviewing these authorities, it is sufficient to say that they fully sustain the rule above announced. In some of them there does not appear to be even an express contract that the substitution shall be made, but the right was enforced because of a mere understanding or expectation of the transfer of the security; in

others the contract was that the mortgage should be paid, and a new one substituted for it; and in others, where new mortgages were made which were held to be invalid, it was held that the person making the payment was entitled to be subrogated to all the rights of the original mortgagee. This principle commends itself to us as eminently just.

2. It is contended with great confidence in behalf of the appellee that the question under consideration is not an open one in this state, and that, following the case of *Bailey v. Malvin*, 53 Iowa, 371, the decree of the district court in this case must be affirmed. The cases are clearly distinguishable. It is true the facts in the two cases are somewhat similar, so far as those ³⁶¹ in the cited case appear. It is stated in the opinion that "the pleadings are very obscurely set out in the abstract." The principle decided in the case is that a debtor cannot pay a note secured by a mortgage, and then reissue it to another, and authorize him to enforce the mortgage, not as against the mortgagor, but as against the other lienholders. In the case at bar no rights of third persons are involved. It is a question directly between the plaintiff and the mortgagor.

3. It is true, as claimed in behalf of the appellee, that she was not directly a party to the agreement that the mortgage should be assigned to the plaintiff. But ought she to be allowed to profit by the transaction without complying with the contract made by her husband and co-obligor with the plaintiff? It appears to us that every equitable consideration forbids it. She is in no position to demand that the satisfaction of the mortgage shall not be disturbed, and her property remain free and unincumbered. If she accepts the benefit of the plaintiff's money, she should be held to abide by the contract, under which the plaintiff made the payment. This is within the principle of the rule announced in *Eadie v. Ashbaugh*, 44 Iowa, 519, and *Davenport etc. Assn. v. North American Fire Ins. Co.*, 16 Iowa, 74.

4. It is insisted in behalf of the appellee that the Brattleboro Savings Bank was not bound to assign the mortgage, and could not have been compelled to do so, and the plaintiff cannot be allowed to treat the transaction as an assignment because Sharman, who was her agent, violated his instructions, and paid the debt. The defendant ought not to be allowed to reap the benefit of the mortgage debt by the plaintiff for any such reason. It is purely a matter of speculation

as to whether the savings bank would have assigned the mortgage. That proposition was not presented to its officers. It would have been a matter of entire indifference ³⁰³ to the savings bank whether it assigned the mortgage without recourse, or delivered it over as paid. The rights of the savings bank are in no manner involved in this action.

The decree of the district court is reversed.

SUBROGATION—MORTGAGE.—Subrogation is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the right of the creditors in relation to the debt. The right of subrogation is independent of any contractual relations, and includes every instance in which one party is required to pay a debt for which another is primarily answerable, and which, in equity and good conscience, ought to be discharged by the latter. It is a creation of equity existing solely for accomplishing the ends of substantial justice, and, being controlled by equitable principles, will be enforced only when there is an equity to invoke, and no innocent person will be injured. To apply the doctrine, one must have paid a debt due to a third person, for the payment of which another was primarily liable, and the person paying the debt must, in doing so, have acted under the compulsion of saving himself from loss, and not as a mere volunteer: *Note to Mobile Ins. Co. v. Columbia etc. R. R. Co.*, 44 Am. St. Rep. 731. Hence, a mere volunteer, who pays off a mortgage without the knowledge or consent of the mortgagor, is not entitled to be subrogated to the rights of the mortgagee under his mortgage: *Campbell v. Foster Home Assn.*, 163 Pa. St. 609; 43 Am. St. Rep. 818. But one who advances money with which to pay off a mortgage, in pursuance of an agreement that he should do so, and that the mortgage should be discharged of record, and a new one given him on the same property for the amount advanced, is entitled to be subrogated to the lien of the mortgage: *Baker v. Baker*, 2 S. Dak. 261; 39 Am. St. Rep. 776, and note. The payment of money due upon a mortgage, by one who is not an intermeddler or volunteer, operates as a discharge of the mortgage, or in the nature of an assignment of it, as may best serve the purposes of justice, and the just intent of the parties: *Heisler v. Aultman*, 56 Minn. 454; 45 Am. St. Rep. 486.

ESTATE OF CONRAD.

[89 IOWA, 396.]

LIFE INSURANCE—PROCEEDS OF POLICY—ASSETS OF ESTATE—DESCENT.—If a policy of life insurance is payable to a beneficiary named therein, or to her "legal representative," upon the death of the insured; or, if the beneficiary is not then living, to her children, or to their guardian, and the only child of the beneficiary dies, leaving two children, and thereafter, but before the death of the insured, the beneficiary dies, the insurance, upon the death of the insured, is not a part of the beneficiary's estate, and, therefore, not liable for her debts, but, by the law of descent, goes to the grandchildren.

DEFINITIONS.—"LEGAL REPRESENTATIVE," in the broadest sense, means one who lawfully represents another in any matter whatever.

INSURANCE—CONSTRUCTION OF CLAUSE AS TO PAYMENT.—A clause in a policy of life insurance, authorizing payment to the beneficiary's legal representatives, does not authorize payment to his administrator. It contemplates payment to some legal representative appointed by him to receive the money.

ACTION to determine the validity of creditors' claims to the proceeds of a life insurance policy upon the life of the husband of the deceased, Elizabeth P. Conrad. It was determined that the fund did not belong to her estate, and the claimants appealed.

A. M. Antrobus, for the appellants.

Newman & Blake, for the appellees.

397 ROTHROCK, J. The facts necessary to determine the rights of the parties are as follows: On the third day of February, 1877, John Conrad procured from the Connecticut Mutual Life Insurance Company a paid-up policy on his life, for the sum of four hundred and forty-nine dollars. The said policy was in these words:

"This policy of insurance witnesseth, that the Connecticut Mutual Life Insurance Company, in consideration of the representations and declarations made to them in the application for this insurance, and of the sum of one hundred and seventy-five dollars, receipt whereof is hereby acknowledged, do hereby insure the life of John Conrad (the insured), for the term of his natural life, in the sum of four hundred and forty-nine dollars, for the sole use and benefit of Elizabeth P. Conrad (the assured), wife of said insured; the sum to be paid at the office of this company in Hartford, Connecticut, to the said assured or her legal representatives, within ninety days after due notice and satisfactory evidence of the death of said insured during the continuance of this policy; or, if the said assured be not then living, the said sum shall be payable as above to her children, or to their guardian, if under age. That this policy shall not be assigned; but the same may be surrendered to this company and discharged at any time by the assured if living, and, after her death, by the beneficiary hereof, under the statutes of Connecticut."

At the time the said insurance was effected, Conrad was forty-two years old, and his wife, Elizabeth P. Conrad, and one child, named Lilly Conrad, were living. The daughter

married one Parsons, on February 2, 1883. She died in February, 1888, leaving two children surviving her. Elizabeth P. Conrad died March ²⁹ 23, 1890. John Conrad died May 4, 1891. All of said persons died intestate. C. B. Parsons was appointed guardian of the children of Lilly Conrad Parsons, deceased, on the third day of June, 1891, and he was appointed administrator of the estate of Elizabeth P. Conrad on July 10, 1891. The insurance company paid the amount of the insurance to the administrator and guardian, and he receipted for the same both in his capacity as guardian and administrator. The demands presented by the creditors, and for the payment of which it is claimed the insurance money should be appropriated, are for medical attendance to Elizabeth P. Conrad and for her funeral expenses.

The ultimate question for determination upon the foregoing facts is, whether the proceeds of the policy are part of the estate of Elizabeth P. Conrad. If assets of her estate, there can be no doubt that the money is liable for her debts: *Smedley v. Felt*, 43 Iowa, 607; *Murray v. Wells*, 53 Iowa, 256. The district court held that the fund did not belong to the estate of Elizabeth P. Conrad. We think that the holding was right. It is expressly provided in the policy that, if the assured be not living at the time the policy becomes payable, the amount thereof shall be payable to her children. There was no authority to make payment to the administrator of her estate in any event. The clause authorizing payment to "her legal representatives" does not mean payment to their administrator. It contemplates payment to some legal representative appointed by the wife to receive the money for her. There can be no other meaning attached to the expression "legal representatives," because it is expressly provided that, if the assured be not then living, payment shall be made to the children or their guardian. "Legal representative," in the broadest sense, means one who lawfully represents another in any matter whatever: *Anderson's Law Dictionary*, 883. As Mrs. Conrad died before her ²⁹ husband, and, by her death, all her interest in the policy was extinguished, the creditors of her estate have no claim upon the fund.

But it is insisted that as there were no children living at the time of the death of Mrs. Conrad, or when the policy became payable, the fund did not pass to the grandchildren,

because they are not named as beneficiaries. In such case it should be the policy of the law to dispose of the fund according to the law of descent. The case of *Continental Life Ins. Co. v. Palmer*, 42 Conn. 60, 19 Am. Rep. 530, is in all its essential facts like the case at bar, and it was there held that a transmissible interest vested in the children upon the issuing of the policy, and that the child of the deceased child took by descent the interest of its parent, and was entitled to a portion of the fund which the parent would have received if living.

Counsel for the appellants cites us to the case of *United States Trust Co. v. Mutual Benefit Life Ins. Co.*, 115 N. Y. 152, where, in a case much like that at bar, it was held that the grandchildren did not take any interest in the policy nor the fund arising therefrom. Our examination of this and other cases cited leads us to a different conclusion. We think that, as the wife was not living when the policy matured, the money due thereon was no part of her estate, and that, as the children were named in the policy as beneficiaries, the fund passed down the line of descent to the grandchildren. It seems to us that this conclusion accords with the spirit of our laws upon life insurance. It is a provision made for the family, and is exempt from the payment of the claims of creditors of the insured: Code, sec. 1182. As the wife in this case did not live to acquire any right to the fund, it is surely in accord with the intent of the assured that it should pass to the grandchildren by the law of descent.

The judgment of the district court is affirmed.

LIFE INSURANCE—DEATH OF BENEFICIARY BEFORE THE INSURED, AND ITS EFFECT UPON THE PROCEEDS OF THE POLICY.—If the beneficiary named in an insurance certificate dies before the insured, no interest in the fund vests in the beneficiary, and her heirs will inherit no part of the fund by virtue of their relationship: Note to *Haskins v. Kendall*, 158 Mass. 224; 35 Am. St. Rep. 492. According to the great weight of authority, a policy of life insurance creates a vested interest in the beneficiaries therein named. So, if a wife procures a policy upon the life of her husband, payable to her if living, if not, to her children, and both she and one of the children die before the husband, a transmissible interest vests in the children upon the issuing of the policy, and the heirs of the deceased child take by descent its interest, and are entitled to a portion of the amount assured: See monographic note to *Hooker v. Sugg*, 11 Am. St. Rep. 722, on results of the death of a beneficiary before the death of a person whose life is insured. A policy of life insurance may be made payable to the devisees of the deceased, as designated in his last will and testament, but, if the insured dies intestate, the avails of the insurance will descend to his wife and heirs, or their assignee,

the same as any other property or chose in action: *Newman v. Covenant Mut. Ins. Assn.*, 76 Iowa, 56; 14 Am. St. Rep. 196, and note. Upon the death of a member of a benefit society, the sum payable to the beneficiary named in the certificate cannot be considered as part of the deceased member's estate, nor recoverable by his administrator as assets, unless such administrator happens to be the appointee: Note to *Rollins v. McHatten*, 25 Am. St. Rep. 264.

"LEGAL REPRESENTATIVE."—The meaning of this term, when found in instruments other than those relating to the administration of estates, or the affairs of deceased persons, depends upon the intention of the party using it, and is to be gathered, not always from the instrument itself, but as well from the attending circumstances. Thus, a power to sell given to a trustee or his "legal representative," in a deed of trust, cannot be exercised by the administrator of the trustee, but only by his successor in the trust: *Warnecke v. Lembo*, 71 Ill. 91; 22 Am. Rep. 85.

GILMAN LINSEED OIL COMPANY v. NORTON.

[89 IOWA, 434.]

SALES—POSSESSION—TITLE.—The mere possession of chattels, without other evidence of property or authority from the true owner to sell, does not enable the possessor to pass title, though he is a dealer in that class of property.

SALE BY AGENT WITHOUT AUTHORITY.—If one advances money to another to buy flaxseed for him, and to hold it as his agent, under an agreement vesting the title at once in the principal, without any condition, and binding the agent not to buy or sell flaxseed to any one but the principal, a sale, by the agent, of seed so purchased, to a third person, without the principal's knowledge, conveys no title, though the agent is a dealer in wheat and other grains.

ESTOPPEL—SALE BY AGENT WITHOUT AUTHORITY.—One who intrusts the possession and control of personal property to an agent, who sells it without authority, and without the knowledge of his principal, is not estopped from claiming it in the hands of an innocent purchaser without notice, though the agent was a dealer in property of like character.

ESTOPPEL—SALE BY AGENT WITHOUT AUTHORITY.—The fact that one who intrusts the possession and control of personal property to an agent who sells it without authority, and without the knowledge of his principal, attempts, after receiving information of the sale, to procure a settlement with the agent for its value, and makes no demand of the buyer therefor until after suit is brought against him, does not estop the principal from asserting his claim against the buyer for its value.

ACTION to recover the value of a quantity of flaxseed alleged to have been wrongfully converted by the defendants to their own use. There was a judgment for the plaintiff and the defendants appealed.

H. G. McMillan, J. M. Flower and T. M. Stuart, for the appellants.

J. H. Parson and E. Y. Greenleaf, for the appellees.

⁴³⁹ ROBINSON, C. J. In the year 1889 the plaintiff was engaged in business in Gilman, in the state of Illinois, and E. M. Lamar & Co. were doing business at George, in this state. In March of that year the plaintiff entered into an agreement in writing with Lamar & Co., by which the former agreed to furnish to the latter one thousand bushels of flaxseed, for the purpose of having it loaned to farmers for use as seed, ⁴⁴⁰ for the purpose of procuring the product of the seeding. Lamar & Co. were to loan the seed to farmers for the purpose stated only, for and in the name of the plaintiff, on terms specified in the agreement, taking notes to secure payments for the seed, and making contracts for the product thereof at the rate of twenty-five cents less than the Chicago prices, for each bushel delivered to the agent of the plaintiff at George. Lamar & Co. were to keep an account of their transactions, on books of account which were to be furnished by and remain the property of the plaintiff, and to make reports to it when demanded. They were to ship to the plaintiff all the products of the loaned seed which they should receive, under the contracts with the farmers, and were not to loan, sell, or buy any flaxseed during the continuance of the agreement for any one excepting the plaintiff without its written consent. They were to receive, as their only compensation for services rendered in performing the agreement on their part, the sum of five cents per bushel for the flaxseed bought for and shipped to the plaintiff. The agreement also contained a paragraph in words as follows: "It is further mutually agreed that all seed purchased under the agreement is from the time of such purchase the sole and absolute property of the party of the first part [the plaintiff], and that the party of the second part [E. M. Lamar & Co.], has no right or interest in, or lien on, the same, save only for money they have actually advanced, and that, so long as it remains in their actual possession, they hold it only as the agent of the party of the first part." There was also a provision for the payment of a commission for purchasing seed not under contract, but it is not involved in this case.

In the latter part of the year 1889 Lamar & Co. purchased flaxseed under that agreement with money furnished by the plaintiff. In November, 1889, they shipped to the defendants in Chicago two carloads of ⁴⁴¹ flaxseed, and drew on them for nearly the amount of its value. The flaxseed was received by the defendants and sold, and the drafts were

paid. The seed so received and sold was purchased by Lamar & Co. under their agreement with the plaintiff, with its money, and they had no lien upon it for any purpose. The defendants claim that they received and sold the seed only as brokers and commission merchants, acting for the shippers, and receiving a commission for their services, and that they did not purchase it on their own account. It appears that in December, 1888, they arranged with Lamar & Co. to furnish them two thousand dollars, for use in their grain and seed business, and the next year the amount was increased to three thousand dollars. Shipments were made by Lamar & Co. to the defendants to the amount of thirteen thousand dollars, and drafts to the amount of sixteen thousand dollars were drawn on them and paid, leaving a balance due from Lamar & Co. to the defendants of three thousand dollars. When the shipments in question were made, the drafts drawn against them were charged to Lamar & Co., and the proceeds of the shipments were credited to them.

1. The defendants contend that the agreement between the plaintiff and Lamar & Co. was in the nature of an extension of credit, and that the latter were charged with the cash advanced them, and received credit only when the flaxseed was delivered in Gilman; that they were required to guaranty weights and quality, and that the plaintiff reserved the right to refuse any flaxseed if the weights and quality were not satisfactory. The claims thus made are not supported by the evidence. It is true that Lamar & Co. guaranteed the weights at Gilman, and that they were responsible for damages which should result from shipping inferior, dirty, or unmerchantable seed, but the ⁴⁴³ right to reject seed was not reserved to the plaintiff. On the contrary, the title to all seed purchased under the agreement vested in it at once, and the obligations in regard to weight and quality of seed placed upon Lamar & Co. were designed to secure a faithful performance of the agreement on their part, or to require them to make good the loss which should result from their failure to do so. The transfer of title did not depend upon any condition, and the transaction was not, in any sense, a conditional sale of property; and section 1922 of the code, which requires sales, contracts, and leases, wherein the transfer of title or ownership of personal property is made to depend upon any condition to be in writing and recorded, to be valid against certain creditors and purchasers without notice,

has no application: See *Van Sandt v. Dows*, 63 Iowa, 594; 50 Am. Rep. 759. The flaxseed, when shipped to the defendants, belonged to the plaintiff, and Lamar & Co. had no authority to divest it of its title by selling the seed to others. It is said that for a time the plaintiff was unable to receive flaxseed; that Lamar & Co. had filled their bins and were compelled to ship some of their contents away. But, if that be true, it gave them no right to ship in their own name, and sell it as their own.

2. It is contended that the plaintiff is estopped to deny the right of Lamar & Co. to sell the seed, for the reason that it had given them the possession and control of it, and the apparent right to treat and dispose of it as their own. The plaintiff did not authorize Lamar & Co. to ship the flaxseed to anyone but itself, and it did not know anything of the shipments until after they were made. If it is estopped to claim the seed, it is because Lamar & Co. were buying wheat and other grain, and selling it on their own account. But, in our opinion, that fact alone was insufficient to bind the plaintiff by selling the seed in question. "The mere possession of ⁴⁴³ chattels by whatever means acquired, if there be no other evidence of property, or authority to sell from the true owner, will not enable the possessor to give good title": *McNeil v. Tenth Nat. Bank*, 46 N. Y. 329; 7 Am. Rep. 341; *Ballard v. Burgett*, 40 N. Y. 814; *McGoldrick v. Willits*, 52 N. Y. 617; *Barnard v. Campbell*, 55 N. Y. 462; 14 Am. Rep. 289; *Sanders v. Keber*, 28 Ohio St. 640; *Oshorn v. McClelland*, 43 Ohio St. 307; *Reed v. Upton*, 10 Pick. 522; 20 Am. Dec. 545; *Coggill v. Hartford etc. R. R. Co.*, 3 Gray, 545; *Dunlap v. Gleason*, 16 Mich. 158; 93 Am. Dec. 231; *Kohler v. Hayes*, 41 Cal. 455; *Mechem on Agency*, sec. 788; 1 Benjamin on Sales, sec. 437.

Some of the authorities cited refer especially to conditional sales, but are applicable to the question under consideration. The doctrine which they announce is applicable to cases where personal property has been delivered to a person who is engaged in the business of buying and selling such property. In *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332, it is said that, aside from statutory provisions regulating such matters, "it is very clear . . . that the bare possession of goods by one, though he may happen to be a dealer in that class of goods, does not clothe him with power to dispose of the goods as though he were owner, or as having authority

as agent to sell or pledge the goods, to the preclusion of the right of the real owner. If he sells as owner, there must be some other indicia of property than mere possession. There must . . . be some act or conduct on the part of the real owner whereby the party selling is clothed with the apparent ownership or authority to sell, and in which the real owner will not be heard to deny or question to the prejudice of an innocent third party dealing on the faith of such appearances." Following that rule, it was held, in effect, that a dealer in jewelry who received a valuable diamond ring to obtain a match for it, or, failing in that, to get an offer for it, could not by a sale thereof to an innocent purchaser ⁴⁴⁴ divest the owner of his title. In *Conable v. Lynch*, 45 Iowa, 84, it was held that an agent, who received a wagon and other property under a contract to retail them for his principal, could not sell the wagon as his own to an innocent purchaser and receive credit for its value on a debt owing to him by the agent: See, also, *Baehr v. Clark*, 83 Iowa, 313; *Crooker v. Brown*, 40 Iowa, 144.

The case of *Wright v. E. M. Dickey Co.*, 83 Iowa, 464, relied upon by the defendants as being decisive of the question under consideration, is not in conflict with the conclusion we reach. It appeared in that case that a landlord having a lien upon certain grain knew that his tenant was selling it, but was silent, when, by making known his lien, he would have prevented the sale to an innocent purchaser. In this case, however, the plaintiff not only had no knowledge of the intention of its agents to sell, but had no reason to believe that they intended to do so.

8. It is insisted that the plaintiff is estopped, by its conduct subsequent to the sale, to assert ownership of the flaxseed, and that it has in effect ratified the sale. It appears that some attempt was made by the plaintiff to obtain a settlement with Lamar & Co., and that it made no demand upon the defendants for the seed until this action was commenced. There was no ratification of the sale, and the defendants have not been prejudiced in any manner by the delay of the plaintiff in demanding the compensation it seeks to recover in this action. It was justified in endeavoring to obtain redress from Lamar & Co. Having failed in that under the circumstances we have stated, it is not estopped to assert its claim against the defendants. We have stated the facts as the district court was authorized to find them.

With respect to some there was a conflict in the evidence, but the conclusion of the court is so far supported by the evidence ⁴⁴⁵ that it must be treated as conclusive. It rendered judgment in favor of the plaintiff for the value of the flaxseed in dispute, with interest and costs.

We find no cause to disturb that judgment, and it is, therefore, affirmed.

SALES—POSSESSION—SALE BY AGENT WITHOUT AUTHORITY.—Mere possession of another's property affords no evidence that the person having possession has power to sell, and he who purchases or intermeddles with it must see that he is protected by the authority of one who has power to sell. Every one is bound at his peril to ascertain in whom the real title is vested, and, no matter how much diligence he may exert to that end, he must abide by the consequences of any mistake. Hence, purchasing personal property from one who has no right to sell, and holding it to the buyer's use, is a conversion, for which trover or replevin will lie without previous demand or refusal: *Felsian v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 184, and monographic note showing that the owner of a chattel cannot be divested of title without his consent; that in regard to dealings with agents and factors, the bare possession of goods by one, though he may happen to be a dealer in that class of goods, does not clothe him with power to dispose of the goods as though he were owner, or as having authority as agent to sell or pledge the goods, to the preclusion of the right of the real owner; that, if he sells as owner, there must be some other indicia of property than mere possession; and there must be some act or conduct on the part of the real owner whereby the party selling is clothed with the apparent ownership or authority to sell, and which the real owner will not be heard to deny or question, to the prejudice of an innocent third party, dealing on the faith of such appearances. The rule of caveat emptor applies to sales of chattels. The purchaser gets no better title than the seller possesses. A purchaser from a seller, who has no title whatever, gets no title, for the true owner of a chattel can never be deprived of his title thereto without his consent: Note to *Tuttle v. Campbell*, 16 Am. St. Rep. 661. One whose property has been sold without his consent may replevy the specific goods, or sue the purchaser for their value, where the property itself has passed beyond the owner's reach: Note to *Felsian v. Lewis*, 3 Am. St. Rep. 205.

REED v. BROWN.

[89 I.WA, 454]

CONTRACTS—CONSIDERATION.—WHILE A PRE-EXISTING DEBT is a valuable consideration for the transfer of negotiable instruments, it should not be so held as to other personal property.

SALES—CONSIDERATION.—A PRE-EXISTING DEBT is not a valuable or sufficient consideration for the purchase of goods as against a third person from whom the vendor fraudulently obtained them. Such a purchase is not one for value.

SALES—CONSIDERATION.—A PROMISE TO PAY for goods fraudulently obtained by the vendor from a third person is not a valuable or sufficient consideration for the transfer as against the real owner.

ACTION to recover possession of certain articles of merchandise of the value of forty-nine dollars and ninety-three cents. The goods were sold by the plaintiffs and appellees, Reed, Murdoch & Co., to Rae & Harker. Rae & Harker were insolvent, and sold the goods to the defendants and appellants, Brown Brothers. The fraud consisted in Rae & Harker's obtaining the goods while they were insolvent. There was a judgment for the plaintiffs, and the defendants appealed upon a certificate of the trial judge that the case involved a question of law, upon which the opinion of the appellate court was desired.

Frank J. Brown and T. D. Higgs, for the appellants.

C. A. Irwin, for the appellees.

458 GIVEN, J. The certificate upon which this appeal is taken is as follows:

"Where goods are purchased from an insolvent firm, but without any knowledge on the part of the purchaser 459 of said insolvency, to be paid for in part with a pre-existing debt, and a promise on the part of the purchaser to pay the balance on demand, but where the balance is not demanded or paid, and a receipt given to the vendor by the purchaser for the debt, as aforesaid, and when the purchaser is told to take any goods he chooses from a large quantity, and the purchaser takes goods that were obtained by fraud on the part of the vendee, and the defrauded vendor rescinds the sale, does such a purchase constitute a purchase for value, as against the defrauded vendor?"

It is not questioned in the record, or in argument, but that the appellees had the right to, and did, rescind the contract by which they sold the goods in controversy to the appellants'

vendors, Rae & Harker, and would be entitled to recover them from Rae & Harker, if still held by them. Nor is it questioned but that the appellants were innocent purchasers of the goods from Rae & Harker. The sole contention is whether they were purchasers for value, or, in other words, whether the pre-existing debt, and the promise to pay the excess of the value of the goods over the amount of the debt, was a valuable consideration, as against the defrauded vendors, the appellees.

1. We first inquire whether the pre-existing debt was a valuable consideration for the purchase. This question is presented for the first time in this court. Though the amount in controversy is small, counsel urge the importance of the question, and have aided us in its solution by the marked care and ability with which it is presented. Cobbey, in his *Law on Replevin*, section 286, states the law to be as follows: "Goods obtained by fraud, and used to pay a pre-existing debt, may be replevied by the true owner. Where goods obtained by fraud are turned over to pay a pre-existing debt of the vendee, either by actual sale or by pledge, such second vendee is not considered as an innocent purchaser for value, as, if he is compelled to surrender the goods to the true owner, he is in no worse condition than before. In such cases it is well settled that the true owner may retake his property": See *Newmark on Sales*, sec. 205. Of the many cases which we find fully supporting this statement of the law, we cite the following, most of which are directly in point: *Root v. French*, 18 Wend. 570; 28 Am. Dec. 482; *Sargent v. Sturm*, 23 Cal. 359; 83 Am. Dec. 118; *Durell v. Haley*, 1 Paige, 492; 19 Am. Dec. 444; *Linnard's Appeal* (Pa. Sup. Ct., April 5, 1886), 8 Atl. Rep. 840; *Bradley v. Obear*, 10 N. H. 477; *Farley v. Lincoln*, 51 N. H. 577; 12 Am. Rep. 182; *Sleeper v. Davis*, 64 N. H. 59; 10 Am. St. Rep. 377; *Johnson v. Peck*, 1 Wood. & M. 334; *Ruth v. Ford*, 9 Kan. 17; *Thompson v. Rose*, 16 Conn. 71; 41 Am. Dec. 121; *Dickerson v. Tillinghast*, 4 Paige, 215; 25 Am. Dec. 528; *Stevens v. Brennan*, 79 N. Y. 254; *Poor v. Woodburn*, 25 Vt. 234; *Ratcliffe v. Sangston*, 18 Md. 383; *Spira v. Hornthall*, 77 Ala. 137; *Henderson v. Gibbs*, 39 Kan. 680; *Eaton v. Davidson*, 46 Ohio St. 355. In *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573, 42 Am. Rep. 53, this court held that an attaching creditor of a fraudulent vendee parts with no consideration; that he stands in the shoes of the vendee, and cannot hold the property attached, as against the de-

frauded vendor. The reasoning in that case is in harmony with the cases cited above.

The only cases we have discovered, holding contrary to the above-mentioned cases, are *Shufeldt v. Pease*, 16 Wis. 659; *Butters v. Haughwout*, 42 Ill. 18; 89 Am. Dec. 401. The appellants cited *Johnson v. Barney*, 1 Iowa, 531, and *Trustees v. Hill*, 12 Iowa, 463. In the former case it is held, in harmony with the general current of decisions, "that the rights of the holder of a negotiable instrument are the same whether the debt for which it is transferred is pre-existing, or contracted at the time of the transfer." The latter case recognizes this rule as applying to transfers of negotiable paper in payment of a pre-existing debt, and holds that if the transfer is as collateral security for a pre-existing debt, without any new consideration, an assignee of the negotiable instrument is not a purchaser for value, in the usual course of trade. This case has been followed in *Ryan v. Chew*, 13 Iowa, 589; *Rudwick v. Lloyd*, 15 Iowa, 441; 83 Am. Dec. 423; *Union Nat. Bank v. Barber*, 56 Iowa, 559; *Bons v. Tharp*, 63 Iowa, 223.

It being thus settled, as the law of this state, that a pre-existing debt is a valuable consideration for the transfer of a negotiable instrument, the appellants contend that the same rule should apply to the transfer of any chattel property. In considering this claim, we must have in mind the distinction between negotiable instruments and other chattels. It is unquestionably the policy of the law, in the interest of trade and commerce, to facilitate the circulation of commercial paper. The necessities of commerce require that bills of exchange and promissory notes shall be treated as possessing some of the attributes of money; and to give them this attribute, and to give confidence in their reception, they are protected in the hands of an innocent holder for value, before due, from defenses growing out of the dealings of the prior parties. Negotiable instruments are excepted from the rule with regard to other property. It is only he who has a title himself to a personal chattel that can convey it to another; but the bona fide assignee for value of even a stolen note, who takes it innocently, in the course of trade, before due, with due caution, has a valid title, although his assignor had no title whatever. It is these distinctions between commercial instruments and other property that have led the courts to hold that a pre-existing debt is a valid consideration for the transfer of a negotiable instrument: See 3 Kent's Commen-

taries, 79; *Eaton v. Davidson*, 46 Ohio St. 355; *Carlisle v. Wishart*, 11 Ohio, 172; *McLeod v. First Nat. Bank*, 42 Miss. 112.

⁴⁸² In *Swift v. Tyson*, 16 Pet. 1, Justice Story, after reviewing the authorities, and holding that a pre-existing debt does constitute a valuable consideration for the transfer of a negotiable instrument before due, gives the following reasons: "It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass, not only as security for new purchases and advances made upon the transfer thereof, but also in payment of, and as security for, pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But, establish the opposite conclusion that negotiable paper cannot be applied in payment of, or as security for, pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then, by circuitry, to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine, would become of that large class of cases where new notes are given by the same or by other parties, by way of renewal or security, to banks in lieu of old securities discounted by them, which have arrived at maturity? Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts. This question has been several times before this court, and it has been uniformly held that it makes no difference whatsoever, as to the rights of the holder, whether the debt for which the negotiable instrument ⁴⁸³ is transferred to him is a pre-existing debt, or is contracted at the time of the transfer. In each case he equally gives credit to the instrument."

Manning v. McClure, 36 Ill. 490, cited, only determines that a negotiable note taken as collateral security for a pre-existing debt was taken for value. The question under con-

sideration was not involved in that case. We think it is entirely clear, upon reason and from these authorities, that while, from the necessities of the case, and the nature of negotiable instruments, a pre-existing debt is a valuable consideration for their transfer, it should not be so held as to other personal property.

2. It only remains to determine whether the promise to pay the excess of the value of the goods over the amount of the debt is such a valuable consideration as will sustain the transfer. We have seen that, where a prior debt is the only consideration, it is held not to be a purchase for value, because the purchaser parts with nothing; that, if he is compelled to surrender the goods to the true owner, he has his claim against his debtor, and is in no worse position than before. The same reasons apply to this promise to pay the difference. If, as some of the cases hold, *Rae & Harker* had no title to the goods that they could transfer, as against the appellees, then there was no consideration for the promise to pay this difference.

The question certified is whether this purchase by the appellants constitutes a purchase for value, as against the defrauded vendors. Our conclusion is, that the question must be answered in the negative, and the judgment of the district court affirmed.

CONTRACTS—SALES—CONSIDERATION—PRE-EXISTING DEBT.—A sale of an interest in personal property must be supported by a sufficient consideration: *Tuttle v. Campbell*, 74 Mich. 652; 16 Am. St. Rep. 652. The most notable exception to the rule that the vendor can confer by sale no greater title than he himself has, and that the true owner cannot be divested of his title without his consent, except by legal process, or some improvidence of his own, exists in the case of cash, bank bills, notes, checks, and other negotiable instruments payable to bearer, and transferable by delivery in the ordinary course of business to a person taking them bona fide and for value: See monographic note to *Felsian v. Lewis*, 3 Am. St. Rep. 199, discussing the rule mentioned. The extinguishment of a pre-existing debt is a valid and sufficient consideration for the transfer, not only of negotiable instruments, but of other personal property: *Hanold v. Kays*, 64 Mich. 439; 8 Am. St. Rep. 835; *Bank of St. Albans v. Gilliland*, 23 Wend. 311; 35 Am. Dec. 566, and note. For earlier and contrary views, compare note to *Lockwood v. Bates*, 12 Am. Dec. 136; *Bay v. Coddington*, 9 Am. Dec. 372. One who takes goods from a fraudulent purchaser in satisfaction of a pre-existing debt, in good faith and without notice, is a bona fide purchaser for value, and will take a good title against the original owner: Note to *Williams v. Merle*, 25 Am. Dec. 613, but showing cases to the contrary in discussing the subject as to when a purchaser gets title notwithstanding the true owner's claim. A mere gratuitous promise cannot be enforced by

action: *Presbyterian Church v. Cooper*, 112 N. Y. 517; 8 Am. St. Rep. 767. There must be a consideration to support every promise, whether evidenced by writing or not; *Stewart v. Jerome*, 71 Mich. 201; 15 Am. St. Rep. 252. If property is procured by fraud, the owner is not precluded from recovering it from one to whom it has been sold, if the latter made payment therefor with indebtedness due to him from his immediate vendor: *Hurd v. Bickford*, 85 Me. 217; 35 Am. St. Rep. 353.

SHAW AND SCHOONOVER v. JACOBS.

[80 IOWA, 712.]

CHECKS.—THE BLANK INDORSEMENT of a check which is in form a negotiable instrument, and delivery thereof, transfer the title to the indorsee, and the presumption, in the absence of a showing to the contrary, is that the transfer was for a valuable consideration.

CHECKS—BLANK INDORSEMENT AND CREDIT FOR AT BANK, EFFECT OF—CUSTOM OF BANKS.—If a check upon a bank, payable to a payee named or bearer, is indorsed in blank by the payee, who delivers it to a bank with which he does business, and the bank gives him credit for it, the title to the check passes to the bank, and its ownership thereof cannot be negated by proof of any custom of banks to treat such credit merely as a receipt.

SALE—WHAT IS NOT EVIDENCE OF FRAUD.—In an action upon a check given for the purchase price of hogs, there is no evidence of fraud in the sale, though it appears that the payee warranted the hogs to be sound, and that some of them died soon after their removal, if it is not shown that the hogs were infected when sold, of what disease they died, or that the payee knew they were diseased at the time of the sale.

PLEADING—GENUINENESS OF SIGNATURE—EVIDENCE—BURDEN OF PROOF. The genuineness of a signature to a written instrument may be put in issue by a denial in writing, under oath, not made by the person whose signature it purports to be, and the burden, as to that issue, is upon the party making the denial. Evidence to show that the signature in question is not genuine is, therefore, material and admissible.

ACTION to recover the amount of a check drawn by the defendant. The court directed a verdict for the plaintiffs. The verdict was returned as ordered, and judgment was rendered for its amount.

Sheean & McCarn and M. W. Herrick, for the appellant.

Remley & Eranbrach, for the appellees.

⁷¹⁴ ROBINSON, C. J. The check upon which this action is founded is as follows:

"\$362.68.

MONTICELLO, IOWA, Oct. 17, 1890.

"G. W. & G. L. Lovell, Bankers:

"Pay Osborn Brothers, or bearer, three hundred sixty-two, 68-100 dollars.

JOHN JACOBS."

The petition alleges that the payees of the check, in the usual course of business, transferred it to the plaintiffs by writing thereon "Osborn Brothers"; that it was forwarded through a bank in Dubuque to a bank in Monticello, which presented it to G. W. & G. L. Lovell for payment, but that payment was refused, for the reason that the defendant had ordered that payment be not made; and that the check was then duly protested.

The answer alleges that the check was given to pay the purchase price of one hundred and twenty-five young hogs which were sold by Osborn Brothers to the defendant; that, to induce him to purchase the hogs, ⁷¹⁵ Osborn Brothers fraudulently and falsely stated that said hogs were perfectly sound and free from all disease, and warranted them to be so, well knowing at the time that they were not sound and free from disease; that the defendant relied upon such statements and warranty in making the purchase, and believed such statements to be true; that the hogs were not as represented and warranted, but at that time were infected with a fatal disease which caused the death of one hundred and eighteen of the hogs purchased, and rendered the remaining ones worthless, by reason of which there was a total failure of consideration for the check. Damages to other hogs of the defendant and for services rendered and medicines used in attempting to cure the hogs, to the amount of three hundred and fifteen dollars, are also alleged. The answer denies that the plaintiffs are now the owners of the check, and avers that this action is brought for the benefit of Osborn Brothers, who are the sole parties in interest, for the purpose of avoiding the defense pleaded.

1. On the trial, the plaintiffs introduced in evidence the check, the indorsement thereon, and the certificate of protest and rested. The defendant then offered testimony, which showed that the check was given for hogs, as alleged in the answer. That while he was negotiating for them he told one of the Osborns that he would not have diseased hogs on his place for one thousand dollars, and that Osborn said: "They are just as sound as any hogs could be. We have had them for some time, and they eat well and do well." That he also said: "I warrant every pig to be as sound as any pig you ever had on your place." That the price was then agreed upon, and the hogs purchased were selected from a large number in the yard where they were kept. That the pur-

chase was made Wednesday, and the hogs were received by him the next Saturday. ⁷¹⁶ That they began to die, and many of them were dead on the next Wednesday, and that, of the one hundred and twenty-five purchased of the Osborns, one hundred and eighteen died within three weeks from the time they were received. That twenty-three of his hogs not obtained from the Osborns also died, and that he incurred expense and performed labor in caring for the diseased hogs. The evidence on that branch of the case would have authorized the jury to find that there was a total failure of consideration for the check. No witnesses testified for the plaintiffs in regard to their ownership of it, but the defendant stated that he had a conversation with Mr. Schoonover, in which the latter was asked why he did not return the check to the Osborns, and answered: "I did try to return it, but they would n't take it back," and "I don't know whether they are worth anything, but we are secured by their father." In regard to obtaining the check, Mr. Schoonover said: "Osborn came in after banking hours, threw down the check, and asked, 'How is that?'" Schoonover looked at it, and said, "All right," and gave credit for it. When payment of the check was refused by the persons on whom it was drawn, the cashier of the Monticello bank, to which it had been sent for collection, informed Schoonover by telephone of the fact. In response the latter said: "Well, what have I got to do about it?" The Osborns transacted their banking business with the plaintiffs, but refused to take up the check until an attempt should be made to collect it by suit.

The defendant admits, in effect, that if the plaintiffs are innocent purchasers of the check for value, they are entitled to recover its amount, but he insists that in law they are presumed to have taken it for collection only, with the right to return it when payment was refused. For the purpose of showing that such a presumption is authorized, he offered to prove by two ⁷¹⁷ experienced bankers of Jones county that, by general custom of bankers in that county and elsewhere, a check drawn on one bank, when presented to another by one of its customers, was passed to his credit, but that the credit so given was treated as a receipt for the check, and not as a payment. The offered evidence was rejected. The appellant insists that it should have been received, and cites numerous authorities to show that, in the absence of a special agreement, when a bank receives from a depositor a check

upon another bank for collection, if, without fault on the part of the bank receiving it, the collection is not made, that bank has the right to return the check, and cancel the credit for it which was given to the depositor. The custom which the defendant sought to prove would not have affected the right of the plaintiffs to stand upon their agreement with Osborn Brothers. That was shown by the check and the indorsement thereon set out in the petition. The check is in form a negotiable instrument. The transfer of such checks is governed in most respects by the rules applicable to negotiable promissory notes: Tiedeman on Commercial Paper, sec. 440; 2 Parsons on Notes and Bills, 57 et seq. Notwithstanding the fact that the check in suit is payable to bearer, it was transferred by an indorsement in blank. By so indorsing it, the payees assumed the same liability they would have been under by such an indorsement had the check been made payable to order: Tiedeman on Commercial Paper, secs. 257 a, 270; *Bigelow v. Colton*, 13 Gray, 809; 74 Am. Dec. 633; *Smith v. Rawson*, 61 Ga. 208; *Johnson v. Mitchell*, 50 Tex. 212; 32 Am. Rep. 602; 1 Morse on Banks and Banking, sec. 391; Story on Promissory Notes, sec. 132. The effect of the blank indorsement of a negotiable instrument, including delivery, is to transfer the title to such instrument to the indorsee, and the presumption, in the absence of a showing to the contrary, is that it was for a valuable consideration: Tiedeman on Commercial Paper, sec. 256. The effect of the indorsement in question was to transfer to the ⁷¹⁸ plaintiffs the title to the check, not merely to enable them to collect it, but for all purposes. That such was the intent of the parties is shown to some extent by the fact that credit was given to Osborn Brothers for the check. In the absence of evidence that the giving of credit was only for the purpose of keeping a record of the check, a matter of book-keeping, we must presume that it was intended as a payment. The custom of banks, upon which the defendant relies, could not have controlled the agreement of the parties as shown by the indorsement, and evidence to prove it was, therefore, properly rejected. The claim that the plaintiffs are not the owners of the check is not supported by the evidence.

2. A witness for the defendant testified that the indorsement on the check was, in his opinion, in the handwriting of one of the plaintiffs. On cross-examination the witness stated that he was not much acquainted with the handwriting of

Osborn Brothers, and would not attempt to identify it, and that he would not say the indorsement was not in the handwriting of one of the Osborns. There was no attempt to show that the indorsement was made without due authority, and the evidence on that point would have been entitled to but little weight had it been competent and material. It was immaterial, however, for the reason that the party whose signature the indorsement purported to be did not deny it in writing under oath. For that reason it was the duty of the court to treat it as genuine and admitted: Code, sec. 2730; *Robinson v. Lair*, 31 Iowa, 10.

3. It is said the jury might have found from the evidence that the check was procured from the defendant by fraud on the part of Osborn Brothers, and that the burden was on the plaintiffs to show that they procured it for a valuable consideration, without notice of the fraud. But the record does not contain evidence which would ⁷¹⁹ have authorized the jury to find that the fraud alleged had been proven. The evidence fails to show with what disease the hogs died. It does not show that they were infected when sold. It is shown that about the time the sale was made there were some dead hogs in the yard where those sold were kept, and that some of them died soon after they were removed from it. But it is not certain whether the dead hogs in the yard specified died before or after the purchase was made, and if it be conceded that the hogs in controversy were diseased when sold, it is not shown that Osborn Brothers knew that fact at the time of the sale.

We conclude that the evidence was not sufficient to authorize a verdict for the defendant, and that the action of the court in directing a verdict for the plaintiff was right.

The judgment is affirmed.

OPINION UPON REHEARING.

THE COURT. In a petition for rehearing, the appellant urges several objections to the opinion heretofore filed in this case, one of which demands notice.

It is said that the statement of the opinion that, as the signature which appeared to be indorsed on the check was not denied in writing, under oath, by the party whose signature it purported to be, it was the duty of the court to treat it as genuine and admitted, is erroneous. The answer does not deny specifically the genuineness of the signature, but avers

that the check was delivered to the plaintiffs for the sole purpose of collecting it. There is a denial of some of the matters alleged in the petition, although it is at least doubtful if the genuineness of the indorsement is made an issue. We find, however, on further examination of the record, that the district court, in a ruling on the admission of testimony, treated the signature as ⁷³⁰ denied. It is the well-settled rule that the genuineness of such a signature may be placed in issue by a denial not made by the person whose signature it purports to be, and that in such cases the burden of proof as to that issue is upon the party making the denial. Therefore, evidence to show that the signature in question was not genuine was material. The error of the opinion, in assuming that it was not, does not affect the result in this court, however, for the reason that the evidence submitted was not sufficient to authorize a finding that the signature was not genuine.

Other questions discussed in the petition for rehearing were so treated in the opinion that we do not deem it necessary to notice them further.

The petition for rehearing is overruled.

CHECKS—BLANK INDORSEMENT—CREDIT FOR.—A bank check drawn "payable to order" renders the indorser liable to the same extent as the indorser of a bill of exchange: *Barbour v. Bayon*, 5 La. Ann. 304; 52 Am. Dec. 593; and a blank indorsement and delivery of a negotiable instrument vests title in the holder: *Sterling v. Bender*, 2 Eng. 201; 44 Am. Dec. 539; *Beams v. Briggs*, 1 Iowa, 488; 63 Am. Dec. 464; *Caruth v. Thompson*, 16 B. Mon. 572; 63 Am. Dec. 559; note to *Ditch v. Western Nat. Bank*, 47 Am. St. Rep. 388. Such an indorsement makes a bill or note in effect payable to bearer: *Sterling v. Bender*, 2 Eng. 201; 44 Am. Dec. 539. The indorsee of a promissory note is presumed to be a holder for value, and the burden is on the party denying to rebut this presumption: *Poormas v. Mills*, 35 Cal. 118; 95 Am. Dec. 90. A bank receiving a check indorsed in blank from its customer, and giving him credit on its books for so much money deposited, becomes a purchaser, and the title to the check vests in it, and it becomes the debtor of the customer: See monographic note to *Ditch v. Western Nat. Bank*, 47 Am. St. Rep. 390, on the effect of a check indorsed "for deposit."

SALES—FRAUDULENT REPRESENTATIONS.—Though the seller of a diseased horse represents him as sound at the time of the sale, such representation does not vitiate the sale, unless when he made it he knew that the horse was unsound. There is no deceit without a scienter: *Staines v. Shore*, 16 Pa. St. 200; 55 Am. Dec. 492.

INDORSEMENTS on written instruments are independent writings, and can be read in evidence only after proof made that they are signed by the party sought to be charged, or have received his assent in some binding form: *Turrell v. Morgan*, 7 Minn. 368; 82 Am. Dec. 101.

WEBSTER-GRUBER MARBLE COMPANY v. DRYDEN.

[90 IOWA, 37.]

SALUS — CONTRACT TO SELL PARTICULAR THING — RIGHT TO SUBSTITUTE ANOTHER.—Under a contract to purchase a particular selected monument represented to be flawless, the seller cannot, without the consent of the buyer, who has refused to accept the monument selected because of an alleged flaw therein, substitute another perfect monument of like value and character, and then recover therefor on the contract.

ACTION on a contract to recover four hundred and fifty dollars, the purchase price of a particular sarcophagus monument delivered and set up. Judgment for defendant. Plaintiff appealed.

Jayne & Hoffman, and L. A. Reiley, for the appellant.

Blake & Blake, for the appellee.

28 GRANGER, C. J. It will be seen, by reference to the written contract, that it was for the particular stone then in stock and selected. The contract was signed at the home of Mrs. Dryden, and none of the defendants had seen the stone, nor did they have any knowledge of it except through the agent of the plaintiff company who solicited and obtained the order. A defense to the action is based on misrepresentations as to the character of the stone specified. The day after the contract was signed Mrs. Dryden went to the shops of plaintiff, in Muscatine, and she was shown the monument 29 designated in the contract, and she declined to receive it, because it contained a flaw, and was imperfect. She looked over the stock and found a three hundred and fifty dollar monument that she liked, and wanted to change the order and take that. The company declined to make the change, but consented to make changes in the order so that the amount of the purchase should not be reduced. She declined to receive any but the three hundred and fifty dollar monument, and on the next day notified the company in writing that she would not accept the monument specified in the agreement. The secretary of the plaintiff, who was the agent with Mrs. Dryden at the shops, says in his evidence that when the notice was served there had been no work done toward lettering the monument. He says also that the flaw she complained of was not really a flaw, but "I told her we would make it all right; . . . that we would get another stone to replace the one she objected to; . . . that we wanted to make it satis-

factory to her, and I told her we would try to do so; told her we did not propose to sell her an imperfect monument." Thereafter, the plaintiff proceeded with the contract on its part, by putting in a foundation at the grave, and putting thereon a base stone properly lettered. This base stone was the one forming a part of the monument shown Mrs. Dryden at the shops. The plaintiff proceeded to complete a monument of the kind contracted for, and to that end, and to avoid the complaints as to imperfections, it ordered other stones from the quarries in Georgia, polished and lettered them to conform to the contract, shipped them to the cemetery, and would have put them in position but for the interference of the defendants, who had already moved the base and a part of the foundation placed there by plaintiff, and had secured another monument that was in position. It may be well to here state that the record nowhere ⁴⁰ indicates that the defendants ever authorized, by word or act, any change in the contract, as from the stones in the monument when bought, to others, to avoid the objections, and a ground of defense is, that the monument that plaintiff attempted to place in position was not the one purchased. As to what we regard as controlling facts in the case there is no dispute, and they are substantially as follows: A particular monument was purchased, of which complaint was afterward made, and there was a refusal to accept it as it was, or with other stones, that would remove the flaws which were the grounds of objection. Plaintiff, with a view to enforce performance on the part of defendants, did the work and incurred the expense necessary to comply on its part. It, however, used other stones for the part of the monument above the base, and we are to say whether such a compliance will authorize recovery for the contract price. It is a case in which the parties are especially relying on their legal rights. We are satisfied that, before seeing the monument, defendants did not intend to take it if they could avoid it. We are also satisfied that plaintiff, while willing to make changes that would be of no detriment to it, would not do more, and insisted on every advantage the contract gave. Did the contract authorize the change made? We think not. It was not a purchase of a monument of a particular kind, but a purchase of a particular monument of a particular kind—one in stock selected. If the stones were imperfect, there was no sale, for it is agreed that the intention was to

sell a perfect monument. The sale of an imperfect monument for a perfect one would not be a sale of one that was perfect of the same kind. It was the sale of a particular article. If the monument was not imperfect the plaintiff had the right to perform its contract, and recover, but it must perform by delivering the particular thing purchased. If it was imperfect, then the ⁴¹ order was obtained by misrepresentation, and conferred no rights upon plaintiff. So that in either event, whether the change was made to avoid an unfounded complaint as to flaws or to remedy an actual defect, the result is the same. In the case of an actual defect it was the plaintiff's duty to treat the contract as of no force. In the other case it was its duty to disregard complaints and deliver the article sold if it designed a legal enforcement of its rights. The contract provides that the defendants will not countermand the order. Appellant places much reliance on that particular provision, and refers to the case of *McAlister v. Safley*, 65 Iowa, 719. With our disposition of this case, that one has no applicability. The holding there is, that an unconditional contract for the delivery of a monument gives no right of rescission. Plaintiff's right of recovery is not denied on the ground of a rescission of the contract by defendants, but on the ground of nonperformance on its part. There are some complaints as to the admission of testimony, but no disposition of them could affect the conclusion we reach, and it is not important to consider them.

The judgment is affirmed.

SALER.—A VENDEE IS NOT BOUND TO RECEIVE and pay for a thing he has not agreed to purchase: *Pomeroy v. Shaw*, 2 Daly, 270, cited in the note to *Reed v. Randall*, 86 Am. Dec. 313. See, also, the extended note to *Bragg v. Morrill*, 24 Am. Rep. 105.

BURG v. CHICAGO, ROCK ISLAND, AND PACIFIC RAILWAY COMPANY.

[50 IOWA, 103.]

MUNICIPAL ORDINANCES — REASONABLENESS — SPEED OF TRAINS.—A city ordinance limiting the speed of railroad trains to six miles per hour is unreasonable and void when applied to that part of the city added to, and included in, its boundaries after the ordinance was passed, and at a point where no platted streets are open across the track, and where the right of way is fenced on both sides.

MUNICIPAL ORDINANCES PASSED EITHER BY VIRTUE OF EXPRESS OR IMPLIED POWER must be reasonable, consonant with the general powers

and purposes of the corporation, and not inconsistent with the laws or policy of the state.

RAILROADS—LICENSE TO USE TRACK.—The fact that persons have used a railroad track as a thoroughfare for years without the invitation or consent, but with the knowledge, of the company, does not establish a license in their favor to so use it.

RAILROADS—RULES—APPLICATION TO TRESPASSERS.—A rule of a railroad company that the men in charge of extra or delayed trains must keep a sharp lookout for work trains, section men, and others who may be obstructing the track does not apply to trespassers thereon.

RAILROADS—RULES—APPLICATION TO TRESPASSERS.—Rules and regulations adopted by railroad companies for the preservation of its passengers, employees, and trains do not apply to trespassers on the track whose wrongful and negligent acts place them in danger, and the only obligation of the company in such case is, when made aware of the danger, to avoid inflicting injury avoidable by the exercise of ordinary diligence.

EVIDENCE.—BOOKS OF SCIENCE treating of mechanical appliances for stopping trains, and the distance required therefor, which do not give the size of the train, the pressure applied to the brakes, nor the character of the grade, are not admissible to establish a presumption of negligence in the management of the train in question when no negligence is claimed in the equipment of such train.

RAILROADS—NEGLIGENCE—EX PARTE TESTS AS EVIDENCE.—On the issue as to whether an accident could have been avoided by stopping the train after the party injured could have been seen by the engineer in charge, tests made with similar trains under similar circumstances without notice to the injured party are admissible in evidence.

RAILROADS—DUTY TO TRESPASSING CHILDREN.—An engineer in charge of a railroad train is not bound to exercise any care for the safety of children trespassing on the track until he actually sees them. After he discovers them he is bound to assume that they will remain, and must then exercise the highest degree of care to avoid injuring them.

RAILROADS—PERSON ON TRACK—DUTY TO STOP TRAIN.—A railroad engineer has a right to presume that a person on the track will leave it on the approach of the train, and he is under no obligation to stop until he has reason to believe that an object seen by him is a human being, and that it does not intend to leave the track.

ACTION to recover for the death of a child three years old, killed by a railroad train, while playing upon the railroad track. Judgment for defendant. Plaintiff appealed.

Cole, McVey & Cheshire, for the appellant.

Cummins & Wright, and *G. E. McCaughan*, for the appellee.

108 GRANGER, C. J. 1. In the city of Des Moines is an ordinance limiting the rate of speed of trains to six miles an hour. Plaintiff offered in evidence the ordinance. It was excluded under an objection that it was "incompetent, immaterial, and for the reason that the evidence already shows

that the place where the accident happened was so far removed from a crossing as to render the ordinance unreasonable, even if it was in force." When the ordinance was adopted, the place where the accident happened was not in the city of Des Moines, the city having been since, by an act of the legislature, enlarged so as to embrace that place with other territory. It will appear from this fact that the ordinance was not adopted as being, in the judgment of the council, a reasonable regulation for the operation of trains at the point in controversy. It is not to be understood that the ordinances of the city do not apply to it as enlarged; but, in determining the question whether or not the ordinance is so unreasonable as to be of no validity at the point in question, importance may be given to the fact of whether or not the act, at the time of its passage, was designed or intended as having force there, for, if not, the legislative sanction comes from the fact that the ordinance stands unrepealed after the territorial change in the city, rather than from legislative action based upon known ¹⁰⁰ conditions.

How far such a fact should, or might, properly influence a judicial determination of the question of the unreasonableness of an ordinance, as bearing on its validity, is not, perhaps, to be definitely stated, nor would it likely be the same in all cases. At the place where the accident occurred, there was no greater necessity for such a limit on the speed of the train than in very many places outside the city or station limits. East of the point, some two thousand eight hundred feet are brickyards, where there is an opening for men and teams to cross the track. From this point west, some two miles beyond the place of the accident, the defendant's right of way is fenced. It is also fenced through West End addition to the city of Des Moines, which is over twelve hundred feet east of the place of the accident, and in this addition the platted streets do not cross the railway track. Along where the accident happened, on both sides of the track, there are no residences, except that of Burg, it being about a fourth of a mile from any other, and the land is wooded and uncultivated on both sides of the road, except a small piece near the house of Burg. This case comes clearly within the rule and reasoning of *Meyers v. Chicago etc. Ry. Co.*, 57 Iowa, 555; 42 Am. Rep. 50. Some importance is attached to the facts of the platted West End addition and the brickyards crossing just east of it. They are not of such importance as to change

the rule. In the addition there are but a few buildings—seven in all—and, as we have said, the streets, as opened, do not cross the right of way, which is fully protected by its fences. The brickyards crossing is some two thousand eight hundred feet east of the point of the accident, and could not in any way affect the reasonableness of the rate of speed at that point. After leaving the brickyards crossing, if not before, the train had passed the conditions as to settlement and the business of the city ¹¹⁰ which demanded the limit upon train speed that is imposed by the ordinance. The city, as enlarged, is nine miles in width, requiring, under the limitations of the ordinance as to rate of speed, one hour and thirty-five minutes to make the distance, when, without any opportunity for dispute, for a part of the distance the limit is absolutely unnecessary. As is said in *Meyers v. Chicago etc. Ry. Co.*, 57 Iowa, 555, 42 Am. Rep. 50: "The ordinance in question not only places an unreasonable restriction upon the railways themselves, but it unreasonably impedes the whole traveling public." It is, however, urged that the action of the city council is conclusive as to the validity of the ordinance.

The *Meyers* case cited involved the validity of an ordinance in the city of Council Bluffs, which city is under a special charter, which does not, in express terms, grant to the council power to regulate the speed of trains, but the authority so to do is implied from other express powers granted. The city of Des Moines is incorporated under the general incorporation laws of the state, and the law in express terms confers authority upon cities incorporated under it to regulate the speed of trains within their limits. It is said that the power of courts to inquire as to the reasonableness of such ordinances is limited to cases in which the ordinances are adopted under an implied authority. In the *Meyers* case the authority of the court to determine the reasonableness of the ordinance is not questioned. The case, however, cites as authority the rule announced in 1 Dillon on Municipal Corporations, section 319, that: "In this country the courts have often affirmed the general incidental power of a municipal corporation to make ordinances, but have always declared that ordinances passed in virtue of the implied power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state." The citation is but a recognition

111 of the rule of such interference by the courts where the action of the council is upon implied authority only. Its only application to this case is that it does not announce the rule as applicable to cases of express as well as implied authority, leaving, perhaps, the inference that in cases of express authority a different rule might obtain. It is true that the rule as stated in *Dillon on Municipal Corporations*, because of the specification as to implied powers, would seem to exclude from its operation cases in which the ordinances were adopted under express authority. Such a rule obtains in statutory and perhaps, to a greater or less extent, in general legal interpretations. Counsel for appellant cite numerous authorities, some of which support the rule of their contention, while others, as we view them, do not. No less can be said than that the authorities are in conflict. In the case of *Town of State Center v. Barenstein*, 66 Iowa, 249, which was a criminal prosecution for the violation of an ordinance licensing peddlers, adopted under an express authority, this court said: "The power to regulate and license peddlers is unquestioned. It is expressly conferred by section 463 of the code. But the power can be exercised only under an ordinance; and if the ordinance is passed for such purpose, and is such that the court must, upon a mere examination of its terms, declare it unreasonable, it is void." The case cites, for its support, *Dillon on Municipal Corporations*, section 254, which in the fourth edition is section 320, following the one heretofore quoted from, and the two sections are designated as "on the same subject." It will thus be seen that this court is committed to a broader rule than that of appellant's contention. As bearing on the case, see *Gray v. Iowa Land Co.*, 26 Iowa, 387; *Williams v. Carey*, 73 Iowa, 194; *Hayes v. City of Appleton*, 24 Wis. 542; *Clason v. City of Milwaukee*, 80 Wis. 316. *Evison v. Chicago etc. Ry. Co.*, 45 Minn. 370, is a 112 Minnesota case, and its similarity to this case is quite striking. The authority to the city council to regulate the speed of trains was expressly granted. We quote the following from the opinion: "A mere statement of these facts ought to be conclusive that, as applied to this part of defendant's road, the ordinance is so manifestly unnecessary to the protection of health and property that no two minds could reasonably differ upon the question. According to the map, which is made part of the record, the limits of the city must be about nine miles in length by seven in breadth, embracing much

land that is not even platted, and hence presumably unimproved, or else devoted to purely agricultural purposes; and it is undoubtedly true that much of that which is platted on paper is in the same condition. To apply uniform, ironclad rules to the whole of this territory, that no train shall run over four miles an hour, is unnecessarily oppressive, and, if obeyed or enforced, would deprive the public of anything like reasonable suburban transportation." We think there was no error in excluding the ordinance under the objection made.

2. A demurrer was sustained to the following amendment to the petition: "That for a long period, to wit, for more than ten years, defendant's roadbed and right of way, from a point west of where the accident happened to the city of Des Moines, has been used by the public as a thoroughfare to and from said city of Des Moines, which fact was well known to the defendant and its employees; by reason of which it became the duty of the defendant and its employees to use greater diligence in looking out for persons who might be upon the track at this point, than if the defendant had not permitted such use of its tracks without objection, as it had done for said period of time." It will be seen that the first part of the amendment states facts, and the latter part conclusions therefrom. The ¹¹³ argument is to the effect that the amendment pleads a license on the part of the company to the public to use the track, and hence additional care on the part of the company is required. The facts stated are not such that the law would infer a license from them. The conclusion stated in the amendment, which indicates the intention of the pleader, is not the equivalent of a license. It states a legal conclusion resulting from a mere use of the track without invitation, or even consent. Such facts do not show a license, nor do they create obligations on the part of the company toward persons so using the track. We are not saying that there might not be such a use of the track as that the assent of the company might be understood or implied therefrom, but no such state of facts is pleaded: See *Richards v. Chicago etc. Ry. Co.*, 81 Iowa, 426; *Masser v. Chicago etc. Ry. Co.*, 68 Iowa, 602. There was an offer of evidence to show such a use of the track as would amount to a license on the part of the company, which was refused. The above considerations will dispose of that question. The offer was not of particular facts, so that the court could judge of their sufficiency for

that purpose, but a mere offer to prove facts that would show a license. The court could rightfully assume that the facts stated in the amendment offered were those relied on, and those were insufficient.

3. Plaintiff filed an amendment to her petition, setting out a rule of the company, as follows: "All extra trains and engines and delayed regular trains must sound the whistle on approaching curves and obscure places, where the view is not clear for at least half a mile, and keep a sharp lookout for all work trains, section men, and others who may be obstructing the track." To the amendment there was a demurrer, which the court sustained. The point of contention is as to the application of this rule to this case—that is, ¹¹⁴ Was it intended to apply to persons wrongfully on the track? We think the universal current of authority is that it has no such application. In the case of *Railway Co. v. Howard*, 19 Am. & Eng. R. R. Cas. 98, in determining the admissibility of such a rule in evidence, it is said: "Rules and regulations adopted by the company for the preservation of its passengers and trains do not apply to trespassers on its road whose own wrongful and negligent conduct places them in danger; and the only obligation or duty on the part of the company or its employees in such a case is, when made aware of the danger, to avoid inflicting any injury if, by the exercise of ordinary diligence, they could prevent it." It is hardly to be doubted that the company had in view, in promulgating the rule, only such obstructions to the track as might arise from the conduct and management of the road, and not obstructions not in reason to be anticipated: See *Harty v. Central R. R. Co.*, 42 N. Y. 468; *Philadelphia etc. R. R. Co. v. Spearen*, 47 Pa. St. 300; 86 Am. Dec. 544.

4. The American Mechanical Dictionary was, by the testimony of the state librarian, shown to be a standard scientific authority on the subjects treated therein. An extract therefrom was offered in evidence, treating of the mechanical appliances for stopping trains and the distance required therefor, and, against objections, admitted; but the court took occasion to comment on the value of the extract as evidence, saying that it was "not very satisfactory evidence"; stating that it did not give the size of the train, the pressure applied to the brakes, the character of the grade—in short, that it did not appear what the conditions were under which the trains were stopped. The court admitted the extract under

the rule of the statute providing that historical books, books of science or art, etc., when made by persons indifferent between the parties, are presumptive evidence of facts of general ¹¹⁵ notoriety or interest: Code, sec. 3653. Whether or not the distance in which a train may be stopped under given conditions is a fact of such general notoriety or interest that such evidence would be competent we need not consider, for we think the reasons given by the court why the evidence was not very satisfactory were reasons why it should have been excluded. The negligence of the defendant was not claimed to be in the equipment of its train, so that no question arises as to that fact. The entire absence of facts showing the conditions under which the trains spoken of in the extract were stopped rendered the extract of no avail whatever in determining the fact of negligence in stopping the train in question. The facts disclosed were not such as could give to the extract the force of presumptive evidence as contemplated by law. If it should not have been admitted, the remarks of the court in disparagement of its value could not have been prejudicial.

5. The plaintiff offered in evidence a record of tests made between the Westinghouse brake and Evans driver brakes, and also one of the tests made at twelve principal cities of the United States, giving results of the Westinghouse brake. These records were contained in the *Railway Age*. The offer was made under the provisions of code, section 3653. The basis of the offer was the testimony of one Webster, who is a locomotive engineer. He said he was acquainted with the publication; that it was "recognized among railway men as a standard authority on railway matters; as a scientific journal on matters of which it treats—railways and their appliances." His further testimony shows that the paper is devoted to the advertisement of numerous mechanical devices that are patented from time to time, that it gives puffs in reference to various contrivances that are used in mechanics, and that it contains recommendations of various mechanical ¹¹⁶ devices. The witness said: "I would not want to swear to it any more than I would to the *Iowa State Register*. It sustains the same relation to railroads as the local paper does in local matters. It contains editorials on different subjects. It gives the opinion of the author upon this and that subject." The publication is not an historical work, nor a book of science or art. It undoubtedly contains articles of

historical value, as well as those pertaining to science and art. This is true of very many leading periodicals of the country that do not come within the purpose of the statute, giving to works of history and books of science and art a value in judicial proceedings, which is the equivalent of a legal presumption. The court properly excluded the publication.

6. Two very important questions in the case are these: 1. The distance at which the children could first be seen by the engineer of the approaching train; and 2. The possibility of stopping the train, so as to prevent the accident, after the situation was or should have been known. Before reaching the point of the accident, there is a curve in defendant's road, and it is when coming out of or around this curve that the point can first be seen. As to the distance at which the point can be so seen, the parties are in dispute; the plaintiff claiming that the engineer saw the children a distance of seven hundred and forty-three and two-tenths feet, and the defendant that they could not be seen at a greater distance than from five hundred to five hundred and fifty feet. The engineer admits that he saw the children at a distance of from four hundred to four hundred and seventy-five feet. The accident occurred in October, 1890. In January, 1891, and again in May, 1891, the defendant made certain tests with trains to ascertain the distance at which the children could have been seen, and also the distance required to stop the train when running at the same ¹¹⁷ rate of speed as the train did on the day of the accident. The tests made in May were with the same train in use when the accident happened. Those in January were made with a train claimed to be substantially like the other. These tests were made without notice to the plaintiff. The court admitted proofs of these tests against the objections of the plaintiff. It is urged that the conditions were so dissimilar as to render the tests incompetent. It is true that they were not identically the same, but they were essentially so. It was at the same place, on the same track; in one case with the same train, and, in the other, with one so like it that it is not to be seen that it would not furnish a test sufficiently correct to be an aid in determining the fact to be found in the case. It is urged that the accident occurred about noon, and that the January test was made in the afternoon, when the sun would prevent seeing an object on the track. That does not appear

to have been true in fact. So far as the record discloses, the opportunity for seeing at the different times was equally good. In fact, we do not discover a difference as to conditions in any substantial particular. We think these tests were proper, and, if fairly made, the facts thereby disclosed would be of great value in reaching a conclusion. We cannot adopt appellant's view that it was an attempt to "manufacture ex parte testimony." Instances are without number where, pending litigation, the parties have made test measurements and trials relating to facts in dispute, and they have been regarded as competent, and a quite satisfactory class of evidence upon questions of fact, and we are not favored with a suggestion against the reason of such a rule. Upon the question of admissibility of such evidence, courts have never assumed that it was "manufactured," in the sense in which the term is used in argument, and for that reason excluded it, even where the acts are those of the parties. Parties are made competent witnesses,¹¹⁸ and their testimony is admitted with the same legal presumptions as that of other witnesses; but, in weighing the evidence, all facts, including interest, that might reasonably affect its value, are to be considered. It is not the law that in making such tests, measurements, etc., the opposite party is entitled to notice in order that he may be present. It is the right of each party, in the preparation for trial, to take all legal steps in the way of being able to meet the issues of fact by proofs; and, in preparing for the presentation of his evidence, no notice to the adverse party is required. It is not for us to say, because this is a corporation owning the road and means for making the tests, that it is exempted from the general rule—that is, that it shall not use these means with a view to demonstrating the truth. When they are used, the circumstances of their use, including motives for, and all indications of, an unfair or impartial use, are matters that may lessen the value of the testimony. The case of *Klanowski v. Grand Trunk Ry. Co.*, 64 Mich. 279, is relied upon by appellant. It is not a case of authoritative force, because of a division of the court; it appearing that but two of the four judges sitting concurred upon the particular point cited. We are referred to the case of *Brooks v. Chicago etc. Ry. Co.*, 81 Iowa, 504, upon a question of experimental evidence, wherein the plaintiff made the test, sustaining the right to do so. In *Nosler v. Chicago etc. Ry. Co.*, 73 Iowa, 268, the same rule was held in favor of the plaintiff against

the company, and under circumstances equally doubtful as to a similarity of facts. We think the following statement in *Lake Erie etc. Ry. Co. v. Mugg*, 132 Ind. 168, is quite to the point: "Under some circumstances this class of testimony may be very satisfactory, but, unless the experiments are shown to have been made under essentially the same conditions, the tendency is to confuse and mislead, rather than enlighten, the jury." While ¹¹⁹ the conditions need not be identically the same, they should be essentially so; and the important fact to have in view in passing upon the admissibility of such testimony is, Will it aid, rather than confuse, the jury in reaching its conclusions? With that as the rule, we think the testimony in this case was properly admitted. It may be added that the court, in a very appropriate instruction, guarded against ill effects from the evidence because of varying conditions.

7. The following instructions given by the court are made a ground of complaint in a single branch of the argument: "5. You are instructed that when and after the engineer saw the object upon the track, and discovered that the object seen was the deceased, it became his duty to use all the care and diligence that an ordinarily prudent and careful person would have used, under the circumstances in which he was then placed, to stop said train in time to save the life of said Peter Burg, Jr; and, if you shall find that he did use such care and diligence in trying to stop said train, there was no negligence in stopping said train for which the defendant can be held liable." The next instruction (sixth) states the opposite of the rule, to the effect that if he failed to use such care and diligence he would be negligent and the defendant liable. The following is the seventh instruction: "If you shall find from the evidence that the engineer, when he first saw the deceased upon the track, honestly thought it was an inanimate object, or was in honest doubt whether the object seen was a human being, then, and in that case, you are instructed that it did not become his duty to thereupon stop his train; that such duty only arose when he discovered that the object seen by him was a human being, in such a position as gave the engineer no reason to expect that the person would remove from the position of danger he was then in." It will be well, in this connection, to state the rule as to the diligence ¹²⁰ required of the engineer to know of the presence of the children on the track. The children were, in a

legal sense, trespassers. They went upon the track, and sat down to play. The engineer was not bound to exercise any care with reference to such persons, and was under no obligation to act for their safety until they were actually discovered. *Masser v. Chicago etc. Ry. Co.*, 68 Iowa, 602, was for the killing of a boy eleven years old, who, with another, had gone upon the track, and was "playing or lounging there." It is said in the opinion by Chief Justice Adams: "But the plaintiff contends that the boy might, and should, have been seen sooner. It seems not improbable that he might have been seen a little sooner, but no locomotive engineer is bound to watch out for trespassers on the track. The company does not owe trespassers that kind of care. This has been settled by repeated adjudications." The case cites a number of authorities on the question, and the rule is an undoubted one. The settled rule being that the duties of the engineer with reference to saving the lives of the children commenced when he actually knew of their presence on the track, we may inquire as to the correctness of the rule stated in the instructions. It is said that the instruction "told the jury that those in charge of the train were only required to use ordinary diligence in trying to stop the train, and save the lives of the children, after they saw the children, and knew they were human beings." As we interpret the statement in argument, it does not state the rule of the instruction. The rule of the instruction is that when the child was discovered (and this, under the law, was when the engineer became charged with diligence) he must use all the care and diligence that an ordinarily careful and prudent man would have used, under the circumstances in which he was then placed, to stop the train. What is the care and diligence that a reasonably careful and prudent man ¹³¹ would have used under such circumstances? Not a mere ordinary effort to stop the train, but the use of every means at his command—an exercise of the highest degree of care and diligence. Such an effort or exercise of care would be the natural promptings of an ordinarily prudent man under such circumstances. The law requires, at all times, that persons should act with reasonable care and diligence; but what acts will constitute reasonable care and diligence depends upon the circumstances in different cases, and, as circumstances vary, so will requirements as to reasonable care and diligence. In another instruction the court explained the rule,

so that its proper application by the jury is not doubtful. The complaint as to the seventh instruction is that under it "the engineer might have believed the objects he saw were children, but yet entertained some doubts that they were," and that the jury was told that "the engineer was under no obligation to stop the train until he knew they were children." The gist of the instruction is that the engineer was not required to stop his train until he knew that the object on the track was a human being, and then only when he had reason to believe it would not leave the track. The phrase as to an honest doubt does not change its effect. It is not the law that, when a human being is discovered on the track, an engineer must stop his train, and much less so when he merely sees an object as to which he has doubts. But when it is discovered, and he has reason to believe that for any reason it will not leave the track, he must stop the train, if necessary, for its safety. An engineer may rightfully presume that a person on the track will leave it on the approach of a train, until the contrary is in some way manifested. Of course, when the engineer knew the fact of these small children being on the track, he had sufficient reason to know that they would remain, and he was at once charged with the highest ¹²³ degree of care in their behalf; and this is the theory upon which the cause was submitted. The occurrence was sadly unfortunate, but the misfortune is not the fault of the railroad company. Its track was made a playground by the children, probably without the fault of any one, as they were themselves under years of discretion. The misfortune does not, of itself, create a liability for damages. It was really, in view of the circumstances, unavoidable. Had the court, at the close of plaintiff's direct evidence, directed a verdict for the defendant, its action would not have been disturbed, as there was absolutely a failure to show negligence on the part of the defendant. Other questions argued are controlled by our discussions, to some extent, and as to others we find no error, and they are not of such importance that this opinion should be extended to consider them.

The judgment is affirmed.

MUNICIPAL CORPORATIONS—ORDINANCES LIMITING SPEED OF RAILROAD TRAINS.—An ordinance limiting the speed of trains to four miles an hour is unreasonable: Note to *Bluedorn v. Missouri Pac. Ry. Co.*, 32 Am. St. Rep. 622. An ordinance limiting the speed of railway trains to four miles an hour is void as to a portion of a railway which, although within the city

limits, runs for several miles through fenced agricultural lands, not thickly settled: *Meyers v. Chicago etc. R. R. Co.*, 57 Iowa, 555; 42 Am. Rep. 50.

MUNICIPAL CORPORATIONS—ORDINANCES.—Municipal corporations have implied power to pass ordinances and by-laws reasonable in character and not inconsistent with their charters nor with the general principles of the laws of the land: *City of Turkio v. Cook*, 120 Mo. 1; 41 Am. St. Rep. 678, and note with the cases collected.

WITNESSES.—ADMISSIBILITY OF OPINIONS BASED ON EXPERIMENTS: See *Libby v. Scherman*, 146 Ill. 540; 37 Am. St. Rep. 191.

RAILROADS—DUTY OF TO TRESPASSERS ON TRACK GENERALLY.—When a trespasser upon the track of a railroad, at a place other than a public crossing, is injured by a train, the company is not liable unless the injury was wantonly and willfully inflicted or was the result of such gross negligence as evidences willfulness: *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596; 32 Am. St. Rep. 218. An engineer in charge of a railway train does not owe a duty to trespassers to keep any special lookout for them: *Central R. R. etc. Co. v. Vaughan*, 93 Ala. 209; 30 Am. St. Rep. 50, and extended note; but compare *Atlanta etc. Ry. Co. v. Gravitt*, 93 Ga. 369; 44 Am. St. Rep. 145, and note. See, also, the extended note to *State v. Baltimore etc. R. R. Co.*, 9 Am. St. Rep. 439.

RAILROADS—DUTY TO CHILDREN TRESPASSING ON TRACK.—A railroad owes, with respect to children of tender years and immature judgment, the duty of keeping a reasonable lookout to discover whether they are on its track, as well as to avoid injury to them after they are seen: *Gunn v. Ohio River R. R. Co.*, 38 W. Va. 165; 32 Am. St. Rep. 842, and note; *Bottoms v. Seaboard etc. R. R. Co.*, 114 N. C. 699; 41 Am. St. Rep. 799, and note.

RAILROADS—PERSONS ON TRACK—DUTY OF ENGINEER.—A railroad engineer, who sees a human being walking along the track in front of his engine, has a right to presume, without further information, that he is a reasonable person, and will get out of harm's way before the engine reaches him: *Dennis v. Wilmington etc. R. R. Co.*, 107 N. C. 686; 22 Am. St. Rep. 902, and note. This question is fully discussed in the extended note to *Central R. R. etc. Co. v. Vaughan*, 30 Am. St. Rep. 54.

BAXTER v. ROLLINS.

[99 Iowa, 217.]

PARTNERSHIP—LIABILITY OF FOR LOAN MADE BY ONE PARTNER.—If one member of a partnership has authority to bind the firm for borrowed money, and it is loaned upon his signature, to the credit and for the benefit of the partnership, the firm is liable therefor.

PARTNERSHIP—LIABILITY OF, FOR CONTRACT MADE BY ONE PARTNER.—To bind a partnership, it is not necessary that the contract should be signed by all of the partners, nor, if there is a firm name, that it be used. If the contract is signed by one partner having authority, with intent to bind the firm and so accepted and credit extended thereto, it is binding on the firm.

PARTNERSHIP—CONSTRUCTION OF CONTRACT.—An agreement between parties to carry on a business "for one year, and as much longer as the

parties may mutually desire," providing for the erection of a building, and putting a large sum of money into the business, and, "when the stock is sold, the original investment shall be deducted and the balance divided," creates a partnership for a continuing business, and, in the absence of restrictions in the contract, each partner may exercise the powers usually possessed by partners in binding the firm.

PARTNERSHIP—CONTRACTS BETWEEN—WHO BOUND BY.—All who deal with a partnership are bound by a contract between the partners of which they have knowledge at the time of so contracting, and they are equally bound, if they have been informed of facts that should have led a reasonably prudent and cautious man to make inquiry.

PARTNERSHIP—LIABILITY OF, FOR LOAN MADE BY ONE PARTNER.—If, under a partnership agreement, two of the partners are to furnish all of the money to a certain amount to be used in the business, and a third partner obtains a loan upon a statement that the others have failed to furnish the amount agreed upon, the party advancing the money with knowledge of the original agreement is put upon inquiry as to a subsequent agreement between the partners, by which the two are to furnish but half the amount originally agreed upon, and the partnership is not liable for the loan.

PARTNERSHIP—DEPOSIT OF FIRM FUNDS—LIABILITY OF BANK.—If a firm business is carried on in the name of one partner having general control, deposits made by him in bank are partnership funds until after a partnership settlement, and the bank cannot be made to account to the other partners making advances for money paid out on the checks of the depositing partner, in the absence of proof that the bank has misappropriated the funds to pay his individual debts.

ACTION to recover the balance due on a note signed "C. W. Rollins & Co." Plaintiffs alleged that the defendants were a partnership in the egg business under the management and control of defendant Rollins; that at his request as such partner, the plaintiffs, doing a general banking business loaned to the partnership, to be used therein, three thousand dollars, for which said note was given. Defendants Alice and Ressa Schleiter alone answered, denying any connection with the note or with a partnership under the name of "C. W. Rollins & Co."; denied the authority of Rollins to pledge their credit or borrow any money thereon, and that this fact was known to plaintiffs; that the only business transaction that they ever had with said Rollins was embodied in the following contract:

"This article of agreement entered into this eighth day of October, 1889, and between C. W. Rollins, Mrs. Alice Schleiter, and Miss Ressa Schleiter, witnesseth: That the parties hereto have entered into a partnership for the purpose of carrying on the egg business in Ida Grove, Iowa, preserving eggs with Judd's Egg Preserving Compound, the

business to be carried on in the name of C. W. Rollins, he to attend to all business, and have the general superintendence of the work. That the parties hereto shall put up at once, or as soon as possible, an egg-house in said Ida Grove, Iowa, to be not less than fifty by one hundred feet, two stories high and a basement; and, for the purpose of carrying on the business, the said Mrs. Alice Schleiter and Ressa Schleiter agree to furnish (\$25,000) twenty-five thousand dollars, as needed in the business, and out of that amount money shall be used, as much as is needed, to erect said building, and in the spring said C. W. Rollins shall replace in said fund the one-half of what the building has cost. The said C. W. Rollins is to make no charge for his services, but when the stock is sold, so put down, the original investment shall be deducted, and the balance equally divided, C. W. Rollins to have one-half and the other parties one-half, and any stock and material on hand shall, in the same manner, be owned equally—C. W. Rollins one-half and the other parties one-half. Said contract to continue for one year, and as much longer as parties may mutually desire to continue the business.

"C. W. ROLLINS.

"ALICE SCHLEITER.

"RESSA SCHLEITER."

These defendants also set up a counterclaim for two thousand seven hundred and sixty dollars. Judgment for plaintiffs. Defendants appealed.

Story & Gaines, for the appellants.

H. S. Bradshaw and Warren & Buchanan, for the appellees.

221 GIVEN, J. 1. Appellants' first contention is that they are not liable on the note in suit, because it is not executed in the name of the partnership of which they were members. It will be observed that the contract provides that the business was to be carried on in the name of C. W. Rollins, and that the note is signed "C. W. Rollins & Co." In *Barcroft v. Haworth*, 29 Iowa, 465, it is said: "To bind the firm it was not necessary that the contract should be signed by all the partners, nor, if there was a firm name, that it should be used. If, by the method adopted, it was the intention to bind the firm, and especially when it was so accepted and credit given upon the strength of the firm, it would be equally as binding as though signed in the most formal and regular

manner": See, also, *Seckell v. Fletcher*, 53 Iowa, 380. If Mr. Rollins had authority to bind the defendant firm for this borrowed money, and it was loaned upon the credit and for the benefit of said firm, it is certainly clear that the appellants are liable therefor. There is a dispute as to whether this money was borrowed for the benefit of the defendant firm, and there is a conflict in the evidence upon this subject. The district court must have found that it was borrowed for the benefit of the firm, and, there being a conflict in the evidence, we cannot, under familiar rulings, disturb the finding of the court.

2. Appellants' second contention is that the partnership contract between the defendants is unlike an ordinary partnership, where the right of a partner to borrow money for the partnership of necessity exists. They insist that this was a partnership limited to a single venture, namely, to invest the money furnished by appellants in eggs during the summer, to be sold in the winter of the year for which the partnership was formed, and that only one investment and one sale were contemplated in the contract. We cannot concur in this view of the contract. The amount expended in erecting and fitting up the building, the amount to be furnished by appellants, and the provision that the ²²² contract was to continue for one year, and as much longer as the parties might agree, preclude the conclusion that the purchase and sale of a single lot of eggs was all that was contemplated. The provision in the contract that "when the stock is sold, so put down, the original investment shall be deducted, and the balance equally divided," does not determine the scope or duration of the partnership, but only the manner in which appellants were to be reimbursed, and the profits divided. The partnership contracted between the defendants was not for a single transaction, but for "the carrying on of the egg business in Ida Grove" for one year, and as much longer as the parties might agree. It was a partnership for a continuing business, and, in the absence of restrictions in the contract of copartnership, either partner might exercise the powers usually exercised by partners.

3. The contract provides that, "for the purposes of carrying on the business, the said Mrs. Alice Schleiter and Ressa Schleiter agree to furnish twenty-five thousand dollars, as needed in the business." No provision is made for obtaining money to be put into the business from any other source, and

we think it is evident that no greater sum was to be put into it. The appellants insist that these provisions were a restriction upon the right of Rollins to borrow money on the credit of the firm to put into the business, and that appellees, knowing these provisions of the contract, must be held to have known that he had no authority to borrow the money for which the note in question was given on the credit of the firm or its members. In the view we take of the contract, we think it is entirely clear that under it Mr. Rollins did not have authority to borrow money to put into the business, so long as appellants did not refuse to furnish it as they agreed. The only money to go into the business was that to be furnished by appellants, and no provision ^{was} made for obtaining it from any other source. It is true that appellants only furnished twelve thousand five hundred dollars to be put into the business. They allege and prove that, at the time the last five thousand dollars was furnished to Rollins, it was agreed that nothing additional should be put in. It is also true that appellees had no knowledge of this subsequent agreement, and that at the time Rollins borrowed the money he represented to them, as a reason for doing so, that appellants had failed to furnish the full amount agreed upon in the written contract. "As partners are bound by their own stipulations as between themselves, so all who deal with them are equally bound by them, if, at the time of contracting or trading with the partnership, they knew the nature of their agreement with each other": *Bromley v. Elliot*, 38 N. H. 287; 75 Am. Dec. 183. Appellees, knowing the stipulations of the contract, are bound by it; but, as already stated, they had no notice of the subsequent agreement alleged by appellants.

Under another familiar rule, it is not necessary that they should have been fully informed as to the agreements between the partners. "They will be equally bound, if they have been informed of facts that should have led a reasonably prudent and cautious man to make inquiry": *Bromley v. Elliot*, 38 N. H. 287; 75 Am. Dec. 183; *Livingston v. Roosevelt*, 4 Johns. 251; 4 Am. Dec. 273. Knowing, as appellees did, that, under the written contract, appellants were to furnish all the money to be put into the business, it was certainly sufficient to put them upon inquiry to be told that appellants had failed to furnish the amount agreed upon—an inquiry that would have discovered to them the subsequent agreement by which the amount to be furnished was reduced one-half. If appel-

lees had known of this subsequent agreement, they would not have been warranted in loaning the money to Rollins on the credit of the firm. While they did not know of ²²⁴ it, they did know, according to Rollins' statement to them, a fact that should have put them upon inquiry before loaning the money—an inquiry that would have discovered to them that Rollins had no authority to borrow it on credit of the firm. Our conclusion is that the court should have held, as a matter of law, that Rollins had no authority to borrow the money on the credit of the partnership; that appellees, with their knowledge of the written agreement, were bound to take notice of that fact; and that information that appellants had failed to furnish the amount agreed upon did not authorize the loan on the credit of the firm, but was a statement which should have put appellees upon inquiry.

4. The basis upon which appellants ask to recover upon their counterclaim is that the two thousand seven hundred and sixty dollars derived from the sale of eggs was wrongfully deposited with appellees; that, under the contract, said proceeds should have been paid to them; and that appellees, knowing that fact, wrongfully retained said money, and refused to pay it to the appellants. This claim is made upon the theory that the partnership between the defendants was limited to a single transaction—the purchase and sale of a single lot of eggs—and that, upon the sale being made, appellants were entitled to the proceeds to the extent of their advancement. We have seen that such is not our construction of the contract. It was a continuing partnership, “to be carried on in the name of C. W. Rollins, he to attend to all the business, and have the general superintendency of the work.” Rollins transacted partnership business through the plaintiff bank, making deposits therein, and paying for eggs purchased by checks thereon. While the proceeds of sales were to ultimately come to appellants to the extent of their advancements, it was not wrongful for Rollins to deposit such proceeds with the plaintiff bank. As the contract ²²⁵ required the business to be done in the name of C. W. Rollins, the bank kept the account in that name, and credited these proceeds to that account. It is claimed in argument that appellees should have shown what disposition was made of this deposit, and that the evidence shows that it was, in part at least, applied to the payment of the private indebtedness of Rollins. This branch of the case does not seem to have

claimed the attention that the other part did, and the evidence is limited, and leaves it indefinite as to the disposition of this two thousand seven hundred and sixty dollars. It will be observed that appellants do not, in their counterclaim, ask to recover because of a misappropriation of this fund to the payment of private debts of Rollins, but solely upon the ground that under the contract the money belongs to them. We think it cannot be said that this money belonged to them, until there was a settlement that would determine how much of it was proceeds of sales after proper deductions, and that, until this was done, it was money of the partnership. If appellants relied upon a misappropriation of the money to the payment of the individual debts of Rollins, they should have so alleged. We think there was no error in dismissing appellants' counterclaim, but, for the error already pointed out, we conclude that the judgment of the district court must be reversed.

PARTNERSHIP—WHEN BOUND BY LOAN AFFECTED BY ONE MEMBER—Commercial Partnership.—It is so well settled as to hardly call for the citation of authority that, in the case of commercial or trading partnerships, each partner has undoubted authority to pledge the partnership property, or borrow money in its name for partnership purposes, and draw, negotiate, accept, or indorse bills of exchange and promissory notes and checks, and other negotiable securities, or do any other acts incident or appropriate to the firm's business, according to the common course and usages of such trade and business. In other words, it is a legal consequence of every commercial partnership or firm engaged in buying, selling, or exchanging, that each partner is the general agent of the firm, and has power to act for and bind it, in all matters within the scope of the partnership business. And it is within the scope of such business to borrow money, to draw, accept, or indorse bills of exchange or promissory notes. These are the means of conducting such business, common alike to the butcher, grocer, dealer in dry goods, or other commodities, or to the factor, broker, or banker, or in fact to any partnership not confined to one transaction or a particular series of transactions. Whoever associates with another for the purpose of carrying on trade, confers on him, as to third persons who are not notified to the contrary, and who deal with him fairly and in good faith, authority to bind the partnership by contracts or engagements usually incident to the business in which the firm is engaged: *Hoskinson v. Eliot*, 62 Pa. St. 393; *Dowling v. Exchange Bank*, 145 U. S. 512; *Randall v. Meridith*, 76 Tex. 669; *Holt v. Simmons*, 16 Mo. App. 97; *Ulery v. Ginrich*, 57 Ill. 531; *Wagner v. Simmons*, 61 Ala. 143; *Bacon v. Hutchings*, 5 Bush, 595; *Pahlman v. Taylor*, 75 Ill. 629; *Sherwood v. Snow*, 46 Iowa, 481; 26 Am. Rep. 165; *Walsh v. Lennon*, 98 Ill. 27; 38 Am. Rep. 75; *Lanier v. McCabe*, 2 Fla. 22; 48 Am. Dec. 173; *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 33; *National Bank v. Noyes*, 62 N. H. 35; *Martin v. Muncy*, 40 La. Ann. 190; *Wiley v. Stewart*, 122 Ill. 545; *Wiley v. Thompson*, 23 Ill. App. 199; *Seckell v. Fletcher*, 53

Iowa, 230; *Gray v. Ward*, 18 Ill. 32; *Dow v. Phillips*, 24 Ill. 249; *Courtesy v. Baker*, 7 Har. & J. 28; *Smith v. Collins*, 115 Mass. 388.

If the partnership contemplates the periodical or continuous or frequent purchasing, not as incidental to an occupation, but for the purpose of selling again the thing purchased, either in its original or manufactured shape, it is a trading or commercial partnership within the meaning of the rule laid down by the cases cited above: *Randall v. Meridith*, 76 Tex. 669; *Kimbro v. Bullitt*, 22 How. 268; *Holt v. Simmons*, 16 Mo. App. 97. It is within the power of a partner in a mercantile firm and business to borrow money in the name of the firm, and to bind it by an agreement to pay interest on the loan at any lawful rate, and to sign the firm name to any writing admitting the fact of borrowing and promising to pay: *Walah v. Lennon*, 98 Ill. 27; 38 Am. Rep. 75. And it is immaterial in such a case, as to the person thus dealing with one of the partners, that others were not informed of the transaction: *Wagner v. Simmons*, 61 Ala. 143; *Wiley v. Thompson*, 23 Ill. App. 199; although the partner, in transacting it, acted in violation of his duty, without the knowledge or consent of the other members: *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23; or that they repudiated it as soon as it came to their knowledge: *Wagner v. Simmons*, 61 Ala. 143.

The fact that a member of such firm, in whose name negotiable paper has been given for the loan, by the managing partner, is ignorant of the transaction, and that no entry thereof has been made on the books of the partnership, does not release him from liability, if the transaction has been made for, and has inured to the benefit of, the firm: *Martin v. Muncy*, 40 La. Ann. 190. But a partner binds his firm only when he uses the name of the firm and acts within the scope of his authority: *Norton v. Thatcher*, 8 Neb. 186. For the law implies authority of one partner to borrow money, and execute notes or other negotiable paper, only when, from the nature of the partnership, the authority is necessary to the successful carrying on of the business engaged in, or when its exercise is according to the usage or custom in partnership enterprises of like character: *Bradley v. Lins*, 19 Ill. App. 322; *Ditte v. Lonedale*, 49 Ind. 521; *Lefler v. Eice*, 44 Ind. 103.

It is always presumed that when a member of a firm borrows money, or gives a note in the name of the firm, the transaction is for a partnership purpose, and the burden of proof is on the firm to show the contrary: *Carrier v. Cameron*, 31 Mich. 373; 18 Am. Rep. 192; *Barrett v. Swann*, 17 Me. 180; *Littell v. Fitch*, 11 Mich. 525; *Hogg v. Orgill*, 34 Pa. St. 344; *Ensminger v. Marvin*, 5 Blackf. 210; *Knapp v. McBride*, 7 Ala. 19; *Thurston v. Lloyd*, 4 Md. 283; *Lindh v. Crowley*, 29 Kan. 756; *Whitaker v. Brown*, 16 Wend. 505.

Each member of a commercial partnership has the right to borrow money and give notes for partnership purposes in the firm name, and thereby bind all the partners, notwithstanding a private arrangement or agreement among themselves to the contrary, if such agreement is not known to the party giving credit to the firm: *Benninger v. Hess*, 41 Ohio St. 64; *Gregg v. Fisher*, 3 Ill. App. 261. And if one partner borrows money, representing that it is for the use of the firm, and gives the note of the firm thereto without the knowledge of his copartners, and then appropriates the money to his own use, the firm is liable, unless the creditor knew, or had reasonable ground to believe, that the money was not borrowed for the use of the firm, or the circumstances were such as to put him upon inquiry, and he neglected to inquire: *Wagner v. Freschl*, 56 N. H. 495; *Gregg v. Fisher*, 3 Ill. App. 261; *Onondaga County v. De Puy*, 17 Wend. 47; *Whitaker v. Brown*,

16 Wend. 504; *Steele v. Jennings*, Cheves, 103; *National Bank v. Mender*, 40 Minn. 325.

If the managing partner of a trading or commercial firm borrows money and gives a note therefor in the partnership name, and the lender believes at the time that the money loaned is to be used in the partnership business, the firm is liable, and it is immaterial to the lender whether the money is actually used in the partnership, or whether the other members of the firm receive any benefit therefrom: *Lindh v. Crowley*, 29 Kan. 756; *Heitman v. Griffith*, 43 Kan. 553. Third persons dealing with such partner have a right to rely upon his implied authority, and, if they loan money in good faith to him on the credit of the firm, without knowledge or notice of facts such as would lead an ordinarily prudent man to suspect that the loan was made for the individual use of such partner, they can recover against the firm: *Coller v. Porter*, 88 Mich. 549. And the firm is so bound when its course of business is such as to induce an honest belief in the mind of the lender, who is familiar with the manner of conducting its affairs, that the partner has authority to sign the note: *Kellon v. Leonard*, 54 Vt. 230.

In order for the firm to avoid liability on the note, the lender must know, or have reason to believe, at the time of making the loan, that the borrower wants the money for his own private use, or that the transaction is out of the ordinary course of business: *Bascom v. Young*, 7 Mo. 1; *Potter v. Dillon*, 7 Mo. 228; 37 Am. Dec. 185. For one partner cannot generally, in the absence of express authority, bind the firm by a note executed by him in the name of the firm, in a transaction outside the scope of the partnership business, and known to be so to the lender, even though the money borrowed is applied to firm purposes: *Bays v. Conner*, 105 Ind. 415. A new partner in a firm is not liable for money borrowed by the old firm of the same name without his knowledge or consent, and applied to the liabilities of the old firm, the lender being aware of the purpose for which the money is borrowed: *Elkins v. Green*, 13 Bush, 612. One member of the partnership is not liable for money loaned to another member of it in the firm name, before the formation of the partnership, although it was borrowed for, and afterwards put into, the partnership, with the knowledge of all of the members thereof: *Baxter v. Plunkett*, 4 Houst. 450; *McNaughton's Appeal*, 101 Pa. St. 550. One partner cannot bind the firm for money borrowed by him in the name of the firm to pay for his share of the capital stock: *Childs v. Pellett*, 102 Mich. 558; *McLinden v. Wentworth*, 51 Wis. 170; *Norwalk Nat. Bank v. Sawyer*, 38 Ohio St. 339; especially when the lender knows for what purpose the money is being obtained; *McLinden v. Wentworth*, 51 Wis. 170. A firm engaged in commercial business is liable upon a note given for a loan of money to keep its business going, and signed in its name by one of the partners without special authority from his copartners: *Morse v. Hagenah*, 68 Wis. 603.

It has been said in one case that "if, therefore, money be borrowed by a partner in his own name and on his own credit, and his individual note be executed therefor, it is no fraud afterward to substitute the note of the firm, provided it be shown that the money actually went into the business of the firm, or, if a partner borrow money for the firm and on its credit, it is no fraud to substitute the note of the firm for the individual note of the partner, which may have been originally given to secure its payment, though it may not appear that the money was applied to the business of the firm." In either case the firm is liable: *Union Bank v. Eaton*, 5 Humph. 499.

If money is borrowed, and a note given therefor, by one member of the

firm after its dissolution in the name of the firm, the partnership cannot be held liable for the amount of the note, unless it is shown that the act of the partner has been ratified by the firm: *McElroy v. Mclear*, 7 Cold. 140; *Carter v. Pomeroy*, 30 Ind. 438. This is especially so if the fact of dissolution of the firm is known to the lender: *Taylor v. Hillyer*, 3 Blackf. 433; 26 Am. Dec. 430. The subject of the authority of a member of a dissolved partnership is discussed in the note to *Gilmore v. Ham*, 40 Am. St. Rep. 561-576.

A third party, taking from a partner the signature of his firm upon his own private individual transaction or loan, cannot hold the firm liable therefor without proof of authority, adoption, ratification of the act, or assent thereto. And the taker of a note, under such circumstances, must prove the assent of the other partner, for prima facie such a transaction is a fraud, both on the part of the debtor and the creditor: *Tompkins v. Woodyard*, 5 W. Va. 216; *Noble v. McClintock*, 2 Watts & S. 152; *Livingston v. Roosevelt*, 4 Johns. 251; 4 Am. Dec. 273; *Lanier v. McCabe*, 2 Fla. 32; 48 Am. Dec. 173; *Taylor v. Hillyer*, 3 Blackf. 433; 26 Am. Dec. 430; *Sherwood v. Snow*, 46 Iowa, 481; 26 Am. Rep. 155; *Poindexter v. Waddy*, 6 Munf. 418; 8 Am. Dec. 749.

When a member of a partnership borrows money upon his own account, representing that it is to be used in the partnership business, the firm is not liable therefor, although it is so used. To bind the firm the lender must understand at the time that he is dealing with the firm, through the agency of the partner negotiating the loan: *Allep v. Gong Choy*, 13 Or. 206; *National Bank v. Thomas*, 47 N. Y. 15; *National Bank v. Meader*, 40 Minn. 325. But, if the partnership agreement provides that an existing debt of one of the partners shall be assumed and paid by the firm, either of the partners has authority to execute a note in the name of the firm to secure the payment of such indebtedness: *Randall v. Hunter*, 66 Cal. 512.

Nontrading Partnerships are usually defined to be such as are limited to a single enterprise, and are not engaged in trade, and it is a universal rule of law that the individual members of a nontrading or noncommercial partnership have no implied authority to borrow money, and bind the firm therefor, by notes given in its name, or to pledge the assets of the partnership as security for money borrowed, in the absence of proof to show the actual necessity or usage for the exercise of such power by the individual members of the firm in conducting its business: *Harris v. Mayor of Baltimore*, 73 Md. 22; 25 Am. St. Rep. 565; *Deardorf v. Thatcher*, 78 Mo. 128; 47 Am. Rep. 95; *Davis v. Richardson*, 45 Miss. 499; 7 Am. Rep. 732; *Bays v. Conner*, 105 Ind. 415; *McCrury v. Slaughter*, 58 Ala. 230; *Judge v. Brasswell*, 13 Bush, 67; 26 Am. Rep. 185; *Smith v. Sloan*, 87 Wis. 285; 19 Am. Rep. 757; *Levi v. Latham*, 15 Neb. 509; 48 Am. Rep. 361; *Pease v. Cole*, 53 Conn. 53; 55 Am. Rep. 53; *Prince v. Crawford*, 50 Miss. 344; *Dowling v. Exchange Bank*, 145 U. S. 512; *Randall v. Merideth*, 76 Tex. 669; *Webb v. Allington*, 27 Mo. App. 559; *Lee v. National Bank*, 45 Kan. 8; *Walker v. Walker*, 66 Vt. 285; *Pooley v. Whitmore*, 10 Heisk. 629; 27 Am. Rep. 733; *Crosthwait v. Ross*, 1 Humph. 23; 34 Am. Dec. 613; *Gray v. Ward*, 18 Ill. 32. The extent of the power of a partner to bind his firm for borrowed money is a question of law in commercial, and a question of fact in nontrading, partnerships. The business of a trading partnership being ascertained, and the nature of the contract made by the individual member thereof, and the circumstances attending it being known, the court may generally determine, as matter of

law, whether the contract was within the implied power of the partner, but a partner in a noncommercial partnership does not generally possess power to bind the firm by borrowing money, and consequently the extent of his powers is not fixed by the rules of law, and each case is left to be decided upon its own particular facts by the jury: *Judge v. Brasswell*, 13 Bush, 67, 26 Am. Rep. 185.

He who seeks to hold a noncommercial partnership liable upon a note or other security given by one member in the name of the firm for borrowed money has the burden of proof, and, before he can hold the firm liable, must show that the security was executed by the authority, or with the knowledge and consent, of all of the partners, or that it was necessary in the course of their business, or usual in similar partnerships, or that the act of such partner has been subsequently ratified by the firm: *National etc. Bank v. Noyes*, 62 N. H. 35; *Judge v. Brasswell*, 13 Bush, 67; 26 Am. Rep. 185; *Smith v. Sloan*, 37 Wis. 285; 19 Am. Rep. 757; *Levi v. Latham*, 15 Neb. 509; 48 Am. Rep. 361; *Pease v. Cole*, 53 Conn. 53; 55 Am. Rep. 53; *Prince v. Crawford*, 50 Miss. 344; *Deardorf v. Thatcher*, 78 Mo. 128; 47 Am. Rep. 95. In such case the burden of proof is on the party suing to prove such authority, necessity, or usage, and the fact that the partnership, by the express consent and approval of all of its members, on one occasion borrowed money from the plaintiff, does not confer such authority on one member of the firm, especially when the note is given for money borrowed by him for his own use: *Levi v. Latham*, 15 Neb. 509; 48 Am. Rep. 361.

The following partnerships have been held to be noncommercial and subject to the above rules. A firm engaged in real estate, loan collection, and insurance business: *Lee v. National Bank*, 45 Kan. 8; *Deardorf v. Thatcher*, 78 Mo. 128; 47 Am. Rep. 95; or in conducting a theater in a certain place: *Pease v. Cole*, 53 Conn. 53; 55 Am. Rep. 53; or formed for the purpose of taking and executing paving and curbing contracts: *Harris v. Mayor of Baltimore*, 73 Md. 22; 25 Am. St. Rep. 565; or formed by physicians to practice medicine and surgery: *Crosthwait v. Ross*, 1 Humph. 23; 34 Am. Dec. 613; or for mining: *Randall v. Merideth*, 76 Tex. 669; *Judge v. Brasswell*, 13 Bush, 69; 26 Am. Rep. 185; or for farming: *McCrary v. Slaughter*, 58 Ala. 230; *Walker v. Walker*, 66 Vt. 285; *Prince v. Crawford*, 50 Miss. 344; or to practice law: *Smith v. Sloan*, 37 Wis. 285; 19 Am. Rep. 757; or in digging tunnels: *Gray v. Ward*, 18 Ill. 32; or in publishing: *Pooley v. Whitmore*, 10 Heisk. 629; 27 Am. Rep. 733; or in milling: *Lanier v. McComb*, 2 Fla. 32; 48 Am. Dec. 173.

BIGELOW v. BURNHAM.

[90 IOWA, 300.]

NEGOTIABLE INSTRUMENTS—PRESUMPTION OF TITLE FROM POSSESSION—UNNECESSARY ALLEGATION.—Possession of a note payable to bearer and properly delivered authorizes the holder to sue thereon, and raises a presumption of ownership without an allegation or proof of title, and, if such allegation is unnecessarily made, it need not be proved until such presumption is overcome.

CONFLICT OF LAWS—USURY.—If a contract is made in one state to be performed in another, at a rate of interest lawful in the one state and unlawful in the other, it is presumed that the parties contract with ref-

erence to the laws of the state wherein the stipulated rate of interest is lawful, and such presumption prevails until overcome by proof that the transaction is a device to defeat the usury laws.

CONFLICT OF LAWS—USURY.—A note dated in one state, executed and delivered by a resident of that state in another state, reserving a rate of interest legal in the former, but illegal in the latter, state, may be enforced in the former state, if it is shown that the parties intended that the law of that state should govern the contract.

W. Milchrist and C. A. Irwin, for the appellant.

Nagle & Birdsall and T. D. Higgs, for the appellee.

§§ KINNE, J. ¹1. Plaintiff sues on a promissory note worded as follows:

“STORM LAKE, BUENA VISTA COUNTY, IOWA.

“For value received, I promise to pay Rufas Burnham, or bearer, eighteen hundred and fifty-eight dollars and sixty-three cents within one year from date, with interest at seven per cent.

“ROLLIN BURNHAM.

“May 2, 1885.”

She, in an amended petition, averred that this note was executed in renewal of an indebtedness from defendant to Rufas Burnham for real estate sold by ²⁰¹ the latter to the former, and prayed for the establishment of a vendor's lien upon the land. The defendant admitted the execution and delivery of the note, that it had not been paid, and denied all the other allegations of the petition. Defendant also pleaded that the note was executed in the state of New York to evidence a contract there made, and that under the laws of that state it was void, as in violation of the statutes relating to usury. In a reply, plaintiff denies that the note was executed in New York; avers that, when executed, defendant was a resident of Iowa, and that the note was made with reference to the laws of Iowa, and was in fact an Iowa contract. The cause was tried in equity to the court, and a judgment entered for the plaintiff, but a vendor's lien refused.

2. This case has once before been in this court: See *Bigelow v. Burnham*, 83 Iowa, 120; 32 Am. St. Rep. 294. On the trial below, plaintiff introduced in evidence the will of Rufas Burnham, and the probate thereof in the state of New York. It is said that this cannot be done, as the will was never probated in this state. This will gave to plaintiff certain property, including the note in suit, after the payment of lawful debts and obligations of deceased, his funeral expenses, and certain legacies. The executor testified that all these

had been paid before he delivered the note to plaintiff. The note is payable to bearer; it is shown to have been properly delivered to plaintiff; it was in her possession, and possession alone of such a note authorizes the holder to sue thereon: *McCormick v. Grundy Co.*, 24 Iowa, 382; *Allensworth v. Moore*, 3 G. Greene, 273; *Riggs v. Price*, 3 G. Greene, 334. In the case at bar, plaintiff's petition contained an unnecessary allegation showing how she derived title to the note. If she had simply averred her ownership and possession, and claimed the amount due thereon, it would have been a sufficient allegation of her title; and, the note being in her possession, the ³⁰³ presumption of law would obtain, until rebutted, that she was the owner of the instrument: *Allensworth v. Moore*, 3 G. Greene, 273; *Rubey v. Culbertson*, 35 Iowa, 264; *Stoddard v. Burton*, 41 Iowa, 582; *King v. Gottschalk*, 21 Iowa, 512; *Hesser v. Doran*, 41 Iowa, 468. Now, although plaintiff had made an unnecessary allegation in her petition, she was not bound to establish the same on the trial. As the defendant introduced no evidence to overcome the presumption of ownership which arises from the possession of the note, plaintiff's case, as to title to the note and right to sue thereon, was established prima facie by her introduction of the note in evidence; and the introduction of the will and probate thereof, to show how her title was devolved, was not necessary until defendant had introduced evidence to overcome the legal presumption which arose from her possession of the note. Hence, we may discard the will and its probate entirely, and still plaintiff's case, as to title and right to sue, is complete. Under these circumstances, we need not determine whether the will and probate of it could properly be introduced in evidence, as, if error, it could work no prejudice.

3. On the former appeal, it was held that the note, on its face, would be presumed to be payable in Iowa; that where a contract was made in one state to be performed in another, and a rate of interest was contracted for which was lawful in the one state and unlawful in the other, it would be presumed that the parties contracted with reference to the laws of the state wherein the stipulated rate of interest was lawful, and such presumption would prevail until overcome by proof that the transaction was a device to defeat the law against usury. It was also held that, in cases like that at bar, the law will effectuate the intention of the parties. These propositions are all supported

by authorities cited in the opinion: *Bigelow v. Burnham*, ²⁰³ 83 Iowa, 120; 32 Am. St. Rep. 294. Counsel for defendant contend that the contract was made in New York, and was to be performed there, and, as it reserved a greater rate of interest than is allowed under the laws of that state, it is void. We have no doubt, from the record now before us, that the contract evidenced by the note was made in New York. Defendant went to New York from Iowa on a visit, and, while at his father's house, entered into the agreement to borrow the money for which the note was given. The note, while dated in Storm Lake, Iowa, was, in fact, executed and delivered in New York. The money loaned was there paid over to defendant. In view of what was said in the former appeal, and of the grounds on which we rest our present decision, we do not deem it necessary to enter into a discussion of the question as to whether the presumption which the law raises as to the place of payment being in the state of Iowa can be overcome by parol evidence showing that payment was to be made elsewhere. Now, it is conceded by counsel that a citizen of one state may loan money to a citizen of another state, and contract for the rate of interest allowed in the latter state. If that was the transaction between the parties to this note, then it may be enforced in this state. We think the parties entered into this contract in view of, and expecting it to be controlled by, the laws of Iowa, and that it is valid and enforceable here. From the record, it appears that defendant had, for a long time before the execution of this note, been a resident of Iowa, and when he executed it he was such a resident. It seems clear that it was the intention of his father, in making the loan, to have it controlled by the laws of Iowa. Both parties knew that a note drawing seven per cent interest would be void under the laws of New York. The note was dated "Storm Lake, Iowa"; no particular place of payment was mentioned; and, at least, in the absence of ²⁰⁴ evidence to the contrary, it would be payable there. The conversation had with reference to the dating of the note clearly indicates that, so far as the payee was concerned, he intended the contract to be governed by our laws. The defendant accepted the money knowing that, and we think, under all the circumstances, it should be held that both parties entered into the contract in view of the law of Iowa as to interest. The defendant, for years, treated the contract as valid and binding upon him under our law; and

he ought not now to be permitted, under all the circumstances, to claim that it was a device to defeat the usury laws of New York. We have not deemed it necessary to refer to the authorities, as they are fully cited in the opinion on the former appeal. Besides, there is no contention as to the right of parties, in such a case, to contract with reference to the rate of interest lawful in either state, and we hold that the testimony shows that that is what was done in the case at bar. We discover no reason why defendant should not pay this note.

The judgment below is affirmed.

NEGOTIABLE INSTRUMENTS—PRESUMPTION OF OWNERSHIP FROM POSSESSION.—Possession of a note is prima facie evidence of ownership: *O'Keefe v. First Nat. Bank*, 49 Kan. 347; 33 Am. St. Rep. 370, and note.

USURY—CONFLICT OF LAW.—When a contract is made in one state to be performed in another, and the legal rate of interest is higher in one state than in the other, the parties may in good faith stipulate for the higher rate of interest without incurring the penalties of usury in either state: *Comd v. Home Cattle Co.*, 32 Neb. 761; 29 Am. St. Rep. 465, and note. See, also, the extended note to *Bank v. Cook*, 46 Am. St. Rep. 202.

TRASK v. TRASK.

(99 IOWA, 312.)

DEEDS MAY BE DELIVERED TO A THIRD PERSON for the grantee, and, if subsequently assented to by the latter, the delivery is as effective to pass the title as if made directly to him.

DEEDS.—DELIVERY OF DEED TO A STRANGER, to be delivered to the grantee at the direction of the grantor, or with a reservation of a right in him to countermand it, does not pass the title, nor raise a presumption that the delivery is made with that intention. To pass the title, the facts and circumstances attending the transaction must be such as to show that the grantor intended that the deeds should be delivered by the custodian to the grantee.

DEEDS.—DELIVERY TO THIRD PERSON.—If a grantor, together with his wife, executes a deed to his son, and the grantor delivers the deed in an envelope to a cashier of a bank stating to him that the contents of the envelope are for his son if anything happens to him, such delivery is a conveyance in presenti to the son, and takes effect upon the death of the grantor by relation from the delivery to the cashier of the bank.

C. E. Ransier, for the appellant.

E. E. Hasner and H. W. Holman, for the appellee.

³¹² **ROTHROCK, J.** Ami H. Trask was a resident of the city of Independence, in this state. He died in the month

of June, 1891, at the age of about sixty-eight years. The plaintiff is his widow, and the defendant is his son. He was twice married. The defendant is the son of his first wife. He married the plaintiff ²¹⁰ about twenty years before his death. His death was neither sudden nor unexpected. It was caused by the fatal disease known as cancer. The defendant was the only child born to him, and, at the time of the father's death, the son was about twenty-seven years old, and was married. The plaintiff never had any offspring. During the life of Ami H. Trask, he accumulated property of the value of from thirty to forty thousand dollars. It consisted of farms, a livery barn and livery stock, and city lots and bank stock, and other property. When he married the plaintiff, she had an estate in her own right, the value of which does not very clearly appear. It consisted in part of a dwelling-house and some city lots. It does not appear that she at any time transferred any of her property to the deceased. In January, 1891, Mr. Trask went to Hot Springs, Arkansas, for treatment of the malady with which he was afflicted. Before making that trip he made his last will and testament, and also a deed of what was known as the livery barn property, and what was known as his Sumner township farm. This deed was made to his son. It was signed and acknowledged by him and his wife, the plaintiff herein. At the same time he made to his son a bill of sale of his personal property. All of these written instruments were placed in an envelope, and delivered to the cashier of a bank. The deceased owned other real estate, which was then not disposed of. He returned from the Hot Springs in the April following. After his return there was a misunderstanding in regard to the deed, so far as it was a conveyance of the Sumner township farm. The plaintiff herein claimed that there was a mistake; that she did not understand that the deed conveyed the said farm. This claimed misunderstanding led to a readjustment of the matter, and the deceased and his wife each consulted attorneys, and the attorneys conferred with each other. A final ²²⁰ arrangement was made by the parties, which was intended as a settlement of all their property rights. This was amicable, and appears to have been really agreed upon by the deceased and his wife, without any interference of any one. It was in pursuance of advice given by the attorneys of both the husband and wife. The attorneys did not advise as to the amount Trask

should give his wife. That matter was settled by the parties themselves. In pursuance of this arrangement conveyances were made of all the remainder of the real estate owned by Trask, which deeds Mrs. Trask signed and acknowledged. A deed was made by Mrs. Trask of all her real estate to her adopted daughter, and Mr. Trask joined therein, and released any prospective right he might have in her property. Up to this time the envelope containing the will and the deed to the Sumner township farm and livery barn property, and the said bill of sale, remained in the bank. On the day that the final settlement was made, the envelope containing these instruments was taken from the bank, because it had been claimed that Mrs. Trask had not intended to execute a deed for the Sumner township farm; and a new acknowledgment was written thereto, by which she again acknowledged its execution. When this was done, and as part of this full settlement, the deceased paid to his wife the sum of three thousand five hundred dollars, by a bank check, which was in these words:

“INDEPENDENCE, IOWA, May 9th, 1891.

“*Peoples National Bank*: Pay to Althea Trask or order (\$3,500) three thousand and five hundred dollars. Settlement of all claims for dower. A. H. TRASK.”

On the same day the will and bill of sale of the personal property, and the deed of the Sumner township farm, were replaced in the same envelope and returned to the bank.

³²¹ This action is grounded upon the alleged fact that the deed of the Sumner township farm, and the bill of sale of the personal property, did not pass the title of the property to the defendant, because they were not delivered to him. This is the only real question in the case. If the delivery of the envelope containing these instruments to the bank passed the title of the property therein, the decree of the district court should be affirmed. If it did not pass the title, the decree should be reversed. Counsel for the respective parties have argued this question at great length, and with much ability. They have presented a multitude of adjudicated cases upon the question. If we were to cite and comment upon all these cases, this opinion would fill a large part of a volume of our reports, and such a review of authorities would serve no useful purpose. The rule is well settled. The difficulty arises in determining, under the facts disclosed in evidence, what rule of law applies. It is well settled, and may be said to

be an established rule, that a deed may be delivered to a third person for the grantee, and, if subsequently assented to by the grantee, it will be as good a delivery as if made directly to the grantee. But a delivery of a deed to a stranger, to be delivered to the grantee at the direction of the grantor, or with a reservation of the right in the grantor to countermand it, does not pass the title. A delivery to a third person does not authorize a presumption that it is done with the intention of passing the title. The facts and circumstances attending the transaction must be such as to show that the grantor intended that the deed should be delivered by the custodian to the grantee. Every such case must be determined by the intention of the grantor: 5 Am. & Eng. Ency. of Law, 445. In *Stow v. Miller*, 16 Iowa, 460, it is said: "If a father dies, leaving among his papers a deed of land, duly executed in form, ³²² to one of his children, the law will give effect to the same, if there is anything indicating the intention of the intestate that it should become effective. For example, the conveying to other children an equal portion of his real estate, as was done in this case, a court of equity would be much inclined, in order to effectuate the ends of justice, to declare the deed valid, as was done in the case of *Scrugham v. Wood*, 15 Wend. 545, 30 Am. Dec. 75, and this is about as far as the courts have gone on this subject." The facts attending the delivery to a third person, which may pass the title to the grantee, are not required to be such as that it is beyond the mental power of the grantor to alter his intention, or that he has not the physical power to regain possession of the deed: *Newton v. Bealer*, 41 Iowa, 334. As we have seen, the intention of the grantor is the polar star by which courts must be guided in determining the question.

We have said that when the deed and bill of sale were delivered to the bank the last will and testament was in the same envelope. The will, so far as it relates to his wife, was as follows: "I give and bequeath to my wife, Althea Trask, one-third of all property of which I may die seised or possessed, whether the same is real or personal; to have and to hold the same forever, less the amount already paid to her, and paid for improving her property." At the time the papers were deposited with the bank, the testator had real estate remaining after the conveyance of the Sumner township farm. It is claimed with great confidence on the part of appellant that the grantor surely did not intend that the title should pass to

his son, because, when he made the final disposition of all of his property, on the ninth day of May, 1891, he placed the will in the same envelope, and returned it to the bank. It is to be conceded that the act was not in accord with an intention that the title to the property should pass to his son; ³²³ and one or two witnesses testified that he declared to them, after the final settlement, that the papers did not amount to anything, or words to that effect. In our opinion, this and other evidence relied on by appellant is fairly overcome by the other facts and circumstances in the case, a few of which we will mention: It does not clearly appear what was indorsed on the envelope when it was delivered to the bank. It was first delivered to the cashier of the bank by Trask, in person. He stated the contents of the envelope, and told the cashier they were for Charlie, his son, if anything happened to him (the grantor). This was the day before he went to Hot Springs. After his return, and it was made known that his wife claimed that she did not intend to join in the deed to the Sumner township farm, and when the final settlement was made, the papers were withdrawn from the bank, for no other purpose than to have said deed reacknowledged, and when that was done it was immediately returned to the bank. It appears to us that the only purpose in taking the deed from the bank was to make it effective against any assault upon it which might afterward be made by his wife. It was not under a claim that he was dissatisfied with the deed, but quite the contrary. Above all, there is the undisputed fact, standing out all through the evidence, that the settlement made on the ninth day of May, 1891, was a complete adjustment of all their family property rights; and when the envelope, with the inclosures, was returned to the bank, they were returned for the son, and either at or about that time he stated that, if he should be taken away, his son was to have what he had, and that he had settled with his wife. This is strongly corroborated by the check for three thousand five hundred dollars, which he gave her when the settlement was made. We might cite many other circumstances which tend to show that the title to both the real and ³²⁴ personal property passed by the delivery of the deed and bill of sale to the bank. But it is not necessary to further elaborate the case.

There is a question made about whether there was a change of the possession of the personal property from the father to

the son. There was no occasion for such change. The son had been virtually in the actual possession for some time before the bill of sale was made. We will say that there is no claim made that the deed and bill of sale were testamentary in their character, and invalid because not executed with the formalities of a will, and the facts do not warrant any such conclusion. If the instruments were delivered to the bank as conveyances in *præsentia*, they took effect upon the death of the father, by relation, from the delivery to the bank: *Hinson v. Bailey*, 73 Iowa, 544; 5 Am. St. Rep. 700.

The decree of the district court is affirmed.

DEEDS—DELIVERY TO THIRD PERSON FOR GRANTEE.—A deed delivered by the grantor to a third person to be delivered to the grantee, and by such third person delivered to the grantee, constitutes a good delivery, though the grantor was dead at the date of the last delivery. The delivery becomes operative by relation as of the date when first made to such third person, if an intent to that effect is manifested by acts or words, or both: *White v. Pollock*, 117 Mo. 467; 38 Am. St. Rep. 671, and note; *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326, and note. See, also, to the same effect, *Brown v. Stutson*, 100 Mich. 574; 43 Am. St. Rep. 462, and note.

HAEFER v. MULLISON.

[30 IOWA, 372.]

APPEAL—JUDGMENT ON DEMURRER—EXCEPTION TO.—After an exception is taken to a ruling on a demurrer, no exception need be taken to the judgment rendered on the ruling in order to sustain an appeal therefrom.

EXEMPTIONS.—CROPS GROWN ON LAND PURCHASED WITH PENSION MONEY are not exempt from execution, unless the land is a homestead, when the statute exempts money received as a pension, whether in the actual possession of the pensioner, or deposited, loaned, or invested by him. The money or investment is alone exempt.

Anderson & Anderson, for the appellant.

W. E. Mitchell, for the appellees.

373 **ROBINSON, J.** The petition alleges that the corn in controversy was raised on land in this state which is owned by the plaintiff, and which had been purchased with money he had received as a pension from the general government, and that the corn was exempt from seizure under the execution. The ground of the demurrer was that the petition did not state a cause of action, for the reason that it shows that

the corn was not exempt from execution. The demurrer was sustained by the court (Judge Smith presiding) on the fifteenth day of April, 1892, and to that ruling the plaintiff excepted. On the third day of the next month the court (Judge Thornell presiding) rendered judgment as follows: "This case coming on for hearing, and the plaintiff electing to stand on his petition without amendment thereto after demurrer sustained, the plaintiff's petition is dismissed, and judgment for costs for defendants." To that judgment no exception was taken.

1. The appellees claim that the appeal cannot be considered on the merits, because no exception was ³⁷⁴ taken to the judgment. The plaintiff does not respond to that claim, but we do not think that it can be sustained. It was held in *Barnhart v. Farr*, 55 Iowa, 366, that an exception to the judgment was not necessary where one had been taken to the conclusion of law upon which it was founded. In *Aldrich v. Price*, 57 Iowa, 155, it was held that, where the overruling of a motion which asked for judgment was excepted to, it was unnecessary to except to the judgment afterward rendered to have it reviewed on appeal: See, also, *Gullihier v. Chicago etc. Ry. Co.*, 59 Iowa, 419. In this case the judgment was founded upon the ruling on the demurrer, and, an exception having been duly taken to that, no exception to the judgment was required to entitle the plaintiff to a review of the ruling by this court. This conclusion is not in conflict with the cases of *Redding v. Page*, 52 Iowa, 406, and *Chapman v. Lobey*, 21 Iowa, 300, cited by appellees.

2. The petition shows that the indebtedness on account of which the execution in question issued was incurred in May, 1889, and afterward. The corn which was taken under the execution had been raised on the land, and was standing in the field, but it is not claimed that it was not matured and ready to be harvested; and, for the purposes of this appeal, it must be assumed that it had ceased to be a part of the land upon which it was grown. The appellant relies upon chapter 23 of the acts of the 20th general assembly to sustain his claim to the corn. The first two sections of that act are as follows:

"SECTION 1. All money received by any person resident of the state as a pension from the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned, or invested by him, shall be

exempt from execution or ³⁷⁵ attachment, or seizure by or under any legal process whatever, whether such pensioner shall be the head of a family or not.

"Sec. 2. The homestead of every such pensioner, whether the head of a family or not, purchased and paid for with any such pension money, or the proceeds or accumulations of such pension money, shall also be exempt as is now provided by the law of this state in relation to homesteads; and such exemption shall also apply to debts of such pensioner, contracted prior to the purchase of such homestead."

In *Diamond v. Palmer*, 79 Iowa, 578, it was held that section 1 exempts only the pension money actually invested, and that the claim that it exempts, not only animals in which it is invested, but also the increase of such animals, was too broad. The section, in terms, exempts the money received as a pension, whether it is in the actual possession of the pensioner, or is deposited, loaned, or invested by him. It is the money, or that in which it is invested, which is exempt by section 1, and not the proceeds and accumulations of it. Section 2 exempts the proceeds and accumulations, when invested in a homestead. When the land was purchased, and the money was paid for it, the investment was completed. The crops thereafter grown on the land were the products or proceeds of the land and of the seed planted, of the labor performed in raising them, and of the forces of nature which aided in their growth, and were not exempt, as property in which the pension money had been invested. It is proper to state, in this connection, that it is not shown that the land upon which the corn was grown was the homestead of appellant. The petition states that he was the owner of, and lived upon, certain land in Fremont county, which he purchased with pension money received from the government of the United States, and that the corn had been raised ³⁷⁶ upon the land. But it is not stated in the petition, nor claimed in the argument, that the land was the homestead of plaintiff, nor that he resided thereon when the corn was grown. We cannot presume that it was his homestead at that time, and the rule announced in *Morgan v. Rountree*, 88 Iowa, 249, 45 Am. St. Rep. 234, is not shown to be applicable to this case.

The judgment of the district court is affirmed.

EXECUTION—PROPERTY PURCHASED WITH PENSION MONEY—EXEMPTION
OF.—A horse obtained by a debtor in exchange for another purchased with pension money, and exempt from levy by statute, is also exempt to its full

value when no additional means are invested, though such value is in excess of the amount originally invested in the first horse: *Smith v. Hill*, 83 Iowa, 684; 32 Am. St. Rep. 329, and note. See, also, *Orow v. Brown*, 81 Iowa, 344; 25 Am. St. Rep. 501, and the extended note to *Rossell v. Rhodes*, 3 Am. St. Rep. 596.

KIRKMAN v. FARMERS' INSURANCE COMPANY.

[90 IOWA, 457.]

INSURANCE.—WAIVER.—AGENTS OF INSURERS POSSESSING LIMITED POWER to solicit insurance, deliver policies, and receive premiums cannot waive conditions and forfeitures.

INSURANCE.—PROOF OF LOSS.—WAIVER.—An acknowledgment in writing by an insurer of notice of loss, together with a statement that the claim will receive prompt attention, is not a waiver of a condition in the policy requiring proof of loss within sixty days thereafter.

INSURANCE.—PROOF OF LOSS.—WAIVER.—If, under a policy of fire insurance requiring proof of loss within sixty days thereafter, the insured, after the expiration of such sixty days, writes the insurer stating the amount of loss, that notice thereof has been given to and acknowledged by him, that the policy is burned, asking for a copy thereof, and "if the loss will be settled without suit, please inform me; if not, we desire to commence suit at once," to which the insurer replies by inclosing a copy of the policy, together with a statement that no proof of loss has been received, this does not constitute a waiver of such proof, although formal proof is thereafter sent with an inquiry if the loss would be paid, to which no reply is given.

INSURANCE.—PROOF OF LOSS.—WAIVER.—Under a policy of fire insurance stipulating that none of its conditions can be waived except in writing by the secretary of the company, an adjuster cannot orally waive proofs of loss.

H. L. Dashiell, for the appellant.

T. B. Perry, for the appellee.

⁴⁵⁷ **ROTHROCK, J.** The property insured was a frame dwelling-house, and certain household furniture and personal property kept and used in the house. The policy was issued on the twenty-fifth day of January, ⁴⁵⁸ 1890, and the amount of the insurance was four hundred and twenty-five dollars. The property was totally destroyed by fire on the twenty-seventh day of June, 1890. The policy provides that, in case of loss of the property by fire, "the assured shall forthwith give notice of said loss to the secretary of the company, and within sixty days render a particular account of such loss, signed and sworn to by the assured, stating when and how the loss originated, the nature of the title, and interest of the assured and all others in the property." The applica-

tion for the insurance was taken by one Mullen, a local agent of the defendant, who was a mere soliciting agent, without authority to issue policies. The day after the fire, the husband of plaintiff called upon Mullen, and advised him of the loss, and Mullen wrote a letter to the company at Cedar Rapids, giving notice of the loss. It is conceded that no proof of loss such as was required by the policy was made within sixty days after the fire. The plaintiff claims that formal proof of loss was waived by the defendant. In our opinion, the determination of this question is decisive of the case, and no other question need be considered. The defendant introduced no evidence on the trial, and, after the plaintiff had introduced her evidence, the defendant made a motion for a verdict against the plaintiff, one ground of which was as follows: "The proofs of loss were not furnished in sixty days after the loss, as required in the contract and the statute, and there is no evidence of any waiver of the same by the defendant." The motion was overruled, and the court charged the jury, and a verdict was returned for the plaintiff.

The claim of waiver of proofs of loss is based upon the acts of the officers and agents of the company by which the plaintiff was induced to believe that no proofs of loss were required. There is nothing in the evidence by which any waiver, founded upon the ⁴⁵⁹ acts or declarations of the agent Mullen could be inferred. Moreover, he was a mere soliciting agent, with no power to issue policies or bind the company by a contract of insurance. Agents possessing the limited power of soliciting insurance, delivering policies, and receiving premiums cannot waive conditions and forfeitures: *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83; *Armstrong v. State Ins. Co.*, 61 Iowa, 212; *Garretson v. Merchants' etc. Ins. Co.*, 81 Iowa, 727. The letter written by the soliciting agent was received at the general office, and was answered by a postal card in these words:

"OFFICE OF FARMERS' INS. CO.

"CEDAR RAPIDS, IOWA, June 30, 1890.

"DEAR SIR: Your notice claiming loss on your policy, No. 178,879, has been received, and will receive prompt attention.

Yours truly,

"J. H. SMITH, Prest."

No other communication was had with the home office until November 9, 1891, long after the expiration of the sixty

days in which proofs of loss should have been made, when the following correspondence was had:

"ALBIA, IOWA, November 9, 1891.

"J. H. Smith, President Farmers' Insurance Co., Cedar Rapids, Iowa:

"Mr. Douglass Kirkman, husband of Mrs. Ada Kirkman, informs me that, on the twenty-seventh of June last, Mrs. Ada Kirkman sustained a loss by fire of her property insured with your company by policy No. 178,879. He says he has given you notice of the loss, receipt of which was acknowledged by you June thirtieth last. The policy was destroyed by the fire along with the property insured. The amount of the insurance was \$425, which he claims his wife has sustained by the fire, and this amount he claims of your company as the damage due his wife on the policy. If the matter will be settled without suit, please inform me. If not, we desire suit to commence at once. Will you please furnish me a copy of his policy, the original having been destroyed in the fire, and he will pay the expense.

"T. B. PERRY."

"CEDAR RAPIDS, IOWA, 11—12—'90.

"T. B. Perry, Albia, Iowa:

"As per your request of tenth inst., we herewith inclose you copy of policy issued to Mrs. Ada Kirkman, having date January 23, 1890, No. 178,879. No proof or affidavit of any loss sustained under this policy has been received by the company.

J. H. SMITH, President."

On the fifteenth day of November, 1890, plaintiff's counsel transmitted formal proofs of loss to the defendant, with a letter inquiring whether the proofs were satisfactory, and whether the loss would be paid. The defendant made no reply. It is claimed that the postal card was an implied waiver of proofs of loss, because it was stated therein that the matter would "receive prompt attention." We do not think that this was a waiver of any act necessary to be done by the plaintiff. It was surely not necessary that the answer to the notice of loss should call the attention of the insured to the plain provision of the policy that required proofs of loss within sixty days. The president of the company might well say that prompt attention would be given, without waiving any part of the contract. The postal card was nothing more than notice that the company would give

prompt attention in the performance of its contract. The correspondence which took place in November, as we view it, does not tend to prove a waiver of proof of loss. Plaintiff's counsel is a lawyer of undoubted experience and ability. He founds his claim of waiver upon the fact that the president of the company did not fully answer his letter. It is true, the ⁴⁶¹ answer did not state that the matter would not be settled without suit. But the furnishing of a copy of the policy was to enable counsel to commence the threatened suit, and the statement that no proof of loss had been made was not an intimation that, if it should be made after that, the time of making it would be waived. It was rather an intimation to the learned counsel that he would likely fail in sustaining an action. It is further claimed that one J. H. Stahl was an agent of the defendant, known as an adjuster of losses, and that within sixty days, and on the eighth day of July, 1890, he appeared upon the premises where the property which was destroyed was situated, and that in conversation with the plaintiff and her husband he waived proof of loss, and stated that the insured had done all that was required for them to do, and that the defendant would settle the loss in sixty days. There is some doubt as to whether there was evidence sufficient to authorize a finding that Stahl was an adjusting agent, or that he was clothed with power to waive any stipulation in the policy. This question we need not consider, because the policy in suit contains this provision: "It is expressly provided that no officer, agent, or employee of this company, or any other person, can in any manner waive any of the conditions, provisions, or requirements of this policy, except the secretary, and he only in writing hereon; and this policy is made and accepted on the above express conditions." There is no question as to the rights of the parties under such a contract as this. There is no statute of this state by which insurance companies are bound by all the acts of the agents which they send out to deal with the public, and the courts cannot say that a contract limiting the power and authority of agents is void. The plaintiff in this case must be held to have assented to this stipulation in the policy, and, for aught that appears, she is bound thereby: *Zimmerman v. Home Ins. Co.*, 77 Iowa, ⁴⁶² 691; *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527; 8 Am. St. Rep. 908; *Hankins v. Rockford Ins. Co.*, 70 Wis. 1. We have disposed of this question of waiver without determining whether the president of the company,

notwithstanding the terms of the policy, had the power to make a valid waiver of its conditions. As we have said, we do not regard either the postal card or letter as evidence of a waiver. As to the declarations of the agent Stahl, it is clear from the above-named cases, and many others that might be cited, that he had no authority to waive proofs of loss. We think the motion to direct a verdict for the defendant should have been sustained.

Reversed.

INSURANCE—WAIVER OF CONDITIONS BY AGENTS.—Agents possessing merely the power to solicit insurance, deliver policies, and receive premiums cannot waive conditions and forfeitures: *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83. See, also, *Beebe v. Ohio etc. Ins. Co.*, 93 Mich. 514; 32 Am. St. Rep. 519, and note with the cases collected; note to *Farnum v. Phoenix Ins. Co.*, 17 Am. St. Rep. 247, and the extended note to *Farnum v. Phoenix Ins. Co.*, 17 Am. St. Rep. 248.

INSURANCE—PROOFS OF LOSS—FORFEITURE—WAIVER.—The cases discussing this subject will be found collected in the notes to *Enoe v. St. Paul etc. Ins. Co.*, 46 Am. St. Rep. 813, and *Firemen's Ins. Co. v. Floss*, 1 Am. St. Rep. 405.

INSURANCE—WAIVER OF PROOFS OF LOSS BY ACT OF ADJUSTER.—The refusal by an insurance adjuster, with the approval of his company, to settle a loss, coupled with his declaration that it will not be paid, constitutes a waiver of preliminary proofs of loss: *Hahn v. Guardian Ins. Co.*, 23 Or. 576; 37 Am. St. Rep. 709. When an adjuster for an insurance company demands further proofs of loss, in addition to those furnished, with full notice that they cannot be obtained until long after the time within which suit is required by the policy to be brought, under a condition in the policy, the latter condition will be deemed to have been waived by the insurer: *Dibrell v. Georgia Home Ins. Co.*, 110 N. C. 193; 28 Am. St. Rep. 678, and note.

RICHARDS v. PURDY.

[90 IOWA, 502.]

USURY.—BURDEN OF PROOF is on a party setting up the defense of usury.

USURY—NOTE FOR COMMISSIONS.—A loan negotiated by an agent for both parties, and bearing legal interest on its face, is not rendered usurious by the act of the agent in taking a commission note for his services payable to the lender, thus raising the total interest above the legal rate, provided the lender neither authorizes nor ratifies the act of the agent.

R. M. and J. B. McCrary, for the appellants.

J. C. Kerr, for the appellee.

503 **ROBINSON, J.** On the twenty-fourth day of February, 1886, the defendants, H. E. Purdy and Kitty Purdy, his wife,

made to George L. Richards, as payee, their three promissory notes, of which one was for the sum of two hundred dollars, payable in one year, one was for the sum of five hundred dollars, payable in two years, and one for the sum of one thousand dollars, payable in three years. They bore interest at the rate of eight per cent per annum, and were secured by a mortgage on a quarter section of land, and a mortgage on certain horses and on other personal property. On the eighth day of March, 1887, the defendants made to the same payee their promissory note for four hundred dollars, payable on the eighth day of June, 1887, with interest thereon at the rate of ten per cent per annum, and, to secure its payment, executed a mortgage on a lot in the town of Rockwell. The payment of interest on the notes for five hundred dollars and one thousand dollars to August 24, 1890, and on the four hundred dollar note to December 8, 1890, is admitted by the plaintiff. The two hundred dollar note has also been paid. This action was brought to recover the amount due on the three notes last described, and for the foreclosure of the mortgages on the land and lots. The defendants admit that they made the notes, but allege that the three notes first given were usurious; that the consideration for them was but thirteen hundred dollars in money borrowed of E. A. Richards; ⁵⁰⁴ that the notes were owned by him, but, to enable him to take the acknowledgments of the mortgages, the notes were made payable to his brother, George L. Richards; and that the agreed rate of interest was eighteen per cent per annum. The defendants further claim that the property included in the chattel mortgage has been sold, and that the proceeds thereof have been, or should be, applied in paying the two notes in suit first given, and that those notes have been fully paid. The defendants allege that they have paid large sums on the note last given, and demand an accounting of the money paid to George L. and E. A. Richards. The district court found that there was due on the notes in suit the sum of two thousand one hundred and seventy-three dollars and fifty-five cents, and rendered a decree in favor of the plaintiff for that amount, with attorneys' fees and costs, and for the foreclosure of the mortgages.

1. When the notes in controversy were given, George L. Richards was a nonresident of the state, and the business involved in taking them was transacted for him by his brother and agent, E. A. Richards. H. E. Purdy testifies that when

the papers given in February, 1886, were drawn, he was told by E. A. Richards that the money to be loaned belonged to him, but that he did not wish his business known in the town, and could not take the acknowledgments of papers executed to himself, and therefore the notes and mortgages were nominally made payable to his brother. The testimony of Purdy in regard to the matter is in some respects improbable, and is contradicted by E. A. Richards. We are satisfied that the money loaned belonged to George L. Richards. The claim of Purdy that he received but thirteen hundred dollars for the three notes first given is not sustained by the record. It is quite satisfactorily shown that he received fifteen hundred dollars, and that the two hundred dollar note ~~was~~ was given to E. A. Richards as his commission for securing the loan, and made payable to his brother only as a matter of convenience, to have it secured by the mortgages. It is said that the knowledge of the agent is the knowledge of his principal, and that by accepting the notes the latter ratified the acts of the agent in taking the commission note, and that the transaction was thereby made usurious. It appears, however, that E. A. Richards was also the agent of the borrower, for the purpose of obtaining the loan; and it is not shown that E. A. Richards authorized the charge for commission, or that he knew of it. The notes for five hundred dollars and one thousand dollars were sent to him, but the two hundred dollar note was not. Whether he ever saw the mortgages does not appear. The burden is on the defendants to show usury; and, under the rule announced in *Greenfield v. Monaghan*, 85 Iowa, 211, they have failed to do so.

2. It is claimed that due credits for the payments made on the notes have not been given. So far as the claim relates to the notes for five hundred dollars and one thousand dollars, it is not shown to be well founded; and we think the amount allowed on account of them, to wit, seventeen hundred and fifteen dollars and eighty cents, was authorized. In regard to the four hundred dollar note, it is alleged, and the evidence shows, that the rents derived from the lot mortgaged to secure it were paid to E. A. Richards to be applied in paying the note. He was the agent of his brother to receive payment, and was paid one hundred and twenty-six dollars of the rents, to be so applied; but although his attention, as a witness, was particularly called to that matter, he accounted for only forty dollars and seventy-five cents of the money so

received, and the excess does not appear to have been considered by the district court. We conclude that the ⁵⁰⁰ amount of four hundred and fifty-seven dollars and seventy-six cents allowed on that note is excessive, and that plaintiff was entitled to recover thereon, at the date of the decree, but the sum of three hundred and sixty-seven dollars and fifty-four cents, and that the sum of four dollars and fifty cents should be deducted from the amount allowed as an attorney's fee. One-half of the costs of the appeal will be taxed to the appellee.

The decree of the district court is modified and affirmed.

USURY—COMMISSIONS PAID TO AGENTS.—A person desirous of borrowing money may deem it expedient to secure the services of another to negotiate a loan for him, and may pay for such services, and the amount so paid, or agreed to be paid, when added to the interest stipulated for, may make the cost of the loan to the borrower greater than the legal rate of interest. If, however, the lender does not profit by this, there is no usury in the transaction, though he has notice of the fact that a broker has been employed and is to be paid for his services in effecting the loan: *Extended note to Bank v. Cook*, 48 Am. St. Rep. 196, 197. See, also, the extended note to *Davis v. Gurr*, 55 Am. Dec. 395.

STATE v. SHERWOOD.

[90 IOWA, 560.]

FORGERY—UTTERING FALSE INSTRUMENT.—If one, knowing that an instrument is forged, offers to sell it, and the sale is prevented by the discovery of the forgery, the crime of uttering and publishing a false and forged instrument is complete.

FORGERY—INSTRUMENT EXECUTED ON SUNDAY.—The making of a false and fraudulent note or other instrument purporting to create an obligation or legal liability, though bearing date on Sunday, is a forgery if in fact made on another day of the week.

FORGERY IS THE FALSE MAKING OR MATERIALLY ALTERING, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability.

J. H. Chambers, for the appellant.

J. Y. Stone, attorney general, and *T. A. Cheshire*, for the state.

⁵⁵⁰ **KINNE, J.** 1. This case is submitted on a transcript of the record which embraces copies of the indictment, record entries, motion of defendant for instructions, instructions, motion in arrest of judgment and for a new trial, notice of appeal, and the evidence. The indictment charged the

defendant with uttering and passing as true a forged instrument. It also contains this averment: "The said above-described note, although bearing date of Sunday, December 18, 1892, was made and executed on what is commonly a week day, all of which was well known to the said John H. Sherwood at and before the time of the making and execution of the same." It is first contended ⁵⁵¹ that there is no evidence showing an uttering of the note. The evidence touching this matter in brief is, that defendant, in writing, offered to sell the forged note, and represented that it was given to him and signed by John Van Kirk, whose name appeared thereto as a maker; that afterward, and in furtherance of procuring a sale, defendant made an offer in person to the same party of the note at a certain discount, and passed the note to the person with whom he was negotiating. The sale was not consummated, because the expected purchaser discovered that the note was forged. We think the testimony clearly shows an offer and tender of the note for sale. Our statute provides: "If any person utter and publish as true (any promissory note) knowing the same to be false, altered, forged, or counterfeited, with intent to defraud, he shall be punished," etc.: Code, sec. 3918. While ordinarily the offense is completed by an actual sale and delivery of the paper, yet this is not always necessary to constitute the offense of uttering forged paper: *Mathews v. State*, 33 Tex. 102; *People v. Brigham*, 2 Mich. 550; *People v. Caton*, 25 Mich. 388; *State v. Horner*, 48 Mo. 520. The offense of uttering and publishing is proved by evidence of offering to pass the instrument to another person, declaring or asserting, directly or indirectly, by words or actions, that it is good: 3 Greenleaf on Evidence, sec. 110. The evidence warranted the jury in finding that the defendant uttered and published the instrument as true, knowing that it was in fact false.

2. This note on its face purported to have been executed on Sunday, and hence it is said it was void, so that, even if the signature had been genuine, it could not have been of legal efficacy, or the foundation of a legal liability. The statute defining forgery provides: "If any person, with intent to defraud, falsely make, alter, forge, or counterfeit . . . any promissory ⁵⁵² note, . . . being, or purporting to be, the act of another, by which any pecuniary demand or obligation, or any right or interest in or to any property whatever is, or purports to be, created," etc.: Code, sec. 3917.

This court has defined forgery to be the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability: *State v. Pierce*, 8 Iowa, 231; *State v. Thompson*, 19 Iowa, 299; *State v. Johnson*, 26 Iowa, 413; 96 Am. Dec. 158. True, it has been broadly stated that there can be no forgery if the paper is invalid on its face, for it then can have no legal tendency to effect a fraud: *State v. Johnson*, 26 Iowa, 418; 96 Am. Dec. 158. It is shown, without conflict, that the purported maker of this note was not an observer of the seventh day of the week as the Sabbath. We have, then, the question as to whether a note purporting to be dated on Sunday purports to create a liability in such a sense as that the false making or signing of the same may be a forgery. A note made on Sunday, but in fact delivered on a week day, is not void: *Bell v. Mahin*, 69 Iowa, 408. There is nothing in the note itself, aside from its date, which tends to show when it was delivered. We are cited to no case, nor have we been able to find one, where the facts were the same as in the case at bar. In this case it appears from the uncontradicted testimony that the entire note and signature must have been written on a week day; that the note was dated on Sunday by mistake of the party who drew the body of it for defendant. Now, while it is true that a note in fact made and delivered on Sunday is void, and could not be used in evidence, still, in a civil action, by making proper averments touching a mistake in the date, or that it was, in fact, delivered on a week day, such note would be admissible in evidence, and, on proof that it was made or delivered on a week day, it ⁵⁵² would be the basis of a legal liability against a genuine maker. The intent to defraud is the gist of the offense of forgery. The fact that the false instrument is such that it is calculated to deceive is a material question on an indictment for forgery. It cannot be doubted that a note like that at bar, while apparently void on its face, might, as a matter of fact, be a valid and binding obligation, if genuine, if it appeared that in fact it was made and delivered on a week day. Suppose this was a genuine instrument, and the maker was sued thereon, and the petition, by proper averments, showed that the note was made on a week day, and prayed for proper relief, there could be no doubt, if such allegation was sustained by proper proof, that the validity of the instrument would be established, and a recovery had

thereon. It is not, then, necessarily an instrument which is void. That fact may depend upon averments and proof. That it is an instrument, even though bearing date on Sunday, and that it is calculated to deceive, is apparent. Does it "purport," within the meaning of the statute, to create a liability? It will be observed that, under the wording of our statute, the instrument need not in fact create any liability. The language used is: "By which any pecuniary demand or obligation, or any right or interest in or to any property whatever, is or purports to be created." Now, "purport" means the design or tendency, meaning, import. Clearly, the design of this instrument on part of the defendant was to create a legal liability against the one whose name he falsely signed to it. To be within the literal reading of the statute the false instrument may not in fact be such that, if true, it would have created any liability whatever; it is sufficient if it be such an instrument the design or meaning of which is to create such a liability, though in fact it may not do so. We think that the false making of an instrument of this character, even though it bear date of ⁵⁵⁴ Sunday, may be a forgery under our statute, when, as in this case, it is made to appear in the indictment and from the evidence that it was in fact made on a week day, and when the testimony shows, as it does in this case, that it was meant and intended thereby to deceive and defraud. To hold otherwise would be not only in violation of the spirit and wording of the statute, but would render the business of the forger profitable and successful. All he would have to do to escape liability would be to date the instrument forged on Sunday.

The judgment below is affirmed.

FORGERY DEFINED.—The false making or materially altering, with the intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of legal liability, is forgery: *Commonwealth v. Wilson*, 89 Ky. 157; 25 Am. St. Rep. 528, and note; note to *Luttrell v. State*, 4 Am. St. Rep. 765; extended note to *Arnold v. Coit*, 22 Am. Dec. 306.

FORGERY—COMPLETION OF OFFENSE.—Where there is a present intent to defraud, the crime of forgery is complete, whether the expected advantage is to accrue from it to defendant personally or to another, and whether that purpose is successfully attained or not: *State v. Cross*, 101 N. C. 770; 9 Am. St. Rep. 53. Offering to pass a forged instrument asserting that it is good constitutes uttering, though the instrument is not accepted: *Smith v. State*, 20 Neb. 284; 57 Am. Rep. 832; *Hale v. State*, 1 Cold. 167; 78 Am. Dec. 488, and note.

SHAFFER v. McCrackin.

[30 IOWA, 575.]

JUDGMENTS—PROOF OF PAYMENT.—The payment of a judgment to the attorney who obtained it may be proved by parol evidence.

JUDGMENT—PAYMENT—ASSIGNMENT.—Payment made to the attorney of record who procures a judgment before his authority is revoked, or before notice thereof to the judgment defendant, is binding on the judgment plaintiff, and an assignee of such judgment takes it subject to all equities and defenses.

JUDGMENTS—PROOF OF PAYMENT.—The account-book of an attorney, to whom a judgment obtained by him is shown to have been paid, is incompetent, as evidence, to show nonpayment without first laying a proper foundation for its introduction, and a showing that it is the only account-book kept by him.

JUDGMENTS.—SALE UNDER A JUDGMENT IN FACT PAID, though not satisfied of record, is void, and conveys no title, even though the purchaser has no knowledge that the judgment has been paid.

Leggett & McKemey, for the appellants.

Jones & Fullen, for the appellees.

575 GRANGER, C. J. Barbara Iver was a judgment creditor of John G. Weitzel, in the sum of three thousand nine hundred and ten dollars and fifty cents. On this judgment there are conceded payments of three thousand five hundred and twenty dollars and fifty-six cents, made on and before June 1, 1870. Barbara Iver died, and by bequest her husband, John Iver, became the owner of the judgment, which he assigned to the defendant, Joseph R. McCrackin, who took execution on the judgment, levied on the land in question, and after sale, and the expiration of redemption, he took a sheriff's deed therefor. Minnie Shaffer and her coplaintiffs are heirs of Amelia Weitzel, deceased, who was the wife of John G. Weitzel, in whom, they allege, was the title to the land, and they aver that it was not the land of John G. Weitzel at the time of the levy and sale, but that of Amelia Weitzel, and that her heirs are the owners thereof. Some conveyances of the land were made that need not be set out. They also allege that prior to the assignment of the judgment to defendant McCrackin, it had been fully paid, and issue was taken thereon. The payment, if made, was to the attorneys of Barbara Iver, Slagle & Acheson, who represented her in her suit in which the judgment was obtained. Slagle and Acheson are both deceased. The payment, if made, was about seven hundred dollars. The district court took

the case under advisement, and prepared the following opinion, showing its conclusions of fact and law:

"1. Was the judgment on which the land in question was sold paid off before the sheriff's sale? This will depend on whether the alleged seven hundred dollars payment on said judgment was in fact made. The ^{see} payment of a judgment may be proved by parol evidence: *Hollenbeck v. Stanberry*, 38 Iowa, 325. Payment made to the attorney of record who procured the judgment, before his authority is revoked, or before due notice of such revocation is given to the judgment defendant, is binding on the judgment plaintiff: 2 Black on Judgments, sec. 986. The assignee of a judgment takes it subject to all equities and defenses: *School District v. Schreiner*, 46 Iowa, 172. Mr. L. D. Jones testifies that the alleged seven hundred dollars payment was in fact made within his personal knowledge. This testimony is competent and pertinent. It cannot be disregarded. And Mr. Jones, in his evidence, states the circumstances of said payment so clearly, so fully, and with such minuteness of detail, that I am not at liberty to say that he is mistaken, or that the facts have faded from his memory.

"2. What evidence is produced against this positive testimony of Mr. Jones? Really, there is none. The account-book of Messrs. Slagle & Acheson, to prove the nonpayment of the seven hundred dollars, is incompetent, 1. Because items of money received or paid are not the subject of book-account, and cannot be proved in that way: *Veths v. Hagge*, 8 Iowa, 163; *Young v. Jones*, 8 Iowa, 220; 2. The proper foundation was not laid for the introduction of said book: McClain's Code, sec. 4908; 1 Greenleaf on Evidence, sec. 118, note; and 3. The book being introduced to prove a negative, it should for that reason be shown that all the account-books of Slagle & Acheson likely to contain the seven hundred dollars item are before the court. How can you prove that an item was not entered on any book by simply introducing one book in evidence, and without showing that to be the only account-book?

A sale of property under a judgment which has been satisfied is void, even though the satisfaction does ^{see} not appear of record, and the purchaser has no knowledge that the judgment has been paid: 12 Am. & Eng. Ency. of Law, 150 e, note 6, and authorities there cited; *Craft v. Merrill*, 14 N. Y. 456; *Carpenter v. Stilwell*, 11 N. Y. 71. The judgment is the

power back of, and authorizing, the execution sale. If the judgment has been paid off, the power is gone, and no title passes, even to an innocent purchaser. He who buys at a judicial sale must, at his peril, see that there is a valid subsisting power to make the sale: See authorities last cited, and especially see *Craft v. Merrill*, 14 N. Y. 461, and *Carpenter v. Stilwell*, 11 N. Y. 71. If the judgment in question was satisfied before the sheriff's sale, as I think the evidence shows, then J. R. McCrackin acquired nothing by his purchase. He has no right, title, or interest whatever in the premises in dispute.

3. "But what right, title, or interest in said premises have plaintiffs or the other parties to the suit? It may be truly said that they must recover, if at all, on the strength of their own right, and not on the weakness of McCrackin's claim. Yet they need not have a perfect title to said premises, as against J. R. McCrackin. If they have any right or equity therein, they should be protected as against him who has no right whatever. It matters not that other persons may be able to assert rights in said premises as against plaintiffs. That fact, if it exists, cannot prejudice Mr. McCrackin, whose interest in the land may be represented by zero. See, as bearing on this question, *Craft v. Merrill*, 14 N. Y. 456. Before proceeding to point out what I conceive to be a tenable ground on which plaintiffs can stand, let me say that, in my opinion, their counsel must abandon the claim that Amelia and J. G. Weitzel conveyed the land in question to Peter Roth in trust for Amelia's heirs. Such an ^{and} alleged trust would be an express trust, and would have to be in writing: Code, sec. 1934; *McClain v. McClain*, 57 Iowa, 187. Roth and wife conveyed the land to J. G. Weitzel. Weitzel claims that this is not what he wanted. He desired the premises conveyed to his and Amelia's children, or to some one in trust for them. Weitzel claims that he never accepted Roth's deed, and tries to repudiate said conveyance. But I think the weight of the evidence shows that J. G. Weitzel solicited Roth to convey the land to him, and that said conveyance is valid and binding as between the parties. Roth no longer claims the premises under the deed from Amelia and J. G. Weitzel to him. J. G. Weitzel is willing and anxious that his and Amelia's children should have the land. J. R. McCrackin cannot object to such a consummation. No one can, unless it be creditors, if any, of J. G. Weitzel. If there be such

creditors, their rights could not, and are not, attempted to be determined in this suit."

Our consideration of the evidence leads us to the same conclusion as to the fact of payment. The legal conclusions are supported by authority, and, in so far as they are essential to a conclusion of the case, they are approved, and the judgment will stand affirmed.

JUDGMENTS—PAYMENT OF TO ATTORNEY.—After judgment has been recovered, the attorney, by virtue of a general retainer, continues to be the agent for collection, and he is authorized to receive payment and to enter satisfaction: Extended note to *Clark v. Randall*, 76 Am. Dec. 260.

EXECUTION SALE UNDER SATISFIED JUDGMENT.—One whose land has been levied on and sold under a judgment which has, in fact, been paid, though not satisfied of record, may treat the sale as void and recover the land, or, at his election, may waive the invalidity of the sale and sue the execution creditor for the value of the land: *Pope v. Benster*, 42 Neb. 304; 47 Am. St. Rep. 703, and note with the cases collected.

LIMBURG v. GERMAN FIRE INSURANCE COMPANY.

(90 IOWA, 709.)

INSURANCE—OCCUPANCY.—The words "vacant and unoccupied" in an insurance policy must be construed with reference to the kind and adaptability of the structure or building insured.

INSURANCE.—OCCUPANCY IMPLIES ACTUAL USE of a dwelling-house as such, and an insurer has a right, under a policy employing such word, to the care and supervision of the insured premises involved in such an occupancy.

INSURANCE—OCCUPANCY.—The mere use of a store building as a place in which to store a few articles of personal property, no other business being carried on therein, renders the building "vacant and unoccupied" within the meaning of those words as used in an insurance policy.

INSURANCE—OCCUPANCY OF PREMISES.—An insured building used by a tenant as a store and cigar factory is rendered "vacant and unoccupied" within the meaning of those words as used as a condition in the policy of insurance, when the tenant, upon the expiration of his lease, removes himself and most of his stock from the building, leaving therein only a counter for sale and a few articles belonging to himself and another stored there without the knowledge or consent of the landlord, and retains a key to the premises in order to show intending purchasers the counter while the landlord is seeking another tenant.

INSURANCE—OCCUPANCY OF PREMISES.—Altering and repairing an unoccupied building does not constitute an occupancy under an insurance policy providing that the premises shall not become vacant and unoccupied, and that mechanics may be employed for a certain number of days for the purpose of making alterations and repairs in the insured premises.

VERDICT.—If the jury ignore and disregard proper instructions given, the verdict may be set aside.

J. C. Davis, for the appellant.

J. F. Smith, for the appellee.

KINNE, J. The defendant company issued to the plaintiff its policy of insurance for the sum of five ⁷¹⁰ hundred dollars on a frame store building in the city of Keokuk, Iowa. The policy insured the property against loss by fire from September 4, 1890, to the fourth day of September, 1891. On March 29, 1891, the property was partially destroyed by fire. The plaintiff brings this action to recover, claiming that the loss is total. The defendant pleads a provision in the policy that if the premises "be or become vacant or unoccupied, and remain so for ten days," the policy shall be void. It alleges that for more than ten days immediately prior to the fire said premises had become and remained vacant and unoccupied. It also claims that the insured property was only damaged to the amount of two hundred dollars. Other issues were presented, as to which no question is now made, and they need not be stated.

1. The provision of the policy on which the defense is chiefly based is: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and remain so for ten days." It becomes necessary, therefore, to determine when, in legal contemplation, a building may be said to be "vacant or unoccupied," within the meaning of these words as used in the policy. At the outset it will be well to bear in mind that, in order to avoid liability under this clause of the policy, it is not incumbent on the defendant to show that both conditions existed for the ten days immediately preceding the fire. It is sufficient, under this provision of the policy, to defeat liability, if the building was either vacant or unoccupied for the required time, in the absence of other provisions indorsed upon or added to the policy.

A learned writer has said that the words "vacant and unoccupied" are not synonymous; that "vacant" means empty of everything but air, and that occupied ⁷¹¹ means that no one has the actual use or possession of the premises; and it is further said that the words must be construed with reference to the kind of structure or building insured: 1 May on Insurance, sec. 249 a. It occurs to us that these words must also be con-

strued in view of the uses and purposes for which the building is adapted; that is, as to whether it is so built and arranged as to be used as a dwelling-house, or a store building, or a schoolhouse, or a structure fitted and adapted for use for some other purpose. Webster defines "vacant" as being "deprived of its contents; not filled; empty." The same authority defines "occupy" thus: "To take or hold possession of; or hold or keep for use; to possess." Another definition is: "To hold possession; to be an occupant." It is said that occupancy implies an actual use of a dwelling-house as a dwelling place; that the insurer has a right, by the terms of such a policy, to the care and supervision which would be involved in such an occupancy: *Bonenfant v. American Fire Ins. Co.*, 76 Mich. 653; *Shackelton v. Sun Fire Office*, 55 Mich. 288; 54 Am. Rep. 379; *Ashworth v. Builders' etc. Ins. Co.*, 112 Mass. 422; 17 Am. Rep. 117. *Weidert v. State Ins. Co.*, 19 Or. 261, 20 Am. St. Rep. 809, was a case of insurance of a dwelling-house, where the policy contained a "vacant" or "unoccupied" clause. It appeared that the plaintiff moved out of the house about March 20th; that on the next day one McNett moved in, and remained until the twentieth day of June; and, after that time, and up to the time of the fire, the plaintiff or his hired man visited the house daily, and that some of the members of his family were at the house every day. It was held that the house was vacant and unoccupied. In *Keith v. Quincy etc. Ins. Co.*, 10 Allen, 228, the court held that the fact that tools remained in a shop, and that it was visited daily by the son of the insured, did not constitute occupancy; that the policy contemplated some practical use of the building. In *Corrigan v. Connecticut Fire Ins. Co.*, 122 Mass. 298, the occupant of the house had moved out, leaving in it some of his furniture and retaining the key; and the premises were held to be unoccupied. In *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184, 37 Am. Rep. 488, it was held that a dwelling-house was unoccupied when no one lived in it; and in *Herrman v. Adriatic F. Ins. Co.*, 85 N. Y. 163, 39 Am. Rep. 644, the holding was that occupancy contemplated the use of a house by human beings as their customary place of abode. In *Cook v. Continental Ins. Co.*, 70 Mo. 610, 35 Am. Rep. 438, the insured had moved out of the house, leaving some furniture, and leaving a man in possession of the house and to sleep therein. He abandoned it, and afterward the house was burned, no

one being then there. It was held that it was unoccupied. In *Watertown F. Ins. Co. v. Cherry*, 84 Va. 72, the premises insured consisted, in part, of a dwelling-house. The evidence showed that the insured had moved out of the house; that it was not in use, except that a party had put some fodder in the outbuildings; and the buildings were occasionally visited by a resident of the neighborhood, who had the key. The building was held to be vacant and unoccupied.

In *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165, it was held that a building used as a morocco factory, and which was unused for about six months prior to the fire, was unoccupied within the meaning and contemplation of the parties, even though all the machinery remained in the building, and it was closed and locked and in the hands of the plaintiff's agent for rent, and he visited it frequently. The court said "that to constitute occupancy of a building used for manufacturing purposes there must be some use or employment of the property. Its use as a place of storage merely is not sufficient. . . . The insurer has a right, by the terms of the policy, to the care and supervision ⁷¹³ which is involved in the use of the property contemplated by the parties at the time of entering into the contract." In *Continental Ins. Co. v. Kyle*, 124 Ind. 132, 19 Am. St. Rep. 77, a tenant moved out of an insured dwelling-house March 26th, after which one who had previously engaged the house made some repairs thereon, and kept in the house some planes, and on March 30th put some hay in the stable, and buried some potatoes on the premises, intending to move in on April 1st. March 31st the house was destroyed by fire, and it was held that a policy conditioned against the premises becoming "vacant or unoccupied" was avoided. In *American Ins. Co. v. Padfield*, 78 Ill. 169, it is said: "A fair construction of the language 'vacant and unoccupied' is that it should be without an occupant—without any person living in it." In *Ashworth v. Builders' etc. Ins. Co.*, 112 Mass. 422, 17 Am. Rep. 117, it is said: "Occupancy, as applied to such buildings [dwelling-house and barn], implies an actual use of the house as a dwelling place, and such use of the barn as is ordinarily incident to a barn belonging to an occupied house, or at least something more than a use of it for storage." In *Insurance Co. v. Wells*, 42 Ohio St. 519, the tenant moved out with no intention of returning, leaving in the premises a barrel of corn and a coal oil can. On the follow-

ing night the building burned. It was held that it was vacant or unoccupied. In *Sleeper v. New Hampshire F. Ins. Co.*, 56 N. H. 401, the occupant of the house removed to another town, taking his family, their wearing apparel, and part of their furniture. It was held that the building was vacant and unoccupied, even though he may have intended to return in eight or ten months, and left in the house a few articles not necessary for his present use. In *Moore v. Phoenix Ins. Co.*, 64 N. H. 140, 10 Am. St. Rep. 384, it is held that the premises were vacant and unoccupied where the occupant had removed therefrom, though a little furniture was left in the house; and it ⁷¹⁴ is also held that the terms "vacancy" and "nonoccupancy" are used interchangeably, and as equivalent in meaning. In *Dennison v. Phoenix Ins. Co.*, 52 Iowa, 457, a building used as a boarding-house and hotel, which had been vacated by a tenant, and stood awaiting another occupant, was held vacant and unoccupied. In *Feshe v. Council Bluffs Ins. Co.*, 74 Iowa, 676, the tenant moved out of a dwelling-house on September 26th, and it was burned October 1st following. The owner lived a mile and a half away, and spent a part of each intervening day in examining and cleaning the house, but did not sleep there nights. Her father, who lived near the insured premises, left an ax and grub hoe in the house at night; otherwise it was not occupied. It was held that to all intents and purposes the house was vacant and unoccupied. It was said: "There was nothing left or placed in the house which indicated an intent to occupy it as a dwelling at any time. It is true it had been rented, and a tenant expected to take possession in about two weeks subsequent to the fire; but this is immaterial." In *Snyder v. Fireman's Fund Ins. Co.*, 78 Iowa, 146, the tenant had moved everything out of the insured dwelling-house, except some trumpery, a box or barrel, a crosscut saw, a pair of skates, and did not expect to return, and there was no evidence touching its future occupancy. The house was destroyed by fire the next morning. Carpenters had been at work repairing it. It was held vacant or unoccupied. In *Sexton v. Hawkeye Ins. Co.*, 69 Iowa, 99, the dwelling-house had been vacated by the tenant about three months prior to the fire. He had left therein two or three jars, and two large four or five gallon jars, and a molasses keg, and a table. It appears also that plaintiff had in the house some tools and other things. It was held that the articles in the house did

not constitute an occupancy, and that a verdict was properly directed for defendant.

Appellee relies upon and cites many cases, among ⁷¹⁵ which we specially refer to the following: *McMurray v. Capital Ins. Co.*, 87 Iowa, 453, was a case where a dwelling-house was insured, and it was claimed that the premises had become vacant and unoccupied. The facts were that the insured had been away for several months, working at his trade. His wife and children were away temporarily on a visit to her parents. The house remained the home. None of the furniture had been removed. There was no intention to abandon it as a place of residence. The absence was for a temporary purpose only. In *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472, 59 Am. Rep. 444, the tenant had removed from the house on Tuesday. The fire occurred the following Friday. The plaintiff was residing in another house on another part of the farm; and on the morning after the tenant moved out, the plaintiff took possession of the house, cleared it, and prepared to move in. Before the fire the plaintiff had in part moved in, had placed therein carpets, bedding and bedsteads, cans of fruit, chairs, pictures, mirrors, stoves, clothing, dishes, and a table, and expected to be there to remain on Saturday; and it was held that the house was not vacant or unoccupied. In *Doud v. Citizens' Ins. Co.*, 141 Pa. St. 47, 23 Am. St. Rep. 263, the provision in the policy was, "if the premises insured be vacated." The tenant moved out, and on the following day the owner was at the house all day, and then left and began packing up preparatory to moving into the house herself, and in fact had placed some things in the house. She was held to be in possession, and that the house had not been vacated. *Roe v. Dwelling House Ins. Co.*, 149 Pa. St. 94, 34 Am. St. Rep. 595, was like the Doud case in its facts. In *Home Ins. Co. v. Wood*, 47 Kan. 521, it was claimed that the house was unoccupied within the meaning of the policy. The jury found that the plaintiff's family was residing in the house at the time it was burned, but were temporarily absent. The evidence showed that the household goods were all in the ⁷¹⁶ house; that some of them had been packed; that the plaintiff stayed in the house every night until five days before the fire, and thereafter slept at another place, because he was ill; that he was at the house every day up to the day of the fire. The court, while expressing doubts as to whether the building was occupied, held that, as the jury had so found,

and there was evidence to sustain their finding, it would not disturb the verdict. In *Burlington Ins. Co. v. Brockway*, 188 Ill. 644, the property was a building occupied by the assured as a dwelling and storeroom. The policy contained a provision like that in the case at bar. The insured ceased to occupy the dwelling part of the building, but did occupy the store up to the time of the fire. The company contended that a failure to occupy the whole building avoided the policy. The court held that the occupancy of the store portion of the building was an occupancy under the terms of the policy. In *Traders' Ins. Co. v. Race*, 142 Ill. 338, the court held that, by reason of special provisions in the policy, the trustee therein mentioned, or the mortgagee, was not affected by a violation of the conditions of the policy by the assured as to nonoccupancy; and, further, as the proceeding was in equity, which will not enforce a penalty or forfeiture, that the company must show that the vacancy or nonoccupancy in some degree contributed toward causing the fire. In *Traders' Ins. Co. v. Race*, 29 N. E. Rep. 846 (Ill., June 18, 1892), the insured had moved furniture in the house, and from that and other circumstances the court held it was not vacant and unoccupied.

It will be observed that few, if any, of the cases relied upon by the appellee sustain his contention that the premises in controversy were occupied within the meaning of that word as used in policies of insurance. Facts touching vacancy or occupancy differ in each case presented; hence each case must be determined upon its own peculiar facts. It must be conceded, also, that ⁷¹⁷ the decisions of courts are not always in harmony where the facts are substantially the same. It will serve no useful purpose to further review the authorities. From them may be deduced certain rules or principles applicable to cases like that at bar. We must, in construing the meaning of the words, "be or become vacant or unoccupied," have in view not only the technical meaning of the words, but the uses for which the property is adapted, which must have been in contemplation of the parties when they entered into the contract. Again, mere use of a store building as a place in which a few articles may be left, no business being carried on therein, and the premises not being so used as to in any wise insure for them the care, watchfulness, and protection from danger to exposure to fire which must have been in contemplation of the parties to the contract, in view of the

adaptability of the building for certain uses only, cannot be deemed an occupancy. To prevent a policy from being avoided for vacancy or unoccupancy in such a case, the use and occupancy must be of such a character as ordinarily pertains to a building adapted for such purposes. A mere storage of property therein, which does not involve the care and watchfulness which the policy holder owes to the insurer, will not suffice to constitute occupancy.

The undisputed facts in the case at bar are, that the insured property was a two-story building, the lower story being adapted and used for a storeroom, with access therefrom to the story above. There was no means of access to the upper story, except by going through the storeroom. When the policy issued, the building was occupied by one Reimbold as a tenant of the plaintiff. He had a cigar store in the front part of the building downstairs, and a cigar manufactory in the rear part. There were two rooms upstairs which seem to have been but little used by the tenant. His lease expired on March 11, 1891. He moved his stock out of the building on March 7th, and on the same day he had his government license transferred to permit his carrying on business in the building to which he had moved. He had a policy of insurance upon his stock and tools used in his business. This he had properly transferred on March 6th. When he moved out on March 7th, he left in the building one counter, which he did not intend to move, but wanted to sell, some shelving, and some leaf tobacco in an upper room. All these articles he had taken from the building prior to March 20th, except the counter, and he thinks he had them all out, except the counter, before the 18th of March. The counter remained in the building and was burned. The fire occurred on March 29th. The tenant, when he went out, or at least by March 11th, gave one key to the building to the agent of the insured, and retained the other. He retained the key so that he might show intending purchasers the counter which he had left there. He exercised no control over the property after his lease expired. During the continuance of his tenancy he had given one Masterson, a saloon-keeper, the right to store some liquors in one of the upper rooms, for which Masterson was to pay him two dollars per month. He had given Masterson no authority to thus use the upper room after his own lease expired. Masterson's place of business was two or three doors

from this building. He never used any part of this building as a storeroom to do business in. He simply kept a few bottles of liquor upstairs there, and, as he needed a fresh supply in his saloon, he would come there and get it. He did not come there frequently, only occasionally. He had in the building, within ten days before the fire, one or two bottles of brandy, one or two jugs of whisky, some bottles of whisky, and a couple of boxes of wine, and some bottles. It does not appear that Masterson had any key to the building after March 11th, or that he was allowed any means of access to his ⁷¹⁹ goods. He had no lease from the plaintiff. He was not thus occupying or using this upper room, after the tenant moved out, by reason of any arrangement with plaintiff, so far as the record shows. Nor does it appear that his use of this room was known to the plaintiff. The plaintiff's agent had rented the building to a new tenant, who was to move in on March 18th, but failed to do so. At the time of the fire there was no certainty as to when, if at all, the building would be occupied. Certain repairs had been made in anticipation of the occupancy of the tenant who was to move in, and failed to do so. The plaintiff's agent testified that at the time of the fire the plaintiff was not in any way occupying the building, and had no tenant in there. The plaintiff's agent was frequently in the storeroom, painting and papering and scrubbing it out, prior to the fire. Do these facts show occupancy? We think not. The tenant who was to occupy more than ten days prior to the fire had failed to come. No other tenant had been found. The premises were not used for the purpose of carrying on business therein for more than fifteen days preceding the fire. They stood awaiting a tenant. There is nothing to show that the plaintiff would ever be able to rent the premises. There was absolutely no use made of the building whatever for the ten days preceding the fire, except that the counter of the late tenant was in there and the Masterson liquors, before mentioned. The parties, when they entered into the contract of insurance, did not contemplate that the property would be treated as occupied if an outgoing tenant left an old counter in the building, nor if some one unknown to the plaintiff stored a few bottles of liquor there. Such use, if it can be dignified into a use, of the building, insured to it practically no care and protection whatever. Such a use, to our minds, falls far short of a compliance with the terms of the contract. That contemplated the use inci-

dent to a store, ⁷²⁰ and such a use would carry with it a large degree of protection to the property, which was not essential or possible under the facts as they appear here. The building was vacant or unoccupied for more than ten days prior to the fire. Counsel for the appellee seem to think that to hold the parties to the contract which they have voluntarily entered into, and in the absence of fraud, is technical. We cannot change or ignore the agreement of the parties. We cannot make a new one for them, but we must construe their agreement as we find it.

2. The appellee contends that, as the policy provides that mechanics may be employed in the building, altering or repairing it, for not more than fifteen days at any one time, and it was being repaired, that should be considered as an occupancy within the terms of the policy. We do not think so. The repairs might be made while the building was occupied. Again, it is not shown that these repairs continued up to within ten days before the fire. The provision of the policy does not indicate that it was in the contemplation of the parties that there should be no occupancy of the premises while repairs were being made. As the point is not pressed with any apparent confidence, we need give it no further consideration.

3. Under the instructions of the court the jury should have found for the defendant. Indeed, under the undisputed facts, there was no such occupancy as the policy contemplated, and hence the court would have been justified in directing a verdict for the defendant.

4. The jury were told by the court in an instruction that, if they found that the building was not totally destroyed, and it could be repaired at an expense of two hundred to two hundred and fifty dollars, then the plaintiff's damages would be limited to the amount it would have cost to repair said building, and put the same ⁷²¹ in as good condition as before the fire occurred, with six per cent interest per annum thereon. Under the provisions of the policy this instruction was proper, and, whether it was so or not, the jury were bound to follow it. The undisputed evidence was that for two hundred and fifty dollars the building could have been made as good as it was before the fire. The jury disregarded the court's instruction and found for the plaintiff for the full amount of the policy, with interest. The court should have set the verdict aside for the reasons given.

Reversed.

INSURANCE—OCCUPANCY—CONSTRUCTION.—A condition in a policy of fire insurance avoiding it in case the premises become "vacant and unoccupied," is to be construed in view of the situation and character of the property insured, and the ordinary incidents and contingencies affecting the use to which it, and other property of like character similarly situated, is subject: *Whitney v. Black River Ins. Co.*, 72 N. Y. 117; 28 Am. Rep. 116, and note; *Continental Ins. Co. v. Kyle*, 124 Ind. 132; 19 Am. St. Rep. 77, and note.

INSURANCE—OCCUPANCY—DWELLING-HOUSE.—Where a policy of insurance on a dwelling-house contains a provision that the policy shall become suspended if the property becomes vacant or unoccupied, "occupied" within the meaning of the policy, means that the dwelling-house must be used by human beings as their place of abode: *Weidert v. State Ins. Co.*, 19 Or. 261; 20 Am. St. Rep. 809, and note. See, especially, the extended note to *Moore v. Phoenix Ins. Co.*, 10 Am. St. Rep. 392.

INSURANCE—VACANT PREMISES.—An insured building is "unoccupied" within the meaning of an insurance policy stipulating that it shall be void if the premises are "vacant and unoccupied" for a certain length of time, in a case where the tenant who occupies the building as a store closes and abandons it before the end of the term, leaving therein only a small amount of merchandise of nominal value, although he retains the key to the building at the request of the insured: *Home Ins. Co. v. Scales*, 71 Miss. 975; 42 Am. St. Rep. 512, and note; but compare *Liverpool etc. Ins. Co. v. Buckstaff*, 38 Neb. 146; 41 Am. St. Rep. 724, and note. See, also, the extended note to *Moore v. Phoenix Ins. Co.*, 10 Am. St. Rep. 393.

CASES
IN THE
SUPREME COURT
OF
MARYLAND.

COCHRANE v. MAYOR OF FROSTBURG.

[81 MARYLAND, 54.]

MUNICIPAL CORPORATIONS—ANIMALS RUNNING AT LARGE.—A municipality having power to ordain and enforce ordinances necessary for the peace, good order, health, and safety of the town, and of the people and property therein, can, by ordinance, restrain domestic animals from running at large. The withholding of this power from the municipality is not inferable from the fact that in the charter of other municipalities it is granted in express terms.

MUNICIPAL CORPORATION—LIABILITY OF FOR FAILING TO EXERCISE ITS POWERS.—A municipality having power to restrain the running of domestic animals at large in its streets, and which fails to exercise its power, is answerable in damages to a person attacked and injured, while walking along such streets, by a cow, which is on the streets by the fault of its owner, and which the municipality could have prevented from running at large by the use of ordinary care and diligence.

MUNICIPAL CORPORATIONS—LIABILITY.—A municipality having powers to be exercised for the public good is liable for its failure to exercise them to any person who has received substantial damages therefrom, and who is not himself in fault.

A MUNICIPALITY IS NOT ANSWERABLE FOR INJURY TO A HUMAN BEING INFLICTED BY A DOMESTIC ANIMAL running at large on the public streets, if such animal was at the place where it inflicted the injury for so short a time that it could not have been discovered by the municipal officers by the use of reasonable care and diligence before inflicting the injury.

Robert R. Henderson and Benjamin A. Richmond, for the appellant.

David W. Sloan and A. A. Doub, for the appellee.

50 *Boyd, J.* The appellant sued the appellee for injuries sustained by her being horned, tossed, thrown down, and trampled upon by a cow, which attacked her while she was

walking along a lane or street of Frostburg. The defendant demurred to the declaration, and the demurrer was sustained by the court below and judgment entered for the defendant. From that judgment this appeal was taken, and we are therefore to inquire into the legal sufficiency of the declaration and determine whether the facts therein stated, which are admitted by the demurrer, give the plaintiff a right of action.

It is alleged that the defendant was, by its charter, vested with control over all the streets, lanes, and alleys of Frostburg, and with full power to provide, by the passage and enforcement of ordinances, for the comfort, good order, health, and safety of all the inhabitants of said town, residing within the limits and passing along and over its streets, lanes, and alleys, and with power to prevent and remove all nuisances in said town, and to shield and protect said inhabitants therefrom; ⁶⁰ that the said town is laid off into streets and alleys, contains between four and five thousand inhabitants, and is compactly built, so that there is a great deal of travel and walking on said streets and alleys.

It is further averred that large numbers of horses, cows, hogs, and horned cattle were turned loose and permitted to run at large upon the streets unattended during the day and night, by means of which "said stock, and particularly said cows (they being armed with dangerous horns and equipped with annoying bells), became a common nuisance, and a source of great annoyance and danger to persons passing along said streets and alleys, and particularly so as to women and children, who were attacked and frightened by said stock, whereby the safety and comfort of the inhabitants and the good order of said town were destroyed, and whereby the same became and (at the time of the grievances hereinafter set out) was a common and notorious nuisance, and a constant source of dangerous discomfort to the inhabitants of said town."

It is then charged that, by reason of the powers contained in the charter, it became the duty of the defendant to pass and enforce ordinances to abate and prevent said nuisance, and to prevent said animals from running at large and require their owners to keep them off the streets, unless attended by some person in charge thereof; but that the defendant, unmindful of its duty, negligently and wrongfully failed and refused to pass any such ordinances for the preventing and abating said nuisance, and negligently, willfully, and wrongfully refused to take any steps whatever to prevent said stock

and troublesome and dangerous animals from running at large on said streets, and that while said nuisance still continued, plaintiff was walking on a street or lane of said city, using due care and caution, and was attacked by one of the said cows and horned cattle so by the said defendant negligently and wrongfully allowed and permitted to be at large upon the said streets, and was violently horned, tossed, thrown, and trampled upon, etc.

¶ The injuries sustained by plaintiff are then set out in detail, showing that both of her arms were broken, her side torn, and that she was otherwise seriously and permanently injured.

If the defendant can be held responsible in any case to one lawfully using its streets for injuries inflicted by a cow running at large, the allegations in this declaration are certainly sufficient to entitle the plaintiff to recover, if she can sustain them by competent proof. In determining whether the defendant is so liable, we will consider:

1. Has the mayor and city council of Frostburg power under its charter to prevent stock from running at large within the corporate limits? 2. If it has such power, what are the consequences of its neglect or failure to do so?

Article 2 of section 144 of the Code of Public Local Laws authorizes the mayor and city council of Frostburg to pass such ordinances, not contrary to law, as they may deem beneficial to the town; gives them power to remove nuisances and obstructions upon the streets, lanes, and alleys, and to ordain and enforce all ordinances, rules, and regulations necessary for the peace, good order, health, and safety of the town and of the people and property therein, and authorizes them to impose fines, forfeitures, or imprisonment for the violation of any ordinances of the town.

These powers are in substance the same as those of the charter of the city of Cumberland, which were passed upon in the case of *Taylor v. Mayor*, 64 Md. 68; 54 Am. Rep. 759. This court there held that the defendant was authorized and required under its charter to prevent persons from coasting on the streets, if it could do so by ordinary and reasonable care and diligence, and declared such use of the streets to be a nuisance. There was no special authority given in the charter of Cumberland to prevent coasting on the streets, but the power of the city to do so was not only not questioned, but was expressly recognized in that case. If a municipality

can, without express powers in its charter, ⁶³ prohibit the use of its streets for coasting, why should it not have the power to prohibit the use of them by horses, cows, hogs, and horned animals, "during both the night and in daytime, and at all times, and on Sundays," as it is alleged in the declaration, especially when the cows are "armed with dangerous horns and equipped with annoying bells?" It is difficult to imagine a condition of things more calculated to injuriously affect, if not destroy, "the peace, good order, health, and safety of the town and of the people and property therein" than that described in the declaration.

It is true that the decisions are not uniform as to whether what is called "the general welfare clause," usually contained in charters, authorizes municipal corporations to restrain domestic animals from running at large, but many of them so hold: See 15 Am. & Eng. Ency. of Law, 1188, and note, where a number of them will be found collected together.

There can be no good reason assigned why it should not, unless there be some statute law or some other provision of the charter inconsistent with such construction. In those cases in which it is held that municipal corporations cannot, without special authority, pass and enforce ordinances of this character, it will generally be found, upon examination of them, that it is by reason of some statute or other special cause that would not apply to the case under consideration. For example, in the case of *Collins v. Hatch*, 18 Ohio, 523, 51 Am. Dec. 465, so much relied on by the learned counsel for the appellee, the court said that an ordinance to restrain horses, cattle, swine, etc., from running at large could not be adopted under the general welfare clause, as it would be in contravention of the general laws of that state, which allowed such animals to run at large. Is it to be said that the owners of horses, cows, and other animals can turn them loose in the public streets of a town such as described in the declaration, and the authorities have no means to prevent it, unless the legislature has given them express ⁶³ power? It is not necessary to determine whether domestic animals can be impounded and forfeited without express authority being given in the charter, but with powers as broad as those in the charter of defendant, there would seem to be no valid reason why it could not pass and enforce ordinances prohibiting stock from running at large, and imposing

penalties for the violation of them. If the owners of cows and horses tied them along the public streets of Frostburg, so as to interfere with the free passage of people having the right to use the streets, it could not be successfully contended that the authorities were without remedy. Why, then, should they be permitted to turn them loose, thereby not only obstructing the free and proper use of the streets, but permitting them to wander over the sidewalks to frighten, and possibly injure women, and children?

It was contended by the appellee that it is customary in this state to grant special powers to such municipal corporations as desired to prevent stock from running at large, and hence when it is omitted from a charter, the presumption is that it was not intended by the legislature that such power should be exercised. We do not think that such a conclusion can properly be drawn. Various reasons might be given for such omission. Some of those municipalities may have been so disturbed by animals running at large, that they wanted to emphasize that power to restrain them, or they may have thought it safest to include such powers to avoid any question.

In the brief for appellee certain towns are named which have the power expressly granted them to prevent cattle from running at large, and it is stated that Hagerstown, Frederick, and others have no such powers conferred on them. It would seem to be a most unreasonable construction to place upon the action of the legislature to say that, inasmuch as it has granted this express power to some towns of the state, but has omitted it in the charters of Hagerstown and Frederick, therefore, these two cities, which are among the largest in the state, were intended by the ⁶⁴ legislature to be prohibited from exercising such powers. There may be no such provision in the charter of Baltimore city, yet it would scarcely be claimed that it could not prohibit stock from running at large under the general powers vested in it.

The object of such a provision, as the general welfare clause, is to cover those cases not specifically designated. It would be impossible to enumerate in detail, in a charter of ordinary length, all the powers that a corporation could exercise. The very effort to name them all might exclude some that were omitted, but would have been authorized under the general welfare clause if an attempt had not been made to itemize them. We think it clear that the defendant

has the power under its charter to pass and enforce ordinances to prevent stock from running at large within its limits, and that the condition of affairs described in the declaration is a nuisance of such character as should be abated for the peace, good order, and safety of the people and property of the town.

It becomes necessary, therefore, to consider the second inquiry above suggested, namely, What are the consequences of the neglect or failure of the defendant to exercise its powers? We have been referred to a number of authorities outside of this state, to the effect that a municipality is not liable for the injuries sustained by reason of its failure to abate a nuisance, although it has power to do so. But that is no longer an open question in this state. It was said in *Mayor etc. v. Marriott*, 9 Md. 174, 66 Am. Dec. 826, that when a statute conferred a power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative, and the words "power and authority," in such case may be construed "duty and obligation." It was there held that the city of Baltimore was required to pass ordinances sufficient to reach the exigencies of the case, and was bound to see that they were enforced. Mason, J., in delivering the opinion in that case, said: "The people of Baltimore, in accepting the privileges⁶⁵ and advantages conferred by their charter, took them subject to the burthens and restrictions which were made to accompany them under the same charter. One of those burthens was the obligation to keep the city free from nuisances. A disregard of the obligations thus imposed would be attended with the same consequences which would result to the individual at common law, were he to disregard his obligations to the community in these particulars. As the duty is the same in a corporation as an individual, so are the consequences the same for its disregard." On page 175 the court quotes with approval from case of *Pittsburg v. Grier*, 22 Pa. St. 65, 60 Am. Dec. 65, that "It is no matter whether that duty (removing a nuisance) remains unperformed, because it had no ordinances on the subject, or because, having ordinances, it neglected to enforce them. The responsibilities of a corporation are the same in either case."

In *Taylor v. Mayor etc.*, 64 Md. 68, 54 Am. Rep. 759, it was held that the corporation was under an obligation to exercise for the public good the powers conferred on it by its

charter, to prevent nuisances and to protect persons and property. So, whatever may be the law elsewhere, it is well settled in this state that a corporation, having such powers, must exercise them, and is ordinarily liable for its failure to do so to any person who has received special damage therefrom, who is not himself in fault. Of course, as was said in *Taylor v. Mayor etc.*, 64 Md. 68, 54 Am. Rep. 759, if it use ordinary and reasonable care and diligence to prevent the nuisance, its duty is discharged and it is relieved from responsibility, and a vigorous effort to enforce its ordinance on the subject would fulfill its duty in this respect.

The declaration alleges that defendant "negligently and wrongfully failed and refused to pass any such ordinances for preventing and abating said nuisance, and negligently, willfully, and wrongfully refused to take any steps whatever to prevent said stock, and troublesome and dangerous animals from running at large on said street." Now, if it be true, as is alleged in the declaration and admitted by the demurrer, that women and children had been attacked and "frightened by these animals thus running at large in the streets, it would seem clear that it was the duty of the defendant to take some steps to prevent it. It is certainly its duty to prevent such a condition of affairs as is described in the declaration.

But the main difficulty in this case is to determine how far the defendant is responsible for such an injury as that complained of by plaintiff. It is well settled that the owner of a domestic animal is ordinarily not responsible for injuries inflicted by it, unless it is of a ferocious or vicious disposition, accustomed to bite or attack mankind, and he knows that it has such disposition or vicious propensity. "The gist of the action is the keeping of the animal after knowledge of its mischievous propensities," and it is incumbent upon the owner to see that no injury is done by it. There is another class of cases in which owners have been held liable, without proving knowledge by them, on the ground that the animals were wrongfully in the places where they did the mischief. It has, for example, been held that the owner of a horse, who permits it to go at large in the streets of a populous city, is answerable for a personal injury done by it to an individual without proof that he knows the horse is vicious. The owner had no right to turn the horse loose in the streets: *Goodman v. Gay*, 15 Pa. St. 188; 53 Am. Dec. 589; *Decker v.*

Gammon, 44 Me. 322; 69 Am. Dec. 99; *Dickson v. McCoy*, 39 N. Y. 400; *Barnes v. Chapin*, 4 Allen, 444; 81 Am. Dec. 710.

This last case places the liability on the ground that the owner was in fault in permitting his mare to go at large on the highway without a keeper. See, also, *Mosier v. Beale*, 43 Fed. Rep. 358, in which it was held that in an action for personal injury caused by defendant's cow, it was not necessary to allege scienter when it is alleged that the injury is committed while the cow was negligently permitted by defendant to trespass on plaintiff's premises. In the case now under consideration, if the owner of the cow negligently or willfully permitted her to go at large on the streets of Frostburg, he was in fault, and was liable for injuries done by her to persons lawfully using the streets. Let us therefore apply these principles, and determine how far the defendant is liable. We have already said that the defendant had the power, and it was its duty, to prevent such a condition of affairs as the declaration alleges existed at the time of the injury. Of course, the ringing of cowbells, frightening women and children, and other things alleged, which were annoying and injurious to the public at large, do not give the plaintiff a right of action, as she can only recover, if at all, for special injuries sustained by her. Those special injuries were not sustained by the ringing of cowbells, etc., but by the attack of this particular cow. These other matters are relevant, however, to our inquiry, because they are of such character as must likely have brought this nuisance to the attention of the authorities, and hence reflects upon their duty to abate the nuisance. In *Taylor v. Mayor etc.*, 64 Md. 68, 54 Am. Rep. 759, it would not have been contended that if the sled which struck him had been the only one coasting on the streets of Cumberland, the defendant would have been liable. It was because coasting had been carried on to such an extent that the city authorities were called upon to stop it as a nuisance, and something dangerous to those lawfully using the streets. So, in this case, if horses, cows, hogs, and horned cattle were permitted by the town authorities to run at large, as alleged in the declaration, they were called upon to put a stop to it. If, however, this cow that injured the plaintiff was on the street without any fault of the owner, then no blame can attach to the defendant, and it would not be liable, for it would not do to hold a municipal corporation to a stricter liability for injuries done by domestic animals than the own-

ers themselves would be held to. Nor would the defendant be liable, unless it could have prevented this cow from running at large by the use of ordinary care and diligence. If the cow was at such a place and for such short time as it could not have been discovered by the defendant's officers by the use of reasonable care and diligence, before it attacked plaintiff, then the defendant would not be liable, unless the cow's ~~be~~ running at large can be attributed to the failure of defendant to pass and enforce ordinances to prevent stock from running at large. Of course, if the plaintiff is shown to be in fault, another defense would arise. Whether or not the plaintiff can prove such facts as will entitle her to recover can only be determined at a trial of the case, but we think the allegations in the declaration are sufficient to require the defendant to plead, and therefore the demurrer should have been overruled. For these reasons we must reverse the judgment.

Judgment reversed, and new trial awarded.

MUNICIPAL CORPORATIONS—RESTRAINING ANIMALS FROM RUNNING AT LARGE ON STREETS.—The enactment and enforcement of a city ordinance forbidding unmuzzled dogs to run at large is the valid exercise by such city of its police power: *Whitfield v. City of Paris*, 84 Tex. 431; 31 Am. St. Rep. 69. A municipal corporation may, in the exercise of its police power, provide by ordinance that unmuzzled dogs running at large shall be killed: *Julienne v. Mayor*, 69 Miss. 34; 30 Am. St. Rep. 526, and note. A municipal corporation given power to declare what are nuisances and provide for their abatement may pass an ordinance declaring that swine running at large within the corporate limits are nuisances, and provide for the abatement thereof: *Roberts v. Ogle*, 30 Ill. 459; 83 Am. Dec. 201.

MUNICIPAL CORPORATIONS—LIABILITY FOR FAILURE TO EXERCISE POWERS.—A city is not liable for a failure to enact or enforce proper ordinances: *Wheler v. Plymouth*, 116 Ind. 158; 9 Am. St. Rep. 837, and note; *McDade v. Chester City*, 117 Pa. St. 414; 2 Am. St. Rep. 681. A city is not liable in damages for failure to perform duties of a legislative or judicial nature, nor for errors in their performance: *Stackhouse v. City of Lafayette*, 26 Ind. 17; 39 Am. Dec. 450, and note; *City of Anderson v. East*, 117 Ind. 126; 10 Am. St. Rep. 35, and note. A failure to exercise powers vested in a municipal corporation by statute does not render such corporation liable for damages occasioned by such failure: *Carr v. Northern Liberties*, 35 Pa. St. 324; 78 Am. Dec. 342, and note. *Contra*, see *Clayburg v. Chicago*, 25 Ill. 535; 79 Am. Dec. 346, and note, and *Mayor v. Cullens*, 38 Ga. 334; 95 Am. Dec. 398, and note. See, also, the extended notes to *Goddard v. Inhabitants*, 30 Am. St. Rep. 379; *Perry v. Worcester*, 66 Am. Dec. 435, and *Lloyd v. Mayor*, 55 Am. Dec. 349.

SCANLON v. WALSHE.

[81 MARYLAND, 118.]

CHILDREN, ILLEGITIMACY, ACKNOWLEDGMENT OF.—Though children are born to a married woman while living with her husband, still, if they are the fruits of her intercourse with another man, whom she subsequently marries, and who afterward acknowledges them, they are thereby, by virtue of the statutes of Maryland, legitimated and made capable of inheriting his property as if born to him in lawful wedlock.

CHILDREN, LEGITIMACY, PRESUMPTION OF.—Every child born of a married woman is presumed to be legitimate. This presumption cannot be rebutted by circumstances which only create doubt or suspicion, but may be removed by proper and sufficient evidence showing that the husband was incompetent or entirely absent, so as to have no intercourse with the mother at the period when the children must have been begotten, or only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse.

CHILDREN, LEGITIMACY, WHEN MAY NOT BE DISPROVED.—Where opportunities for sexual intercourse occur between husband and wife, and there is no proof of his impotency, no evidence can be admitted to show that another may have been, or probably was, the father of the wife's children.

CHILDREN—LEGITIMACY.—NEITHER THE TESTIMONY OF THE HUSBAND NOR THE WIFE, nor of her alleged paramour, will be received to show that a child born during the marriage was illegitimate if the husband was not impotent and had opportunity for sexual intercourse with the wife.

CHILDREN.—ACKNOWLEDGMENT OF CHILD BORN IN WEDLOCK by a man not then the husband of its mother, made after his marriage to her, and after the dissolution of the marriage existing when the child was begotten and born, cannot operate to make such child his heir when the husband was not impotent, and had opportunity for sexual intercourse with the mother, and the only evidence of illegitimacy was the testimony of the mother and the acknowledgment of the supposed father.

CHILDREN, LEGITIMACY, ESTOPPEL OF PARENT TO TESTIFY TO.—A mother who, in divorce proceedings, and also in proceedings for the adoption of her children, testifies that they were the children of her husband, is estopped in a subsequent proceeding from testifying that they were the issue of meretricious relations between herself and a person not her husband, and whom, after being divorced from her husband, she marries.

CHILDREN, ILLEGITIMACY, PROOF OF.—Though the mother testifies that children begotten and born to her in wedlock are not the children of her then husband, where it appears that she was then living with her husband, who had opportunities for sexual intercourse with her, and who is not shown to have been incompetent, such testimony is not so satisfactory and conclusive as to overcome the presumption of legitimacy.

APPEAL from an order distributing the estate of David J. Walshe, deceased, the question being whether persons to whom distribution was made were his children. In 1875, the mother of these children, then Carlotta Simmonds, pros-

ecuted a suit and obtained a divorce from her then husband, Florian V. Simmonds. In these proceedings she alleged her marriage in 1858, and that thereafter, until two years prior to the filing of her bill, she lived with her husband; that her own conduct had always been proper and without reproach, but she had discovered him to have been guilty of adultery; and that by the marriage she had had six children, named in her bill. The husband answered the bill of his wife, denying that he had been guilty of adultery, and charging her with having committed repeated adulterous acts, and refusing to admit that the children were all the fruits of the marriage. In 1876 a decree was entered, granting the wife a divorce and awarding her the custody of the children; and in the following year she married the decedent, David J. Walshe. Some six years after this marriage she petitioned the circuit court of Baltimore, praying that the names of her children be changed from that of her former husband, Simmonds, to that of her present husband, Walshe. Walshe died in 1891, leaving a will dated in 1878, to which a codicil dated November, 1883, had been added, in which, after devising and bequeathing a life estate in certain property to his wife, he bequeathed the same to be equally divided after his death among her three children, naming them. In this proceeding it was insisted that certain children who were born during the marriage of Mr. and Mrs. Simmonds were in fact the children of Walshe, and letters were produced from him in which he wrote to them as his children, and testimony was received that he had frequently acknowledged them as such, and the mother also testified that they were children of Walshe, and not of her then husband. The reception of this testimony was excepted to, and the decree having passed in favor of the claimants, the appeal was prosecuted.

Richard S. Culbreth and Richard Bernard, for the appellants.

Henry C. Kennard, for the appellees.

127 FOWLER, J. It is fortunate that courts of justice are seldom called upon to consider a case in which the facts are so shocking to every sense of decency and morality as those presented by the record now before us. We shall not attempt, in this opinion, to discuss with any particularity the testimony which we think justifies this remark, for the view

which has been forced upon us, after careful consideration, renders such an uninviting task altogether unnecessary.

On the 26th of March, 1891, David J. Walshe, of Baltimore city, died, leaving a will disposing of his personal property and one-third of his real estate and intestate as to the balance of his real estate, which latter consisted of by far the larger and more valuable part of the property known as the Mansion House, on the northwest corner of Fayette and St. Paul streets, in said city. A bill was filed in the circuit court of Baltimore city by ¹²⁸ Carlotta Walshe, for the sale of said real estate, against a number of persons claiming to be heirs at law of her husband, David J. Walshe, three of them being her own children, born while she was living in lawful wedlock with a former husband, and the others being sisters, and the children of a deceased sister of said Walshe. Proper proceedings were had, and by agreement of parties the whole property was sold for the sum of seventy thousand dollars, which sale was duly confirmed. By a pro forma order, the court below ratified auditor's account B, by which the sum of twenty-five thousand seven hundred and ninety-five dollars and forty-one cents was allowed to three children of the plaintiff as their share of the proceeds of sale. From this order the sisters and the children of a deceased sister of Walshe have appealed, and the question is, Who are the heirs at law of David J. Walshe?

There are two sets of claimants: 1. Two sisters and several nephews and nieces; and 2. The plaintiff's three children, the youngest of whom is about twenty-four years of age, who, although born while their mother was married to, and living in lawful wedlock with, her first husband, Florian V. Simmons, from whom she was divorced, claim to be the children of said Walshe, whom she afterward married, and his heirs at law, because subsequent to their birth their mother and their alleged father married, and he acknowledged them to be his children.

A contention whose foundations are so contrary to good morals, public policy, and the presumption of law, can be maintained only by some statute which not only introduces "a new law of inheritance," as our own statute does (*Brewer v. Blougher*, 14 Pet. 178, opinion by Taney, C. J.), but which, to bring this case within its terms, must also abrogate some rules of evidence which we are not inclined either to weaken or destroy. The statute upon which the appellees, the chil-

dren of Carlotta Walshe, rely to maintain their contention, is section 29, article 46, of the code, which provides that "if any man shall have a child or children by any woman, whom he shall afterward marry, such child or children, if acknowledged by the man, shall, in ¹²⁰ virtue of such marriage and acknowledgment, be hereby legitimated and capable in law to inherit and transmit inheritance as if born in wedlock."

This section was before this court for construction in the case of *Hawbecker v. Hawbecker*, 43 Md. 516, where a married man had by his wife four children born in lawful wedlock, and during the life of his wife he also had six children by another woman. His wife died, and he subsequently married the mother of the last-mentioned children, whom he acknowledged as his, and treated them as he did the children of his first wife. It was very earnestly contended in that case that the section above quoted should not be construed so as to include within its terms a case in which children are conceived and born when their parents are under impediment to marry. But it was held that although the legislature, no doubt, in thus mitigating the severe rule of the common law, intended to hold out to the surviving parents an inducement to marry, and thus put a stop to the further illicit intercourse between them, yet "the main purpose and intent of the enactment . . . was to remove the taint and disabilities of bastardy from the unoffending children, whenever their parents did marry, without regard to the deepness of guilt on the part of their parents." And in concluding the opinion, the language of Chief Justice Taney in the case of *Brewer v. Blougher*, 14 Pet. 178, to the same effect in relation to the same provision of law, is quoted approvingly. We said the legislature has not seen fit to make any exceptions to its operation. Its terms embrace every case where "any man shall have a child or children by any woman whom he shall afterward marry": *Hawbecker v. Hawbecker*, 43 Md. 516.

It will be observed, however, that in the case we have last cited there was no question whatever made as to the paternity or illegitimacy of the children who were admitted to have been born out of wedlock. It was assumed that the reputed was the real father, and that the children were illegitimate; and the only question was whether the law was applicable to ¹²⁰ the admitted facts. But here we have a different condition. Indeed, this is the very opposite to *Hawbecker v. Hawbecker*, 43 Md. 516. For while the force of the broad terms of

the law is here admitted, it is contended that the foundation facts—the facts of illegitimacy and of the alleged paternity—are not established at all, because: 1. The witnesses are incompetent; and 2. Even if competent, their evidence is not of that strong, distinct, satisfactory, and conclusive character which is required to overcome the presumption expressed in the common-law rule, "*Hæres legitimus est quem nuptiæ,*" or another expression of the same rule, "*Pater est quem nuptiæ demonstrant.*" The old rule in England was, and also in this country (1 Greenleaf on Evidence, sec. 28), that this presumption of legitimacy was conclusive, but it is said the courts did not long permit so violent an estoppel: 1 Bishop on Marriage, Divorce, and Separation, sec. 1170. This legal presumption has been characterized as the foundation of every man's birth and status, and of the whole fabric of human society, and nowhere has its full force and extent been so fully acknowledged and so well expressed as in the case of *Hargrave v. Hargrave*, 9 Beav. 553, by Lord Langdale, the then master of the rolls, decided in 1846. He says: "A child born of a married woman is in the first instance presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances, which only create doubt and suspicion; but it may be wholly removed by proper and sufficient evidence showing that the husband was: 1. Incompetent; 2. Entirely absent, so as to have no intercourse or communication of any kind with the mother; 3. Entirely absent at the period during which the child must, in the course of nature, have been begotten; or 4. Only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse." "Such evidence as this," says his lordship, "puts an end to the question and establishes the illegitimacy of the child of a married woman." And in the same case it was held that where opportunities occurred for sexual intercourse ¹³¹ between the husband and wife, and there was no proof of his impotency, no evidence can be admitted to show that any man other than the husband may have been or probably was the father of the wife's child. It was said in *Craufurd v. Blackburn*, 17 Md. 56, 77 Am. Dec. 323, that the declarations of the parents were not admissible to defeat the consequences of marriage, such as that the children are bastards. And Lord Mansfield said in *Goodright v. Moss*, 2 Cowp. 594: "It is a rule founded in decency, morality, and policy that the father and mother shall not be per-

mitted to say, after marriage, ... that their offspring is spurious." And, in our opinion, the testimony of the adulterer, when offered for the same purpose, should likewise be excluded, especially so in all cases in which it appears that the proof does not exclude the possibility or probability of access of the husband to the wife. In such cases, as Lord Langdale said in *Hargrave v. Hargrave*, 9 Beav. 553, there being no proof of impotency, no evidence will be admitted to show illegitimacy. To this extent, at least, we think the presumption of the legitimacy of the child of a married woman should be conclusive.

The mere fact of marriage and acknowledgment should not, under the facts of this case, be received as proper evidence of illegitimacy. The fact of illegitimacy should first be proved, and then the marriage and acknowledgment may be offered to prove paternity. And so it was held in *Grant v. Mitchell*, 83 Me. 27. And in *Hemmenway v. Towner*, 1 Allen, 209, the declarations of the adulterer offered to show illegitimacy of the child of a married woman were excluded, the husband and wife having lived together as such until six months next before the birth of the child. It is true these two cases last cited were decided upon statutes not altogether like ours, but the questions decided were questions of evidence, and we think what was said in those cases on this subject are particularly applicable to this case. Now, the only testimony before us which can be properly resorted to to prove illegitimacy is that of the plaintiff, Carlotta ¹²³ Walshe, which, as we have seen, is inadmissible for that purpose. At the most, her testimony may be offered to show she was untrue to her husband: 1 Bishop on Marriage, Divorce, and Separation, sec. 1179. And so, also, as to the declarations and letters of David Walshe, which appear to have been offered to prove acknowledgment of the children. Neither will be admissible to show the husband is not the father, if he had or could have had access as indicated in *Hargrave v. Hargrave*, 9 Beav. 553, and that he could have had access, we think, is clearly shown in this case, for the separation did not occur until several years after the birth of the youngest child.

But the testimony of Carlotta Walshe, as well as that of the adulterer, if he were alive, would be inadmissible to show bastardy, and equally so his declarations, because they are both estopped to swear to a state of facts in conflict and inconsis-

tent with the proceedings for divorce and for change of name of her three younger children. She will not be allowed now to come into court and recklessly contradict what she alleged in the one and swore to in the other: *Edes v. Garey*, 46 Md. 41; *Hall v. McCann*, 51 Md. 351; *Philadelphia etc. R. R. Co. v. Howard*, 13 How. 335. And, it appearing that he was the instigator of both proceedings and in a position to know the truth, the estoppel should work equally against him, his declarations, and his letters.

In the supplemental brief on the part of the alleged children of Walshe, filed a few days ago, it is suggested that the objections now relied on in this court to most of the testimony are not covered by the exceptions filed by the appellants below, and David J. Walshe is spoken of as a witness whose testimony was objected to below only on the ground of estoppel. It will, however, be observed that he is not a witness. His declarations, verbal and written, were offered, and the testimony of all the witnesses who testified to the former, as well as the latter, which were offered in evidence, all of which was offered to show recognition of the children, was excepted to on the ground of estoppel. And while it ¹³³ may be that the estoppel of the divorce and other proceedings may not go to the extent urged by the appellants, yet, as we have already said, both David J. Walshe, if living, would be, and Carlotta Walshe is, thereby estopped to take positions inconsistent therewith. And we think the exceptions, on the ground of estoppel, filed below, fairly cover the additional grounds of estoppel urged in this court. For while it is required that every exception, in order to be availed of in this court, must be reduced to writing and filed in the court below, at least, before the hearing there begins, yet it is not necessary to set forth all the reasons and grounds on which such exceptions are based. But we think it unnecessary to prolong this discussion. It is conceded the exceptions filed below cover the testimony of Carlotta Walshe as to nonaccess, and having sustained the exception based on this objection, her testimony as to any collateral fact, for the purpose of proving nonaccess, would also be inadmissible: *Weightman on Marriage and Legitimacy*, 144.

And it must be remembered that we have been considering what is the true rule by which to measure the amount and character of evidence required to prove the child of a married woman to be a bastard, which child is born while the mother

is living in lawful wedlock with her husband. And although in this particular case the woman herself and her children, the youngest of whom is twenty-four years old, are trying to establish the illegitimacy of the children, and for that purpose are asking us to destroy or weaken this rule, which the experience of many years and the wisdom of eminent judges have sanctioned, we must remember that such a position is seldom occupied by either the mother or her offspring. She and they are more frequently interested in guarding and enforcing the rule which protects the rights of legitimate rather than the rights of illegitimate children.

We feel bound to say, however, that if all the testimony we have thus excluded were properly before us, we could ¹²⁴ not, while giving full force and effect to the legal presumption of legitimacy, and in the absence of that strong, distinct, satisfactory, and conclusive testimony required to overcome that presumption, do otherwise than reverse the pro forma order appealed from.

Order reversed and cause remanded, costs to be paid out of the fund in hand of the trustees.

PARENT AND CHILD—LEGITIMACY OF CHILD BORN IN LAWFUL WEDLOCK—PRESUMPTION OF.—The birth of a child during wedlock raises a presumption of its legitimacy: *Wright v. Hicks*, 15 Ga. 160; 60 Am. Dec. 687, and note; *Orthwein v. Thomas*, 127 Ill. 554; 11 Am. St. Rep. 159, and note; extended note to *Weatherford v. Weatherford*, 56 Am. Dec. 211.

PARENT AND CHILD—ILLEGITIMACY OF CHILD BORN IN WEDLOCK—EVIDENCE OF.—To bastardize the issue of a married woman, it must be shown, beyond all reasonable doubt, that there was no such access as could have enabled the husband to be the father of the child: *Cross v. Cross*, 3 Paige, 139; 23 Am. Dec. 777, and note; *Woodward v. Blue*, 107 N. C. 407; 22 Am. St. Rep. 897, and note. Evidence which may be considered in establishing the illegitimacy of children is fully treated in the case of *Wright v. Hicks*, 15 Ga. 160; 60 Am. Dec. 687, and note, and in the extended note to *Dennis v. Page*, 72 Am. Dec. 649-654.

HOOPER v. HOOPER.

[81 MARYLAND, 155.]

GUARANTY, INTERPRETING CONTRACT OF.—A guaranty is a commercial instrument, to be construed according to what is fairly presumed to have been the understanding of the parties, without any strict technical accuracy, but in furtherance of its spirit and liberally to promote the use and convenience of commercial intercourse.

GUARANTY.—THE STATUTE OF LIMITATIONS COMMENCES running in favor of a guarantor from the time he is liable to suit, and this may or not be the same time his principal becomes so liable.

GUARANTY, COMMENCEMENT OF LIABILITY—STATUTE OF LIMITATIONS.—If guarantors agree to pay on thirty days' notice any sum due at the making of the guaranty or thereafter to become due, not exceeding an amount specified, and from the person named in the guaranty, they are not liable to pay anything until given the notice stipulated for. Therefore, the statute of limitations does not commence to run in their favor until such notice has been given.

GUARANTY—STATUTE OF LIMITATIONS.—The liability of a guarantor is co-extensive with the liability of his principal, and cannot be defeated by the statute of limitations when the debt of the principal cannot be so defeated.

GUARANTORS—CONTRIBUTION BETWEEN—STATUTE OF LIMITATIONS.—If a guarantor discharges the debt of his principal before the statute of limitations has operated against it, a right of action on such payment accrues in his favor and against his coguarantors, and the statute of limitations does not commence to run until such payment.

GUARANTY—LACHES.—THE MERE FAILURE OF A CREDITOR TO DEMAND PAYMENT of indebtedness due to him, and the payment of which has been guaranteed by another, does not release the guarantors, particularly when delay in making such demand did not place them in a worse position than if it had been made earlier.

GUARANTORS, PAYMENT BY, WHAT IS.—If persons liable as guarantors are themselves creditors of the holder of the indebtedness whose payment they have guaranteed, and he and they agree that the sum due them from him shall be applied in satisfaction of the indebtedness they have guaranteed, this effectually passes such indebtedness, and entitles them to maintain a suit for contribution from other guarantors.

GUARANTY—INTEREST.—If persons guarantee the payment of indebtedness which may become due from one person to another for goods sold and advances made, not exceeding thirty-five thousand dollars, their liability is not limited to that sum, but includes interest thereon, and also interest upon interest, where it is the custom to compound interest, and the guarantors know of its being charged and do not object thereto.

Edward O. Hinkley, Thomas F. Hisky, and John T. Morris,
for the appellant.

Frank Gosnell and T. M. Lanahan, for the appellees.

165 McSHERRY, J. To understand the questions raised in the record now before us, it is necessary, at the threshold, to

outline briefly the material facts disclosed by the bill, the answer, and the evidence.

The late William E. Hooper was possessed at the time of his death, in 1885, of an undivided one-half interest in certain lands and mill property, and three of his four sons, viz., Theodore, James E., and Alcaeus, were possessed in equal shares of the remaining undivided one-half interest therein; and the father and those three sons were then, and previously had been, carrying on as copartners the business of cotton duck manufacturers, under the firm name of William E. Hooper & Sons. The elder Mr. Hooper, by his last will and testament, authorized his executors to unite with the other joint owners of the mill property in forming a corporation, and in 1886, a body corporate, known as the Woodberry Manufacturing Company, was duly chartered. One-half of the capital stock of this company was issued to the executors and trustees named in the will of William E. Hooper, in payment for the interest which he, in his lifetime, had held in the mill property, and the other half was issued in equal thirds to the other three joint owners, in payment for their respective interests in the same property. The other son, William J. Hooper, was largely indebted to the firm of William E. Hooper & Sons. His father had guaranteed the payment of that indebtedness to the firm, and, after the death of the father, William's debt to the firm was accordingly charged to the father's account, thus making William a debtor to the estate for the amount which he had owed the firm; and when William was credited as against this with his part of his father's estate, it did not extinguish that indebtedness in full, but still left him, as to the surplus, a debtor to the estate. In 1886 William failed in business and conveyed his property to trustees for the benefit of his creditors. In the year ¹⁸⁸⁸ 1889 he was indebted to the Woodberry Manufacturing Company, whose stock was held, as just stated, by his father's estate and by his three brothers, and he desired to obtain from that company further advances of money and goods. Accordingly, his three brothers, two of whom are the plaintiffs in this case, and one of whom is the defendant, executed and delivered to the Woodberry Manufacturing Company the following guaranty:

"BALTIMORE, April, 1889.

"In consideration of the sum of five dollars, the receipt

whereof is hereby acknowledged, we, Theodore Hooper, James E. Hooper, and Alcaeus Hooper, jointly and severally agree to pay on thirty days' notice, to the firm of William E. Hooper & Sons, and to the Woodberry Manufacturing Company of Baltimore county, the latter a body corporate of the state of Maryland, any sum that may now or may hereafter be due said firm and said corporation, not exceeding in the aggregate to both thirty-five thousand dollars, for goods sold and money loaned to William J. Hooper individually, or trading as William J. Hooper & Co., each of us reserving to himself the right to withdraw from this agreement by written notice to each of the other signers and to said firm and to said corporation; such notice, however, not to cancel his obligation as to indebtedness existing when it is given."

Then follow other provisions which need not be alluded to. The paper was signed by the three promisors named therein. The advances or loans to which this guaranty relates began October 8, 1888, and ran through the month of December of that year, and the months of March, April, May, down to June 4, 1889, up to which latter date, exclusive of interest, they aggregated thirty-three thousand eight hundred dollars. Interest to September 30th, of the same year, amounting to one thousand and forty-seven dollars and seventy-seven cents, was added, making the sum total due on that date thirty-four thousand eight hundred and forty-seven dollars and seventy-seven cents. On this sum, William J. Hooper paid, in 1890, to the Woodberry company three installments of interest, and on March 6, 1891, he paid a fourth installment, which settled the interest in full to February 1, 1891. No further interest was paid by ¹⁶⁷ him till February 7, 1894, when he gave his note, payable in six months, for a part of the principal and interest then due, and this was credited on the account as a payment. During the whole period of time covering these advances to William J. Hooper, and up to July, 1891, the defendant, Alcaeus Hooper, was treasurer of the Woodberry Manufacturing Company. On April 15, 1891, Alcaeus Hooper gave notice in writing to the Woodberry company, to William E. Hooper & Sons, to William J. Hooper, and Theodore and James E. Hooper, that he declined "to be responsible for any . . . indebtedness, which shall be incurred on and after the date of this notice, under the guaranty of April, 1889, and that he withdrew from said agreement." On March 26, 1894, the Woodberry company demanded pay-

ment from William J. Hooper of the amount due by him to it, and on the same day requested the three guarantors to pay to it the amount whose payment was jointly and severally guaranteed by them under the agreement of April, 1889. William J. Hooper made answer that he would be unable to settle during that year, and the evidence shows that such was the fact. On the day following, the plaintiffs addressed a letter to the defendant, advising him that they would, on the second day of the ensuing April, meet this obligation to the Woodberry company, and requesting him to contribute his share or proportion thereof. They received no reply, and on the day designated they paid to the Woodberry company, in the manner which will be explained later on, the sum of forty-one thousand two hundred and twenty-four dollars and seventeen cents, being the amount, including interest, due by William J. Hooper. On the same day they notified the defendant that they had paid the money, and they thereupon made a formal demand on him for contribution. On the next day, April 3d, the plaintiffs filed a bill in equity against the defendant for contribution. On May 14th, the defendant filed a demurrer to that bill, and relied, among other things, upon the fact that the suit had been prematurely brought. As under the guaranty, ¹⁸⁸⁹ according to his construction of it, no action could be instituted thereon until after the expiration of the thirty days' notice therein provided for, and as the notice actually given bore date March 26th, the bill filed on April 2d was filed prior to the expiration of the thirty days from the date of the notice, and therefore was filed prematurely. The court below, adopting that view, dismissed the bill without prejudice, on May 28th, and on the next day the bill now before us was filed. The prayer of this bill, as it was of the former one, is for a decree compelling the defendant, one of the guarantors, to contribute and pay to the plaintiffs, the other guarantors, the amount claimed to be due to them by him on account of the payment made by them for him, to the Woodberry company, of his proportion of the debt covered by the guaranty of April, 1889. In his answer he relies on the statute of limitations, and insists that he is not liable after three years from the date of the guaranty, or, at most, not after three years from the date of the last loan by the Woodberry company to William J. Hooper, and he denies that the plaintiffs have paid any amount under the guaranty at all.

There is no dispute that the guaranty was executed, delivered, and accepted, or that the Woodberry company advanced money and delivered goods to William J. Hooper; nor is there the slightest pretense that Alcaeus Hooper has ever paid a single cent to reimburse his brothers any portion of the amount they paid for him under the guaranty. The defendant seeks to escape all liability to the plaintiffs, and to avoid a compliance with the obligation which he deliberately, and with full knowledge of all the facts, assumed, by now taking refuge behind the plea of the statute of limitations. Utterly ignoring whatever of equity there is in the claim which they prefer against him, and without venturing to go upon the witness-stand, or to question under his oath any allegation of the bill, he repudiates the liability which has arisen under his explicit and formal contract; and he repudiates it because more than three ¹⁰⁰ years have elapsed between the date of that contract and the time when these proceedings were begun. It is difficult to conjecture, how, under all the circumstances of this case, a less meritorious defense could have been attempted.

Whilst the undertaking of a guarantor technically differs from that of a surety (*Kramph v. Hatz*, 52 Pa. St. 525), still the contract of guaranty is the obligation of a surety: *Davis v. Wells*, 104 U. S. 159. Both are accessory contracts; that of a surety is in some sense conditional; that of a guarantor is strictly so. A guaranty is a secondary, whilst a suretyship is a primary, obligation. A guaranty is a mercantile instrument to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical accuracy, but in furtherance of its spirit and liberally to promote the use and convenience of commercial intercourse. It should be given that effect which will best accord with the intention of the parties as manifested by the terms of the guaranty, taken in connection with the subject matter to which it relates, and neither enlarging the words beyond their natural import in favor of the creditor, nor restricting them in aid of the surety. The circumstances accompanying the whole transaction may be looked to in ascertaining the understanding of the parties: *Lee v. Dick*, 10 Pet. 482; *Mauran v. Bullus*, 16 Pet. 528; *Bell v. Bruen*, 1 How. 169; *Davis v. Wells*, 104 U. S. 159; *Mussey v. Rayner*, 22 Pick. 228. The contract of a surety must have such a construction given to it as will carry out the intention of the parties to it:

Engler v. People's Fire Ins. Co., 46 Md. 338; *McShane v. Howard Bank*, 73 Md. 135; and the contract of a guarantor ought not to be interpreted by any different rule.

When it is remembered that the three guarantors obviously intended to aid in a substantial manner their less prosperous brother, who had but recently before the date of the guaranty assigned his property for the benefit of his creditors, and who was, therefore, practically beginning his ¹⁷⁰ business career anew, and when the terms themselves of the guaranty are considered, and the close kinship and intimate business relations existing between all the parties to the transaction are borne in mind, it may be fairly presumed that the intention of all the parties to the instrument was, not that the guarantors should only be liable for three years from the date of the guaranty, or for three years from the date of the last item in the account due to the Woodberry company, but that they should remain answerable so long as the liability of the principal debtor continued a subsisting, undischarged indebtedness, and that their conditional liability to pay would become a fixed and enforceable obligation as against them as soon as the thirty days' notice should be given and should expire, if the principal debtor were then unable to pay. There is nothing on the face of the guaranty to indicate that the parties to it contemplated that the money loaned by the Woodberry company was to be repaid by the debtor within three years from its date; and much less is there a single word or phrase which implies that they understood or designed that their liability was unconditionally and absolutely restricted or confined to that period of time. On the contrary, giving to the instrument a perfectly natural and unstrained construction, it discloses a purpose to continue liable without reference to such a limit, and it, in terms, fixes another period for payment by the guarantors, from which date, and no other, the statute of limitations began to run in their favor. Now, the statute of limitations commences running in favor of a surety or guarantor from the time he is liable to suit, and this may or may not be the same time the principal becomes so liable: 1 Brandt on Suretyship and Guaranty, sec. 143. When, then, were the guarantors, according to the terms of their contract interpreted in the light of all the surrounding circumstances, bound to pay to the Woodberry company the amount which they jointly and severally promised to pay? Was it on demand? Or, at once, upon the execution

and delivery of the paper? Or, in three years thereafter? Or, ¹⁷¹ at the time the principal debtor was liable to be sued? They jointly and severally agreed "to pay on thirty days' notice." That is the period of time fixed in the guaranty. Until the notice had been given and the thirty days had expired they were obviously not bound to pay. The notice was a condition precedent to the right of the creditor to sue. Even a negotiable promissory note payable upon a condition does not mature until the condition has happened: 3 Randolph on Commercial Paper, sec. 1050; and a guaranty whose words are to be taken as strongly against the guarantor as the sense will admit (*Drummond v. Prestman*, 12 Wheat. 515), is not, upon principle, subject to a different rule. The guarantors had the undoubted right to stipulate that their liability should not be enforceable until after the expiration of a designated time, and having incorporated that provision in the contract both they and the creditor were bound thereby. The financial condition of William J. Hooper, his large indebtedness to the estate of his father, which he was unable to pay, the fiduciary relations which the guarantors held toward the estate as executors and trustees, and the evident purpose they personally had in view to help their brother by advances, which though made in the name of the Woodberry company, were largely in point of fact the money of the estate, because the estate was a holder of much of the company's capital stock, and their intimate knowledge of all the surrounding circumstances, give emphasis to the conclusion that they meant by agreeing "to pay on thirty days' notice," to fix that period as the one when their obligation could be enforced. That the defendant understood the contract to signify this is put beyond all cavil or controversy by the defense he took and successfully availed of when the first bill in equity was filed against him. That bill, as we have already stated, was dismissed at his instance solely because, in the language of his demurrer, "neither the Woodberry Manufacturing Company nor the plaintiffs . . . claiming by subrogation, had the right to claim and demand anything under the pretended assumpsit or guaranty ¹⁷² . . . nor to bring any suit therefor until after the expiration of the period of thirty days from the date of the service of the notice," given on March 26, 1894. Having asserted in a most formal and unequivocal manner, this to be the true and correct construction of the contract, he now repudiates his own interpretation

and relies upon a totally variant and inconsistent one. He was right in the position he took then, and is wrong in the one he assumes now. The agreement to pay on thirty days' notice is not an agreement to pay before thirty days have elapsed; nor is it an agreement to pay though no notice be given; but it is, in legal effect, substantially equivalent to a promise to pay on demand after a designated date. In all such instances it has been held that the statute does not begin to run until the demand has been made: *Rhind v. Hyndman*, 54 Md. 530; 39 Am. Rep. 402. As, then, by the terms of the guaranty the guarantors could not have been required to pay, and could not, therefore, have been sued for a failure to pay, until after the expiration of a thirty days' notice, it is perfectly manifest that the statute of limitations did not begin to run in their favor before that time, however it might have affected the principal debtor. The notice was in fact given on the twenty-sixth day of March, 1894, and expired April 25th, and from the latter date the statute began to run. The case of *Little v. Edwards*, 69 Md. 499, is clearly distinguishable from this. That case involved a guaranty given for the guarantor's interest in a judgment long overdue. It was unconditional and absolute, and suit could have been brought upon it immediately after it was given. Because this was so the statute began to run from its date.

But there is still another view of the subject which completely disposes of the statute of limitations as a defense. The liability of the guarantor is coextensive with that of the principal, unless it be expressly limited: 2 Parsons on Contracts, 6th ed., *5; *Richardson v. Allen*, 74 Ga. 719. This, of course, is subject to the qualifications arising ¹⁷³ out of coverture and infancy, where the guarantor is held, though the principal debtor is not bound at all: 1 Chitty on Contracts, 738, 739. Now, William J. Hooper's liability continued, and the debt due by him to the Woodberry company was not barred by the statute of limitations when the plaintiffs paid it; and it was consequently not barred at that time as respects the guarantors. When the statute has become a bar to the recovery of a debt, for which several are jointly and severally liable, the promise of one will not remove the bar as to the others; but where one of several so indebted makes a new promise or a payment, either of interest or of a part of the principal, before the bar of the statute has attached, this will

prevent the statute from running as to the others, even though they be but sureties. Such promise or payment fixes a new date from which the statute begins to run: *Ellis v. Nichols*, 7 Gill, 86; 48 Am. Dec. 546; *Schindel v. Gates*, 46 Md. 604; 24 Am. Rep. 526; *Burgoon v. Bizler*, 55 Md. 392; 39 Am. Rep. 417. William J. Hooper paid on March 6, 1891, the interest due up to February 1st of that year, and on February 7, 1894, less than three years afterward, he again made a payment by giving his note, which was accepted and subsequently settled. On April 2, 1894, the plaintiffs, two of the guarantors, paid the debt to the Woodberry company. There was consequently no point of time from the date of the first item in the account, October 8, 1888, till the 2d of April, 1894, when the statute of limitations had become a bar. The debt was during all that period enforceable against the principal debtor, and the liability of the guarantors being co-extensive with his, was equally unaffected by the statute. They had it in their power to guard against a liability lasting so long, had they desired to do so, because it is always competent to a guarantor to limit his liability as to time, amount, or parties by the terms of his contract: *Merchants' Nat. Bank v. Hull*, 83 N. Y. 343; 38 Am. Rep. 434. They fixed no limit other than the one heretofore alluded to, and that cannot avail the defendant now. Besides these payments by the principal ¹⁷⁴ debtor, the plaintiffs, two of the guarantors, who were jointly as well as severally bound with the defendant, continuously recognized and asserted and admitted their liability under the guaranty during the whole period of time covered by it. The debt not having been barred when the plaintiffs paid it, there can be no question of their right to recover contribution from the defendant, because the statute of limitations did not begin to run against their demand or claim upon their coguarantor until April 2, 1894: *Bullock v. Campbell*, 9 Gill, 182; *Davies v. Humphreys*, 6 Mees. & W. 153.

Closely allied to the defense we have just considered is the one of laches. Little need be said in regard to it. All of the guarantors knew the financial condition of William J. Hooper when they executed and delivered the guarantee. The record does not disclose that he was at any time, during the period covered by the guarantee, ever able to pay to the Woodberry company the amount that he owed it; nor does it show that when the demand was made, in March, 1894, he

was less able to settle than he had been previously. Under these conditions a mere delay in making a demand upon him could not have resulted in an injury to the guarantors, because they were placed by such delay in no worse position than if demand had been made earlier. Mere prolongation of the time of payment will not discharge a surety or a guarantor: *Benjamin v. Hillard*, 28 How. 149, because, as concisely stated by the late Mr. Justice Mathews, in *Davis v. Wells*, 104 U. S. 159, "both the laches of the plaintiff and the loss of the defendant must concur to constitute a defense." It is therefore incumbent on the party relying on this defense to establish the facts which compose it, and hence he must not only show that there has been an unreasonable delay, but further, that an injury or loss consequent thereon has been sustained by him. Not only has that not been done, but the record contains evidence to the effect that at no time since his assignment, in 1886, has William J. Hooper been in a condition to pay his creditors all that he owed.

¹⁷⁵ We now come to the question respecting the payment by the plaintiffs to the Woodberry company of the amount for which they and the defendant were responsible under the guaranty. William J. Hooper was indebted to the Woodberry company. The Woodberry company was indebted to Theodore Hooper, on April 2, 1894, in a sum amounting to nearly twenty-three thousand dollars, and it was also indebted at the same time to James E. Hooper to an amount exceeding sixty thousand dollars. These sums stood to their credit, respectively, on the books of the company. They could have demanded on that day these amounts in cash. Instead of doing so, they instructed the book-keeper of the company to debit Theodore's account with twenty thousand six hundred and twelve dollars and nine cents, and to debit James E. Hooper's account with the like sum, and the total of these two debits, viz., forty-one thousand two hundred and twenty-four dollars and odd cents, was credited upon William J. Hooper's account. The result of these entries was that William's debt to the Woodberry company was extinguished to the extent of forty-one thousand two hundred and twenty-four dollars, and the debts of the Woodberry company to Theodore and to James E. were reduced each twenty thousand six hundred and twelve dollars. This process as effectually paid the Woodberry company the amount due to it under the guaranty as though Theodore and James E. had

demand and received from the Woodberry company checks for forty-one thousand two hundred and twenty-four dollars, and had presented those checks, had them cashed, and had then taken the cash and paid it to the Woodberry company in settlement of William's indebtedness. After these entries had been made, William owed the Woodberry company nothing on the guaranteed indebtedness, and the Woodberry company owed Theodore and James each twenty thousand six hundred and twelve dollars less than it had owed them before. Clearly, this transaction resulted in an absolute payment by the plaintiffs of the entire indebtedness covered by the guaranty. ¹⁷⁶ It was, however, objected that as no cash was in fact used, no payment was in reality made. But it would have been an utterly idle and useless form had checks been drawn and cashed, and had the cash been then paid to the Woodberry company. The money was in bank deposited in the name of William E. Hooper & Sons, in which name the Woodberry company kept its bank accounts, and could have been drawn out and used, but it would have been re-deposited at once, and, beyond a few additional entries in the books of the concern, the substantial result would have been ultimately identical. We ought to add that there is nothing in the suggestion that money belonging to the estate of William E. Hooper was included in the sums with which William E. Hooper & Sons were credited in their bank accounts, and on which bank accounts the checks, had they been used at all, would necessarily have been drawn, and the suggestion can be of no avail, because the estate was invariably credited on the books of the Woodberry company with whatever sums of money were due to it, and the cash itself was all at the disposal of the Woodberry company for uses of its own.

There is one more question to be considered, and that relates to the appellant's liability to pay to the appellees one-third of the interest paid by them to the Woodberry company. The sum of forty-one thousand two hundred and twenty-four dollars paid by them includes not only simple but some compound interest. The appellant insists: 1. That he is liable, if liable at all, for only one-third of the sum of thirty-five thousand dollars, with interest on that one-third from April 2, 1894, the date his coguarantors paid his share of the obligation for him; and 2. That he cannot be held for any compound interest. He is clearly mistaken in

assuming that his liability under the guaranty was absolutely limited by the terms of that instrument to a sum not exceeding thirty-five thousand dollars altogether. The limitation of thirty-five thousand dollars was not a limitation upon the guarantor's ulterior liability to the creditor,¹⁷⁷ but it was a restriction of the aggregate amount of the loans and advances to be made by the Woodberry company to William J. Hooper. For goods sold and money loaned to an amount not exceeding the sum of thirty-five thousand dollars they guaranteed payment to the creditor, but as the guaranty did not provide for an immediate payment, and the guarantors did not contemplate one, it is obvious that their undertaking embraced besides the specified maximum capital sum, the same accessories and consequences (*connexorum et dependentium*) which measured the extent of their principal's liability: Pothier on Obligations, 404; *Curling v. Chalkier*, 3 Maule & S. 502; *Benjamin v. Hillard*, 23 How. 149. Now, all of the guarantors, including the appellant, who was treasurer of the creditor company when the debt was contracted and the guaranty was given, knew that it was the invariable and uniform practice of the company to charge up interest on all accounts every four months. He knew that interest was an incident, an accessory, and a consequence of every debt due to the company; and, therefore, that when the limit of thirty-five thousand dollars for loans and sales would be reached the debtor would be charged upon that sum with interest in the accustomed way. He contracted with reference to that incident or accessory of the principal's debt, and, like the principal debtor, he is accountable for it. With regard to compound interest there is no difficulty. This is not a proceeding to recover compound interest as a penalty for the breach of a fiduciary duty, as in *Ringgold v. Ringgold*, 1 Har. & G. 79, 18 Am. Dec. 250, and *Diffenderffer v. Winder*, 3 Gill & J. 311; nor does it belong to the group of cases which *Rayner v. Bryson*, 29 Md. 480, and *Dennis v. Dennis*, 15 Md. 73, are illustrations; but it is a proceeding involving the doctrine that where the parties to a transaction amongst themselves treat accrued interest as an augmentation of the original principal sum, and charge up interest thereon, it is unobjectionable if subsequent lienors without notice are unaffected thereby. In *Fitzhugh v. McPherson*, 3 Gill, 408, our predecessors said: "When interest has once accrued, it¹⁷⁸ becomes a debt. There is no longer,

therefore, any objection to an agreement inter partes, that it shall be considered principal, and therefore carry interest": *Fitzhugh v. McPherson*, 9 Gill & J. 51. This was affirmed in *Brown v. Hardcastle*, 63 Md. 498, and is fully sanctioned by judicial precedent elsewhere: *Eaton v. Bell*, 5 Barn. & Ald. 34; *Wilcox v. Howland*, 23 Pick. 167; *Stokely v. Thompson*, 34 Pa. St. 210; *Calhoun v. Marshall*, 61 Ga. 275; 34 Am. Rep. 101; *Vaughn v. Kennan*, 38 Ark. 114; *Wood v. Whisler*, 67 Iowa, 676; 5 Lawson's Rights, Remedies, and Practice, sec. 2443; *Mueller v. McGregor*, 28 Ohio St. 265; *Talliaferro v. King*, 9 Dana, 331; 35 Am. Dec. 140; *Bledsoe v. Nixon*, 69 N. C. 89; 12 Am. Rep. 642; *Pearce v. Hennessy*, 10 R. I. 223; *Peirce v. Rowe*, 1 N. H. 179; *Townsend v. Riley*, 46 N. H. 300; 1 Am. Lead. Cas., 4th ed., 533, notes to *Sellock v. French*. That all the parties agree to this compounding admits of no dispute. Every entry of compound interest made up to July, 1891, was made whilst the defendant was treasurer of the Woodberry company, and whilst he had possession, or, at least, control of the books. The plaintiffs have proved the unbroken custom to make such charges, and the defendant has uttered no word of denial. It is simply incredible that the defendant did not know and did not fully approve of this course of dealing. He was a party to it throughout. His failure to testify in the cause must be treated as an admission of his assent thereto; and his conduct whilst treasurer, in conforming to the uniform custom of making periodical rests, and thus computing interest on interest not only in respect of this, but with regard to all other accounts, estops him to question its propriety now.

Upon a careful review of the whole record, we have discovered no error whatever, and, as a consequence, the decree which required the defendant to make contribution as prayed in the bill will be affirmed with costs in this court and in the court below.

Decree affirmed with costs above and below.

GUARANTY—CONSTRUCTION OF THE CONTRACT.—Mercantile guarantees should not be subjected to the standard of critical nicety applied to instruments drawn by professional men: *Menard v. Scudder*, 7 La. Ann. 385; 56 Am. Dec. 610. A guarantor is bound only by the precise terms of the contract guaranteed by him: *Slaver v. Locke*, 22 Or. 519; 29 Am. St. Rep. 621, and note. A contract of guaranty will be strictly construed; *Crane Co. v. Specht*, 39 Neb. 123; 42 Am. St. Rep. 562.

GUARANTY—LIABILITY OF GUARANTORS.—Guarantors are sureties for others, and are liable in the first instance as principals: *Read v. Cutts*, 7 Greenl. 186; 22 Am. Dec. 194.

GUARANTY.—MERE DELAY TO PURSUE THE PRINCIPAL DOES NOT DISCHARGE A GUARANTOR, provided such delay be unaccompanied by fraud, or an agreement not to prosecute the principal: *Read v. Cutts*, 7 Greenl. 186; 22 Am. Dec. 184.

GUARANTY—INTEREST.—Interest should be allowed on the sum guaranteed from the time of default in its payment, notwithstanding the suit be against the guarantor only: *Bank v. Knotts*, 10 Rich. 543; 70 Am. Dec. 234.

GUARANTY—LIMITATIONS OF ACTIONS.—The statute of limitations does not commence to run in favor of a guarantor upon a continuing guaranty until there is a default in payment by the principal, and a full and complete cause of action has arisen against the guarantor: *Bank v. Knotts*, 10 Rich. 543; 70 Am. Dec. 234.

KILPATRICK v. MAYOR OF BALTIMORE.

[81 MARYLAND, 179.]

CONDITIONS SUBSEQUENT ARE NOT FAVORED IN LAW, because on the breach thereof there is a forfeiture, and the law is adverse to forfeitures.

A CONDITION SUBSEQUENT WILL NOT BE RAISED IN A DEED BY IMPLICATION from a mere declaration therein that the grant is made for a special and particular purpose.

CONDITION SUBSEQUENT, WHAT IS NOT.—A deed of land to a municipality which in the habendum adds the words, "as and for a street to be kept as a public highway," does not create a condition subsequent, and the property does not revert to the grantor because of the failure to use it as a street.

EJECTMENT to recover property used by the city of Baltimore as part of a public square, the deed of which to the city contained in its habendum clause the words, "as and for a street to be kept as a public highway." A pro forma judgment having been entered in favor of the defendant, the plaintiff appealed.

John V. L. Findlay, Thomas Mackenzie, Harry M. Benninger, and James S. Calwell, for the appellants.

Thomas G. Hayes, city counselor, for the appellee.

191 PAGE, J. This is an action of ejectment brought by the appellant to recover from the appellee a strip of land running through Perkins' Spring property in the city of Baltimore. The case was heard below upon an agreed statement of facts, and from the pro forma judgment thereupon rendered this appeal is taken.

On the sixteenth day of October, 1872, the mayor and city council of Baltimore passed a resolution authorizing and directing the city comptroller to lease "for public use" all that portion of the Perkins' Spring property located within the bounds of Ogston, George, and Chatsworth streets (except a portion theretofore leased), "at a rate not to exceed four dollars and a half per front foot, for the building lots contained within said bounds," with the right reserved "to purchase at six per cent capitalized, at the convenience of the city." The land described in this resolution was conveyed to the city in separate parcels, by two deeds dated respectively the eleventh day of January, 1873, and the fourteenth day of January of the same year. These deeds were submitted to and approved by the city solicitor at the same time, that is to say, on the fourth day of January. By the deed of the fourteenth day of January, the grantors, first having set out the resolution above cited, lease to the city for ninety-nine years, renewable forever, with the right reserved to purchase the fee, all of the ground mentioned in the resolution, except so much thereof as constituted Clark street, which was granted by the deed of the 11th of January, to the city "in fee simple." Clark street, thus referred to, did not in fact exist; it was only the strip of land running from Ogston to Chatsworth street, sixty feet wide, which the grantors by the deed of the 11th of January had, in consideration of one dollar, granted unto the "mayor and city council of Baltimore and its successors," with an habendum clause as follows: "To have and to hold the parcel of ground above described, with the appurtenances aforesaid, unto the mayor and city council of Baltimore aforesaid, and its successors, ¹⁸⁷ forever, as and for a street to be kept as a public highway." Upon the execution and delivery of these deeds the city took possession of the property, and since then has used it as a part of Perkins' Spring square. It has expended large sums of money in improving it, by the construction of expensive paved ways for persons using the square, and of a large mound of earth in the center, ornamented and embellished with receptacles for flowers.

No ordinance or resolution was ever passed by the mayor and city council authorizing the purchase of the land mentioned in the declaration as a public highway, or accepting it as such; on the contrary, if it should be used as a street, such use would render the triangular parcel incapable of

improvement as a public square, as provided by the ordinance or resolution of 1872. It is agreed by the parties that the court shall draw such inferences of law or fact from the "statement of facts and exhibits as may be right and proper, and all questions of law, as well as inferences, that might have been made in the court below, shall be open for consideration and decision by this court."

Under these circumstances the appellant contends that the deed of the 11th of January, 1873, was made for the purpose of opening and forever keeping open Clark street, from Ogston to Chatsworth, as a public highway; that the words "as and for a street to be kept as a public highway," found in the habendum, create a condition, and as the city has failed to use the land in accordance with this condition, a forfeiture has occurred, and the title has reverted to the grantors. To sustain this contention, it obviously is necessary to determine that the words in themselves import a condition, or, when taken in connection with the whole deed, that they show a clear and unmistakable intention on the part of the grantor to grant an estate on condition. Technical words are not absolutely essential to create a condition, nor on the other hand does their use necessarily raise one; such words may be controlled by the context of the instrument in which they are used, so that sometimes they work ¹⁹³ a limitation and condition, and sometimes a covenant or a trust only: *Paschall v. Passmore*, 15 Pa. St. 295; *Bacon v. Huntington*, 14 Conn. 92; *Worman v. Teagarden*, 2 Ohio St. 380; *Watters v. Bredin*, 70 Pa. St. 235; *Laberee v. Carleton*, 53 Me. 211.

Conditions subsequent are not favored in law, "because on breach of such conditions there is a forfeiture, and the law is adverse to forfeitures": 4 Kent's Commentaries, 130; *Stanley v. Colt*, 5 Wall. 119. Therefore it is, that a condition will not be raised by implication, from a mere declaration in the deed that the grant is made for a special and particular purpose, without being coupled with words appropriate to make such a condition: *Packard v. Ames*, 16 Gray, 327; *Bigelow v. Barr*, 4 Ohio, 358.

And as a further consequence of this rule, it has always been held that "in doubtful cases the disposition of the courts is to construe language as creating a trust or covenant rather than a condition: See *Earle v. Dawes*, 3 Md. Ch. 230; Brantly's note, and authorities there cited; *Scovill v. McMahon*, 62 Conn. 378; 36 Am. St. Rep. 350; *Greene v. O'Connor*,

18 R. I. 49; *Rawson v. Inhabitants etc.*, 7 Allen, 128, 129; 88 Am. Dec. 670.

In the elaborate and able opinion delivered in the last-cited case by Bigelow, C. J., the court said: "If it be doubtful whether a clause in a deed be a covenant or condition, courts of law will always incline against the latter construction. Conditions are not to be raised readily by inference or argument. . . . We believe there is no authoritative sanction for the doctrine that a deed is to be construed a grant on a condition subsequent, solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, when such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled."

¹²⁴ These principles, which, so far as our researches have gone, seem to be of universal acceptance, are fully sustained by the decisions of this court. Without undertaking to review the cases in which questions of this nature have been considered, we deem it quite sufficient to refer to the case of *Newbold v. Glenn*, 67 Md. 490, in which Judge Robinson, speaking for the court, has succinctly stated the whole law. There, in pursuance of an ordinance of the city, the trustees of the McDonogh Educational Fund and Institute bought of Wolfarden a lot of ground as a site for the proposed McDonogh Institute. The deed recited the ordinance and conveyed the property to the city "in trust for the uses and purposes, and subject to the trusts, limitations, powers, and provisions imposed, expressed, and declared in and by the ordinance." Subsequently the city sold the property to William W. Glen, and bought another, on which the buildings were erected. One of the questions involved was whether the city acquired an indefeasible fee simple title, or only a fee on condition subsequent that the property was to be used as a site for the institute, and on failure so to use it there was a reverter to the grantor. It was held, however, the words relied on to establish the condition were used only "for showing the purpose for which the property was bought and the character in which it was held, and not for the purpose of limiting the right of alienation." It was also held there was nothing "to justify the inference that the property was sold or conveyed on condition that it was to be used as

a site for the McDonogh Institute, and on failure thus to use it, the title was to revert to the vendor, . . . and if such had been the intention, we must presume that it would have been expressed in clear and explicit terms, or in terms at least from which such intention could be fairly inferred." The court also distinguished that case from those of *Reed v. Stouffer*, 56 Md. 236, and of the *Second Universalist Soc. v. Dugan*, 85 Md. 460, in which it was held, "on the express terms of the grant and the incapacity of the grantee to take ¹⁹⁵ upon any other conditions, that upon the failure to use the property for the purposes in consideration of which it was conveyed, the title reverted to the grantor."

Applying these principles to the case at bar, we cannot find anything in the deed of the 11th of January to justify the inference that the property was conveyed on condition that it was to be used as a public highway, and "on failure thus to use it, the title was to revert to the vendor." In the granting clause the property is conveyed absolutely to the city, and in the habendum are the words, "to have and to hold, etc., as and for a street to be kept as a public highway." These words do not *ex proprio vigore* import a condition, nor are they so connected with the grant itself as in any manner to qualify the general terms there employed; and there is no such language to be found in the deed, from which, when the context is taken into consideration, an intention to create a condition can be inferred. The lot was acquired by the city under the authority of a resolution, which directed a lease "for public use," with the right reserved to purchase. It was part of the property included within what was called "the Perkins' Spring property"; and, inasmuch as the whole of the property was immediately upon its acquisition devoted by the city to the uses of a public square, it may reasonably be presumed that such was the "public use" had in view when the resolution was passed. Under these circumstances it is inconceivable, and it would require the plainest terms to enable us to determine that it was the intent of the deed that if the property was put to the public use contemplated by the resolution, and not to the use of a public street, the city should lose its title, and the property revert to the grantors. A glance at the plat, with which we have been furnished, will satisfy any one that to use this parcel of land as a street would be profitless, both to the grantors and the public; and it is agreed by the parties that such use would render the prop-

erty included in the resolution "incapable of improvement as a public square, as provided in the ordinance of 1872."

¹⁹⁶ We are disposed to place but little importance upon the fact that the consideration in the deed is merely nominal. The whole of the Perkins' Spring property (except a portion thereof) was transferred to the city by the same parties. The resolution authorized a lease at four dollars and fifty cents per front foot of the building lots contained. Prior to the passage of the resolution Clarke street did not exist. It is obvious that, if Clarke street be taken into account, more front feet can be obtained than there would otherwise be possible, and thus a larger price could be realized for the entire property. The transfer to the city of the Spring property, although accomplished by two deeds, ought to be regarded as one transaction, and the real consideration for the conveyances must be taken to be the aggregate amounts received from the entire property. In view of all the facts of the case, and the terms of the deed, we think the words relied on to create the condition are quite as consistent with an intent to repose a confidence in the authorities of the city, that they "would fulfill the purpose of the grant, so long as it was reasonable and practicable so to do, as they are with an intent to impose a condition which should compel it, on pain of forfeiture, to maintain the property as a public street, however inconvenient, impracticable, or worthless it might become, either to the vendor or vendee." "Language so equivocal cannot be construed as a condition subsequent, without disregarding the cardinal principle of real property . . . that conditions subsequent, which defeat an estate, are not to be favored or raised by inference or implication": *Rawson v. Inhabitants etc.*, 7 Allen, 131; 83 Am. Dec. 670.

From what we have said it follows that the judgment of the court below must be affirmed.

Judgment affirmed.

CONDITIONS SUBSEQUENT ARE NOT FAVORED, and may be created only by express terms or clear implication: *Scovill v. McMahon*, 62 Conn. 378; 38 Am. St. Rep. 350, and note with the cases collected; extended note to *Farnham v. Thompson*, 57 Am. Rep. 66.

GLUCK v. MAYOR OF BALTIMORE.

[**1 MARYLAND, 315.**]

LANDLORD AND TENANT—EMINENT DOMAIN.—**THE RENT COLLECTIBLE** after part of the premises have been taken in the exercise of the right of eminent domain is the same as before. Such taking does not relieve the tenant from the obligation to pay rent as stipulated in the lease.

LANDLORD AND TENANT.—**NO EVICTION TAKES PLACE** where part of the premises under lease are appropriated to a public use in the exercise of the right of eminent domain.

EMINENT DOMAIN—LESSEE, DAMAGES TO BE AWARDED TO.—In determining damages to be awarded to a lessee when part of the demised premises is to be taken in the exercise of the right of eminent domain, he should be compensated for the diminution in value of the property to him during his term, without taking into consideration the fact that he has not yet paid his rent for such term.

EMINENT DOMAIN—LEASEHOLD PREMISES—REPAIRING INJURIES.—If part of a building is taken in the exercise of the right of eminent domain, the landlord is under no obligation to rebuild or repair it. Hence, in determining the damages to be awarded the lessee, consideration should be given to the fact that before he can continue in the use of the premises he must make alterations and repairs so as to fit them for use after the part has been taken from him.

APPEAL from an award of commissioners assessing damages to be paid to a lessee from the opening of a street. The lessee prayed for instructions as follows: "1. When the owner of property makes a lease to a tenant, he conveys an estate in the property known as a leasehold estate, and such estate in law is entirely separate and distinct from the estate that the landlord retains. In case part of the property is taken for the widening of Gay street, the tenant remains bound to pay for the whole, according to the terms of the lease. In this case the city must pay to the appellant an amount equal to the value of the tenant's estate in the part taken, and an amount equal to whatever damage is done, if any, to the tenant's estate or interest in the portion of the property not taken. 2. If the jury shall find that the appellant is the lessee of the premises No. 222 North Gay street, under the lease of April 14, 1885, and shall further find that the elevator mentioned in the evidence will be removed in widening said street, then the jury are at liberty to allow the appellant the cost of removal of said elevator, and its construction in another part of said premises. 3. If the jury find from the evidence that the appellant is the owner of the leasehold interest in the premises No. 222 North Gay street, created by the lease of 1885, offered in evidence, and if they further find

that in the proposed widening of Gay street a portion of the building known as No. 222 North Gay street will be taken away, then the jury should allow the appellant such a sum as will cover the cost of repairing said building, in its diminished size, and especially of constructing a new front therein, but nothing shall be allowed for repairs to said building save such repairs as may be made necessary by such widening of Gay street." All these were denied, and in place thereof the court gave three instructions asked for by the city as follows: "1. That the appellant, Gluck, is entitled to his appeal from the award of the commissioners of damages for injury to the house No. 222 North Gay street, to recover only such sum, if any, of the fair market value of his lease; they are to bear in mind that he is entitled to have his rent reduced in the same proportion that the value of his lease is reduced; 2. That the appellant, Gluck, has no right to recover for injuries done to the building known as No. 222 North Gay street, such damages belonging to and having been awarded to the landlord; 3. That in estimating the damages to be awarded to Mr. Gluck the jury cannot consider either the goodwill of his business or his prospective profits thereupon, or any inconvenience or loss arising from the interruption of his business, and can only award him the fair market value of his interest in the property 222 North Gay street, the property in question, less the fair market value of his interest in so much thereof as will remain after the opening of Gay street, bearing in mind that the rent will be reduced the same proportion that the value of his lease is reduced."

James B. Guyton, for the appellant.

Thomas G. Hayes, city counselor, and *William S. Bryan, Jr.*, city solicitor, for the appellee.

320 McSHERRY, J. This is a proceeding by the mayor and city council of Baltimore to condemn, under the right of eminent domain, part of a lot of ground and part of the building thereon, for the widening of Gay street. The reversionary interest in the property belongs to the estate of Samuel Hindes, and the leasehold interest is owned by the appellant, Gluck, under a lease executed in 1885, and which expires in 1905. Gluck being dissatisfied with the award of damages made to him, appealed from the return and estimate of the commissioners for opening streets to the Baltimore city court, where a trial by jury was had. At the close of the

evidence both the city and Gluck asked the court to instruct the jury as to the measure of damages applicable to the facts before them. The prayers presented by the city were granted, whilst those presented by Gluck were rejected, and from these rulings this appeal was taken. Compensation was made to the estate of Hindes for the fee simple interest in so much of the lot as is required for widening the street, and the pending controversy relates only to the amount which the lessee is entitled to be paid for his leasehold interest therein. The proposed widening of Gay street will require but a part of the leased lot, and will take a portion of the building standing thereon. This will leave the building not only diminished in size, but without a front wall, and, consequently, untenable. Under the lease, the tenant is bound to pay in monthly installments the rent reserved, and there is no covenant in the lease binding the landlord to make repairs.

The owner of the leasehold and the owner of the reversion together hold the fee simple estate. Each has a distinct estate or property. "The interest of a termor, in the eye of the law, is just as potential as that of the owner ³²¹ of the fee, although in fact it may not practically be so valuable": *Baltimore etc. R. R. Co. v. Thompson*, 10 Md. 87. These several interests are both protected by article 3, section 40, of the state constitution, from appropriation for public use, unless just compensation, as agreed on between the parties or as awarded by a jury, shall be first paid or tendered to the party entitled to such compensation. Whatever be the method of ascertaining the values of these distinct interests, it is evident that the sum of those values must be the full value of the property taken: *Matter of Trustees of New York etc. Bridge*, 137 N. Y. 95; *Burt v. Merchants' Ins. Co.*, 115 Mass. 1. As the owner of each separate interest has the constitutional right to be fully compensated before his estate can be lawfully taken for a public use, he is obviously entitled to look, not to some one else for that compensation, but to the agency authorized to make, and which actually does make, the appropriation of his property. He cannot be driven to seek redress from another. Hence, it will be no answer to his demand to say that the value of his interest, or of a part of his interest, has been improvidently awarded to some one else: *Mills on Eminent Domain*, sec. 70. What, then, is the measure or the standard by which the value of

so much of the appellant's leasehold interest as is needed for widening Gay street is to be ascertained?

Primarily, it would be the fair market value of his interest in the entire lot, less the fair market value of his interest in that portion which would remain after the widening of the street has been completed: *Mayor etc. v. Rice*, 73 Md. 311. This, as a general rule, is a priori correct; but the court in the case last cited was not called on, as it is by the prayers in the case at bar, to designate the particular items which properly go to make up these relative market values. The prayers on both sides in the pending appeal require such an analysis—those of the city by the exclusion, and those of the appellant by the inclusion, of alleged constituent factors of damage. The specific inquiry then is, When part of the demised premises is taken, ³²³ what circumstances affect the relative market values fixed in the rule above quoted as the standards of comparison, if the tenant is bound by an unconditional covenant to pay rent, and the landlord is under no covenant to repair the buildings injured by the appropriation for the public use? This depends: 1. Upon whether the tenant still remains liable for the payment of the whole rent, though part of the leased premises has been actually taken by condemnation proceedings; and 2. Upon whether he is bound to replace the buildings partially removed or damaged, in the absence of a covenant on the part of the lessor to make repairs. These questions are raised by the prayers.

"It is incontrovertible that nothing but a surrender, a release, or an eviction can, in whole or in part, absolve the tenant from the obligation of his covenant to pay rent: *Fisher v. Milliken*, 8 Pa. St. 111; 49 Am. Dec. 497. Thus, if the premises have been wrongfully entered by a disseisor, and the tenant dispossessed for the entire term, or even by the military force of a public enemy, or if they have been destroyed or rendered untenable by earthquake, lightning, floods, or fire, and thus all enjoyment by the tenant entirely lost, yet his covenant remains: *Workman v. Mifflin*, 30 Pa. St. 369, and cases there cited. It is also equally settled that a taking by the sovereign under the right of eminent domain is not an eviction: *Frost v. Earnest*, 4 Whart. 90; *Dobbins v. Brown*, 12 Pa. St. 75; *Ross v. Dysart*, 33 Pa. St. 452; *Schuylkill etc. R. R. Co. v. Schmoele*, 57 Pa. St. 271": *Dyer v. Wightman*, 66 Pa. St. 427. The case last cited, and from which the above extract

is quoted, was a condemnation proceeding in which the fee simple was taken for the construction of a railroad. To the same effect see *Peck v. Jones*, 70 Pa. St. 85; *Ellis v. Welch*, 6 Mass. 246; 4 Am. Dec. 122; *Parks v. Boston*, 15 Pick. 198; *Folts v. Huntley*, 7 Wend. 210; *Foots v. City of Cincinnati*, 11 Ohio, 408; 38 Am. Dec. 737; *Emmes v. Feeley*, 132 Mass. 346; *Stubbings v. Village of Evanston*, 136 Ill. 37; 29 Am. St. Rep. 300; *Corrigan v. City of Chicago*, 144 Ill. 537; and copious ³³³ notes. In 1 Washburn on Real Property, page 342, the author says: "It has sometimes been attempted to apply the principle of eviction from a part of the premises where lands under lease have been appropriated to public use under the exercise of eminent domain. . . . But the better rule, and one believed to be adopted in most of the states, is that such a taking operates, so far as the lessee is concerned, upon his interest as property, for which the public are to make him compensation, and does not affect his liability to pay rent for the entire estate, according to the terms of the lease; and this extends to ground rents." In *Parks v. Boston*, 15 Pick. 198, it was held: "Where part of a lot of land under lease is taken by the mayor and aldermen of Boston for the purpose of widening a street, the lease is not thereby extinguished, nor is the lessee discharged from his liability to pay the reserved rent during the residue of the term, but the lessor and lessee are each entitled to recover compensation for the damage so sustained by them respectively." And in *Foots v. City of Cincinnati*, 11 Ohio, 408, 38 Am. Dec. 737, where the leased premises had been appropriated for a street, the supreme court held that the lessee was not released from the payment of rent, but that he was entitled to recover from the city the damages he sustained. Whilst there are a few cases, chiefly in Missouri and Louisiana, which hold a contrary view, the correct doctrine, both upon principle and by the decided weight of authority, seems to be that a condemnation of a part of a leasehold estate for a public use does not at law amount to an eviction; and whether the fee or a mere easement be taken, the tenant still remains liable under his covenant to pay the rent originally reserved, because nothing short of a surrender, a release, or an eviction will discharge him from his covenant in this behalf. If a condemnation of part of the premises will not discharge the tenant's covenant to pay rent, neither will it operate to apportion the rent so as to relieve the tenant of any portion of his liability to the

lessor. Apportionment of the rent does not mean abatement of it; because though rent may ³²⁴ be apportioned, the tenant still remains liable to pay the whole of it, but in different parts to different persons, except where he has purchased or acquired the reversion of part of the demised premises. So the question recurs, not what will apportion, but what will abate the rent? The total destruction of the premises does not discharge the payment of rent, or any part of the rent, and nothing save a release, a surrender, or an eviction will. A condemnation by eminent domain of part of the landlord's reversion is not in law an eviction or partial eviction, for an eviction is the act of the landlord or of a third party holding under a paramount title: Taylor on Landlord and Tenant, sec. 381. Neither is it a release, which is the descending of the greater estate upon the less: Taylor on Landlord and Tenant, sec. 507; nor is it a surrender, which is the yielding up of the less estate to him who has the reversion or remainder: Coke on Littleton, 337 b. As a consequence, then, a condemnation proceeding cannot of its own vigor on principle operate to abate any portion of the rent, and it therefore follows that, notwithstanding an appropriation under the power of eminent domain of a part of the reversion, the tenant remains liable on his covenant to pay rent, precisely as he does when the entire habitable premises have been destroyed by fire. The appropriation of part of the property for a public use leaves the tenant in the position of being deprived of a part of his property, whilst he still remains liable to pay rent for the whole of it, and to that extent obviously does him an appreciable injury, which should be considered by the jury in estimating the decreased market value of the remaining portion of the demised premises. The first and third instructions given by the court below at the instance of the city in terms excluded this element of damage from consideration by the jury, and informed them that the tenant was entitled to have his rent reduced in the same proportion that the value of his lease was diminished. These instructions were, therefore, erroneous. As the tenant's estate is entirely distinct from the landlord's, and as both estates are within the protection of ³²⁵ the constitution, each must be awarded in money an amount equivalent to the value of that which is taken from him; and as parts of the premises are taken from the possession of the tenant without thereby releasing him from his covenant to pay the whole rent, in estimating the decreased

value of that portion which is left, allowance must necessarily be made for the rent to be paid for that fragment of the originally demised premises of which he is to be deprived, because the obligation of his contract to pay the entire rent is not, and under settled constitutional guarantees cannot be, impaired or abridged by condemnation proceedings which award him no compensation, or which ignore that obligation as an element of substantial injury. The appellant's first prayer which asserts this principle was therefore correct, and ought to have been granted.

It has, however, been contended that if the tenant should be allowed to recover for the full value of the leasehold interest, and the landlord should be required to rely upon the personal obligation of the tenant for the payment of rent, a rule of this character would or might in many instances result in great loss to the landlord. At best this is a mere suggestion of a possible hardship. As said by Rolfe, B., in *Winterbottom v. Wright*, 10 Mees. & W. 115, "hard cases, it has been frequently observed, are apt to introduce bad law." And in *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635, and in *Taylor v. Turley*, 33 Md. 500, this court declined to permit considerations of great hardship to influence the rigid enforcement of established legal principles. Obviously, a principle, if sound, ought to be applied wherever it logically leads, without reference to ulterior results. That it may, in consequence, operate in some instances with apparent or even with real harshness and severity, does not indicate that it is inherently erroneous. Its consequences in special cases can never impeach its accuracy.

The other circumstance which the jury should have been allowed to consider as affecting the market value of that part of the leasehold estate remaining after Gay street ²²⁶ has been widened is, that the building will, by reason of the widening of the street, require a new front wall, and it will be necessary to remove the elevator from its present position to some other place on the premises. The lessor is under no covenant to make repairs; and the lessee is confronted with the alternative of either abandoning the premises for which he must, notwithstanding its untenable condition, pay full rent during the continuance of the term, or of restoring the front wall and reconstructing the elevator at his own cost and expense to make the premises habitable and available.

The appellant's second and third prayers distinctly raise this question.

Now, the common law has always thrown the burden of repairs upon the tenant, though it imposes no obligation on him to make them unless he covenants to do so: Taylor on Landlord and Tenant, sec. 327. A covenant is never implied that a lessor will make them: *Moyer v. Mitchell*, 53 Md. 176; *Sheets v. Selden*, 7 Wall. 423; *Gott v. Gandy*, 2 El. & B. 845; *Pomfret v. Ricroft*, 1 Wms. Saund. 321, 322, note; *Kramer v. Cook*, 7 Gray, 550; *Doupe v. Genin*, 45 N. Y. 123; 6 Am. Rep. 47. So unvarying is this doctrine that even a court of equity will not compel the landlord to expend, in making repairs, the money received by him upon fire insurance policies after the destruction of the demised premises, unless he has expressly agreed to so apply the proceeds. Nor will a court of equity, when the premises have been burned down and the landlord has collected the insurance, prevent him from suing for the rent, even though he refuses to rebuild, if he be under no covenant to repair: *Leeds v. Cheetham*, 1 Sim. 146; *Loft v. Dennis*, 1 El. & E. 474; *Belfour v. Weston*, 1 Term Rep. 310; *Holtzapffel v. Baker*, 18 Ves. 115. And this is so, because a tenant is obliged to continue the payment of rent during the term, although the premises may become untenable for want of repair, or from any other cause, or should even have been burned down in the mean time, unless he protects himself by an express covenant against liability in these contingencies: ³²⁷ *Lamott v. Sterrett*, 1 Har. & J. 42; *Wagner v. White*, 4 Har. & J. 564; Taylor on Landlord and Tenant, sec. 329; *Moffatt v. Smith*, 4 N. Y. 126; *Fowler v. Bott*, 6 Mass. 63; *Bussman v. Ganster*, 72 Pa. St. 285; *Monk v. Cooper*, Ld. Raym. 1477. In the lease under which the appellant holds there is no covenant requiring the landlord to make repairs. Under the law none is implied. The removal of the front wall of the building, and the removal of the elevator, will materially lessen the value of the tenant's estate. The landlord is under no obligation to rebuild the wall or to reconstruct the elevator. What is the consequence? If the tenant abandons the premises because they are untenable, he must still pay the rent. If he repairs them to make them habitable, he must do so at his own cost. In either event he will be directly and seriously injured in his estate by the act of the city in condemning part of his property for a pub-

lic purpose. It is self-evident that a house without a front wall will be untenable and practically useless. But the tenant, though he may be unable to occupy the premises because the city removes the front wall, must pay his rent. He cannot compel the landlord to restore the wall, even if the landlord has been compensated by the city for doing so. "The lessee cannot maintain an action against the landlord to recover from him a certain portion of the sum assessed to him, on the ground that it was intended for the purpose of putting the property in a tenantable condition. The lessee should see to it that that item of damages is allowed to him": Mills on Eminent Domain, sec. 70; *Turner v. Williams*, 10 Wend. 140; *Brooks v. Boston*, 19 Pick. 174. As then the tenant is bound to repair and must rebuild the front wall to make the house tenantable, and must restore the elevator if he wishes to use it, whatever sum of money may be required for these purposes should have been awarded by the jury to be paid by the city to the tenant; and if the city has paid it to the landlord it cannot, on that account, escape its obligation to pay it to the tenant before taking possession of his property. It would be a strange conception ³²⁸ of "just compensation" to the tenant if the money needed to make the house tenantable were awarded to the landlord, and the tenant, to whom the injury is in fact done, were left to rebuild at his own expense. Upon the plainest principles of justice, whatever cost the city causes the tenant to incur in making repairs which are rendered necessary by its acts in widening the street is a proper element of the damage he sustains, and should be considered and estimated by the jury in measuring the market value of the residue of the leased premises after the appropriation of a part of those premises, for the bed of Gay street. Obviously, then, the second and third prayers of the appellant ought to have been granted, and the second instruction given at the instance of the city should have been refused.

What has been said disposes of all the questions before us, and it follows that there was error in granting the instructions asked by the city, and in refusing the prayers presented by the appellant. The rulings excepted to will therefore be reversed and a new trial will be awarded.

Rulings reversed with costs above and below, and new trial awarded.

LANDLORD AND TENANT—EMINENT DOMAIN—TAKING PART OF LEASED PREMISES—EFFECT ON LIABILITY FOR RENT.—A taking of a part of leased premises, in the exercise of the right of eminent domain, does not release the tenant's liability to pay rent for the entire estate according to the terms of the lease: *Stubbings v. Evanston*, 136 Ill. 37; 29 Am. St. Rep. 300, and note; *Foote v. Cincinnati*, 11 Ohio, 408; 38 Am. Dec. 737; but in *Outhbert v. Kuhn*, 3 Whart. 357, 31 Am. Dec. 513, it was held that an apportionment of rent will be made at the instance of a tenant when a public street is opened through the demised premises, the amount of the deduction to which he is entitled, being fixed by the jury.

LANDLORD AND TENANT—EMINENT DOMAIN—EVICTION.—The location of a townway over leased lands does not constitute a breach of covenant for quiet enjoyment, as the lessee has a statutory remedy as owner against the town equally with the lessor: *Bullis v. Welch*, 6 Mass. 248; 4 Am. Dec. 122.

MASON v. UNION MILLS PAPER MANUFACTURING CO.

[81 MARYLAND, 446.]

STATUTE OF LIMITATIONS IN ACTIONS BETWEEN NONRESIDENTS.—A statute providing that "if any person liable to an action shall be absent out of the state at the time when the cause of action may arise or accrue against him, he shall have no benefit of the limitations herein contained, if the person who has the cause of action shall commence the same after the presence in this state of the person liable thereto within the times herein limited," applies when both parties have not been residents of the state. Hence, a foreign corporation sued in this state by another foreign corporation, whether the cause of action arose in this state or not, is not entitled to the benefit of the statute of limitations, neither having been a resident of the state.

STATUTE OF LIMITATIONS.—EXCEPTIONS IN THE STATUTE OF LIMITATIONS IN FAVOR OR AGAINST PERSONS ABSENT FROM THE STATE apply against and in favor of foreigners who have never been therein, though the cause of action also arose in a foreign state or country.

William Reynolds, for the appellants.

George Dobbin Penniman, John K. Cowen, and E. J. D. Cross, for the appellee.

⁴¹⁶ **FOWLER, J.** The question presented by this appeal relates to the construction of section 5 of article 57 of the code, title, "Limitations of Actions." Both parties are non-residents of this state, the defendant being a Pennsylvania corporation, and the plaintiffs are citizens of, and doing business in the state of, Rhode Island, under the name of Mason, Chapin & Co. The plaintiffs sued out of the superior court of Baltimore city, on the 7th of February, 1894, a foreign attachment against the defendant, the cause of action being

a breach of contract by the latter. This attachment was laid in the hands of the Baltimore and Ohio Railroad Company as garnishee, and the defendant corporation voluntarily appeared in the short note case and filed four pleas, upon three of which issue was joined, and to the fourth, which was the plea of limitations, the plaintiffs replied "that the said defendant was, at the time said cause of action accrued to the plaintiffs, absent from the state of Maryland, to wit, in the state of Pennsylvania; and thereafter was, and continued to be, and remained absent from this state up to within three years before bringing this suit." To this replication the defendant rejoined: "That the alleged cause of action accrued more than three years before the institution of this suit outside of the state of Maryland, and at the time of the accruing of said cause of action both the plaintiff and defendant were nonresidents of the state of Maryland, and have never ceased to be nonresidents, and said contract, on which this suit was instituted, was not made in this state, nor was any part of it to be performed in this state." The plaintiffs demurred to this rejoinder, and the court below overruled the demurrer, and gave judgment therein in favor of the defendant. From this judgment the plaintiffs have appealed.

The precise question is whether section 5 of article 57 of the code applies to cases where both plaintiff and defendant are nonresidents, and where the cause of action accrued outside of this state, and the contract sued on is a foreign contract.

449 On the part of the plaintiffs it is contended that they have the same rights and occupy the same position as to the right to rely upon the provisions of our code relative to limitations of actions that any resident of this state has, and that if a citizen of Maryland could not be successfully met by a plea of the statute by a foreign debtor, who is a resident of Pennsylvania, no more can such a plea be so set up against them. On the other hand, the defendant contends that the provisions of section 5 of article 57 were made for and relate alone to debtors who are citizens of Maryland, and that a nonresident creditor who elects to bring a nonresident debtor into the courts of Maryland, in order to recover on a foreign contract, cannot avoid a plea of limitations by pleading the absence out of the state of such nonresident, in the terms of said section 5.

It will be observed that the validity of the replication of the plaintiff must depend upon the construction placed on section 5 of article 57. That section provides that "if any person liable to any action shall be absent out of the state at the time when the cause of action may arise or accrue against him, he shall have no benefit of the limitation herein contained, if the person who has the cause of action shall commence the same after the presence in this state of the person liable thereto within the times herein limited." This language is certainly broad enough to include within its terms the defendant. It could not be much broader than it seems to be made by the words, "any person liable to any action." But comprehensive and all-embracing as it may seem to be, yet the language used in the statute must be construed and taken in the sense in which it appears to be used by the legislature. The defendant suggests that an investigation or historical study of the origin and growth of the statute will show that its contention is the proper one, but after a careful examination of the old statutes, the original statute of 21 James I., chapter 16, and 4 & 5 Anne, chapter 16, section 19, as well as the several statutes adopted by this state, all of which are based upon and in many respects ⁴⁵⁰ similar to, or modifications of, the provisions of the old English statutes just referred to, we have arrived at a different conclusion.

In the statute of James there was a provision in favor of "any person or persons" "beyond the seas," and the same provision appeared on our own statute until 1818, when the act of that year, chapter 216, repealed it. It is true that the words "any person," etc., "beyond the sea," both in the statute of James and our old statute, related to persons who were entitled to sue, but there was a similar provision in regard to defendants to be found in 4 & 5 Anne, chapter 16, section 19, by which it is provided that the statute should not run in their favor during their absence from the realm. And so the words in section 5 of article 57 of the code relate to absent debtors, and the whole section is doubtless a modification of section 19 of the statute of Anne. If these words, or similar ones, have been uniformly held, when used in the English statutes of limitations, from which ours are derived, to include both residents and nonresidents, subjects and foreigners alike, then a like construction should be given to them, or similar words, when they appear in our statutes.

In Angell on Limitations, section 21, the correct rule is laid down for construing these statutes. He says, in speaking of the statute of James I., as modified by that of 4 & 5 Anne, "where any difference appears between the provisions of that statute in respect to personal actions and those of American statutes of limitations, it will be seen to be more in words than in substance, the end of one and all of them being one and the same. . . . And the mere change of phraseology in the revision of the statute before in force will not work an alteration in the law previously declared, unless it undisputably appears that such was the intention of the legislature": See authorities cited in note. In the case of *Strithhorst v. Graeme*, 2 W. Black. 723, which was an action of assumpsit, the defendant pleaded nonassumpsit and limitations. The plaintiff, who was a foreigner, replied that he had been beyond seas, etc., in Germany and ⁴⁵¹ so remained, etc. Counsel argued that the replication was bad, because, if the law stood so, foreigners who reside always out of England would have the same or greater advantage than natives, and that the exception in the statute was meant for Englishmen who occasionally go beyond seas. But Wilmot, Lord C. J., said: "The exception in the statute is general, and therefore there must be judgment for plaintiff." This case is also reported in 3 Wilson, 145, and the opinion of the chief justice is there given more fully to the same effect. Also *Le Veux v. Berkley*, 5 Q. B. 836, which was tried before Lord Denman. And in the later case of *Lafoude v. Ruddock*, 24 Eng. L. & Eq. 239, it was again contended that the proviso of section 7 of the statute of 21 James I., relating to creditors "beyond the seas," could not apply to foreigners coming to England for the first time. Jervis, C. J., again applied the liberal construction, and said: "The proviso in favor of persons under disabilities in the statute of 21 James, chapter 16, applies as well to foreigners who have never been in this country as to parties residing abroad at the time of the accruing of the cause of action, and returning afterward to England." As we have seen, this same exception in favor of absent creditors was, until 1818, a part of our statute, and it was then repealed, because it was not considered fair, as suggested also in the old English cases we have cited, that citizens of other states and subjects of foreign countries should have greater advantages than our own citizens. And that this was the object intended by the repeal of the proviso

in favor of absent creditors is evident from what was said by Archer, J., in delivering the opinion of the court of appeals in the case of *Frey v. Kirk*, 4 Gill & J. 521; 23 Am. Dec. 581. "The unlimited latitude," he said, "given to persons beyond seas was considered by the legislature as unreasonable, and it could constitute no actual grievance or just cause of complaint if they were reduced to the same standard as our own citizens." And again, he says in the same case that the construction the court had placed on this ⁴⁵² same act was such as put all suitors, foreign and domestic, upon the same footing: See, also, *Pancoast v. Addison*, 1 Har. & J. 350; 2 Am. Dec. 520. It is apparent, therefore, that the saving or exception in favor of creditors has always in England, and in Maryland also, as long as it was a part of our law, been held to apply to both foreign and domestic creditors.

And if that be so, why should not the like provision in section 5 of article 57 have the same liberal construction? In England, under the statute of 4 & 5 Anne, chapter 16, section 19, a foreign defendant could not plead the statute of limitations unless he had returned and been in England during the statutory period of limitation: *Forbes v. Smith*, 11 Ex. 161; *Fannin v. Anderson*, 7 Q. B. 811. And it has been uniformly held that the words "beyond the seas" is equivalent to "out of the state"—"out of the jurisdiction." It was so held by this court in *Maurice v. Worden*, 52 Md. 291, and, therefore, if section 5 should be read as construed in that case, it would read as follows: "If any person, etc., shall be out of the state, beyond seas, or out of the jurisdiction of the state" at the time the action accrues, etc., he shall have no benefit, etc. So read, section 5 would be identical with section 19 of statute 4 & 5 Anne, chapter 16, which has always been held in England to include both residents and nonresidents: *Fannin v. Anderson*, 7 Q. B. 811; *Towns v. Mead*, 16 Com. B. 123; *Forbes v. Smith*, 11 Eq. 161. Then, according to the terms of this section thus read, a citizen of Pennsylvania may be sued in our courts, and it is conceded that, as against one of our citizens, a citizen of Pennsylvania cannot successfully plead the statute when sued here, if the former shall commence his action after the presence here of the latter within the statutory period, for it was so held in *Hysinger v. Baltzell*, 3 Gill & J. 158. In *White v. White*, 1 Md. Ch. 57, it was held that the circumstance of the defendant in that case, being a nonresident, did not deprive him of

the benefit of the statute of limitations of Maryland, because it was clearly shown that ⁴⁵³ he had been in Baltimore more than three years before the action was commenced. And, of course, if he had not been here during the statutory period, he could not have relied upon limitations as a defense.

It would also seem to be clear that the plaintiffs, who are citizens of another state, have the same right to sue here that a citizen of this state has, and it is difficult to understand upon what principle of justice or fairness the nonresident debtor should be allowed to plead limitations against a nonresident creditor, and not against one of our own citizens. All should be on the same footing: *Frey v. Kirk*, 4 Gill & J. 521; 23 Am. Dec. 581. And this would accord not only with justice, but would seem to be giving to nonresidents nothing more than they have a right to demand. For it would not do to say that our citizens and citizens of other states would enjoy the same rights and privileges here, when, under our law, the latter would be absolutely barred from recovery by a plea of limitations, while it would not avail against the former: *Paine v. Drew*, 44 N. H. 314. And inasmuch as the right to set up limitations as a defense has no existence except by virtue of statute, we should not allow it to prevail any more in the one case than in the other, unless it can be clearly shown that there is some statutory provision requiring such a distinction to be made.

It was urged that the course of the plaintiffs is somewhat inconsistent, in that they seek to avoid the effect of defendant's plea, because of the nonresidence of the latter, while the very action by which the defendant was forced into a Maryland court is founded upon the same fact. While it is true the attachment proceedings were based on the nonresidence of defendant, yet this is another case, in which, as the plaintiffs contend, the question of residence or nonresidence is not involved, but only the question of the absence or presence in this state of the defendant, without regard to residence. Nor is it correct to say that the defendant was compelled to appear to this action. On the contrary, its appearance was entirely voluntary: *Fairfax Forrest etc. Co. v. Chambers*, 75 Md. 604. Such appearance was not even necessary to enable it to plead limitations or make any other defenses; for the same defenses which could have been made in this case would have been as well made on its behalf by the garnishee in the attachment case without any appearance on the part of the

defendant in this case: Poe on Practice, secs. 540, 543. But there does seem to be some inconsistency in the position assumed by the defendant. Because it is a nonresident, it claims the benefit of that part of the statute of limitations which is in its favor, and denies, for the same reason, that section 5, which is not in its favor, has any application whatever to it. It would seem but fair that our statute should apply altogether or not at all to the defendant. If altogether, the rejoinder of the defendant was bad, and the replication of the plaintiff was good, and if not at all, the defendant's plea was bad, and in either case the judgment on the demurrer should have been against the defendant.

We may now briefly consider another question raised by the demurrer, namely, the cause of action having accrued, and the contract having been made outside the state, does such contract constitute such a cause of action as is contemplated by section 5 of article 57? It was contended by the defendant that foreign contracts are not contemplated by this section, but that it relates only to contracts made in this state, and to be performed here. But we think such a construction would be strained, and it was said by Jervis, C. J., in *Lafoude v. Ruddock*, 24 Eng. L. & Eq. 239, "the rejoinder now proposed is that the plaintiff is a Frenchman domiciled in France, and that the cause of action accrued there, so as to negative inferentially that the plaintiff returned to this country within the meaning of the proviso." "It seems to me," he continued, "that is seeking to put too strict a construction upon this statute," and it was held that "the mere circumstance of the cause of action accruing in France, and the plaintiff being a domiciled Frenchman," was no answer to the replication that at the time the cause of action accrued ⁴⁵⁵ the plaintiff was beyond seas, and had commenced his action within the period limited, next after his return, etc. Nor is there anything in the language of the section under consideration which would seem to compel us to adopt the narrow construction suggested by the defendant. In *Fairfax Forrest etc. Co. v. Chambers*, 75 Md. 604, it was held that "our courts have jurisdiction in regard to contracts whether made in or out of this state, and where the suit is brought by a nonresident against a nonresident defendant upon a foreign contract, if the defendant voluntarily appears, and the case is tried upon its merits, the validity of a judgment rendered in such a case cannot be questioned." There, as here, the

defendant was a nonresident corporation, and the proceedings were begun by suing out a foreign attachment. If, then, our courts have jurisdiction in respect to, and the section in question is general enough to include, foreign contracts, we can see no reason why they should not be held to be embraced within its terms. To exclude them would be to deprive citizens of other states of rights and privileges to which they are entitled: *Le Roy v. Crowningshield*, 2 Mason, 157; *Paine v. Drew*, 44 N. H. 314. But it was urged that to adopt the liberal construction, and thus assume jurisdiction over foreign litigants, would make the courts of this state the battle ground on which would be waged a never ending war. The danger, if any is more imaginary than real.

In *Paine v. Drew*, 44 N. H. 314, Sargent, J., who delivered the opinion of the court in that case, said: "The objection that our courts will be crowded with stale claims from abroad, to the exclusion of their legitimate business, is purely imaginary. The fact that this question is now for the first time directly raised, is a sufficient answer to the objection."

No authority has been produced to sustain the defendant's position. On the contrary, a number of courts of the highest authority have held, in construing statutes more or less like ours, that the more liberal construction is the more reasonable and just one. We will examine a few of them, ⁴⁵⁸ though the language of the statutes construed differs more or less from each other and also from our own statute, so that decisions based upon them cannot always be accepted as of controlling authority. The case, however, just cited (*Paine v. Drew*, 44 N. H. 314), is so similar in all its facts to the one at bar, and the opinion of the court is so full and clear, that it deserves more than ordinary consideration. The statute of New Hampshire (Pub. Stats., 1891, c. 217) provides that "If the defendant at the time the cause of action accrued, or afterward, was absent from or residing out of the state, the time of such absence shall be excluded," etc. It was held (*Paine v. Drew*, 44 N. H. 314) that a citizen of Maine suing a citizen of Massachusetts, in the courts of New Hampshire, the latter could not avail himself of the statute of limitations in any other manner than as though the plaintiff were a citizen of New Hampshire; in other words, that the statute would not protect him until he had been in New Hampshire long enough to allow the plaintiff to sue within the time limited. In commenting upon provisions of statutes

of the various states like our section 5 of article 57 it was said, "It has been held almost uniformly that these words, 'absence,' 'return,' 'leaving property,' etc., are not confined in their application to those who have once been inhabitants, but are equally applicable to those who have never before been in the state; to foreigners as well as citizens," and that whether the statute runs against a claim or not depends entirely on the presence or absence of the defendant, and that it matters not whether the plaintiff be resident or nonresident, absent or present in the state. In the case of *Ruggles v. Keeler*, 3 Johns. 263, 3 Am. Dec. 482, Chancellor Kent took the same view, and that, too, upon the construction of a statute substantially like ours. He said, "Whether the defendant be a resident of this state and only absent for a time, or whether he resides altogether out of the state, is immaterial. He is equally within the proviso." The proviso referred to is that "if the defendant shall be out of the state" he shall have no benefit of the statute, etc. And in the case just cited both parties were nonresidents.

⁴⁵⁷ In *Graves v. Weeks*, 19 Vt. 181, it was held that the statute of that state extended to the case where both parties were residents of another state, and the debtor is within the state of Vermont for temporary purposes. The statute was that limitations should not run "when the debtor at the time the action accrued was out of the state." To the same effect are *Hartley v. Crawford*, 12 Neb. 471; *Kemps v. Bader*, 86 Tenn. 189; *Power v. Hathaway*, 43 Barb. 214; *Olcott v. Tiogo R. R. Co.*, 20 N. Y. 210; 75 Am. Dec. 393; *Larson v. Aultman etc. Co.*, 86 Wis. 281; 39 Am. St. Rep. 893; *Bulger v. Roche*, 11 Pick. 36; 22 Am. Dec. 359; *Goetz v. Voelinger*, 99 Mass. 504; *McCann v. Randall*, 147 Mass. 81; 9 Am. St. Rep. 666. In Angell on Limitations, section 205, the author says: "The acts of limitations of Maryland of 1715 and 1765 are by judicial construction to be taken together, and to receive an interpretation to carry into effect the plain and obvious intent of the legislature, which was that limitations should not attach against a creditor where the debtor was absent from the state." And he cites *Hysinger v. Baltzell*, 3 Gill & J. 158, where the defendant was a resident of Pennsylvania when the cause of action accrued, and it was held he could not plead the statute, because he had not been here long enough to afford the plaintiff an opportunity to prosecute his writ. It is true that in *Hysinger v. Baltzell*, 3 Gill & J. 158,

the plaintiff was a resident of this state, but, as we have seen, both residents and nonresidents stand upon the same footing in this respect: *Frey v. Kirk*, 4 Gill & J. 521; 23 Am. Dec. 581. And the absence or presence in the state of the plaintiff has no effect whatever upon the running or not running of the statute; *Paine v. Drew*, 44 N. H. 314; *White v. White*, 1 Md. Ch. 57. In conclusion we will refer to the case of *Maurice v. Worden*, 52 Md. 291, which we think gives a clear and satisfactory construction of section 5 entirely confirming the views here expressed. The whole question raised by the defendant here is whether that section applies to it. The contention is, that the section referred to will be so construed as to restrict it to resident debtors, and reliance was placed here, as there, upon section 4 of the same article of the code and its relation to section 5, the ⁴⁵⁸ argument being that inasmuch as the former related only to residents, the latter, which was claimed to be a supplement to it, had no other or greater significance. This court, however, seems to have placed very little reliance upon section 4 for any purpose, and declared it to be so ambiguous that it is practically useless—so useless that it was said the profession did not seem ever to have relied on it. But in regard to section 5 it was said that the meaning of the phrase therein used, namely, “out of the state,” is identical with the well-known expression “beyond the seas,” or “out of the actual jurisdiction,” “beyond the reach of process of the state.” We have already seen that the words “beyond the seas,” whether used in statutes of limitations in regard to creditors or debtors, have always been held to apply to both residents and nonresidents, unless otherwise provided, as, for instance, in the Illinois statute. “Without undertaking,” said this court in the case just cited, “to review all the cases in which have been construed the words ‘beyond the seas,’ and ‘out of the state,’ there is in reality no conflict among them, and they all tend to ascertain whether or not in the particular case the party could be reached by the process of the court. If he can be reached by process, it matters not whether he be resident or not, for in either case he will be protected by the statute unless his creditor sues him within the time limited—and this without regard to whether the creditor be present or absent from this state. And, on the other hand, if the debtor cannot be reached by process, he is “beyond the seas,” “absent out of the state.” And therefore, although a defendant

may be actually within the territorial limits of the state, if he is beyond the reach of process, he is, within the meaning of the statute, "out of the state": *Maurice v. Worden*, 52 Md. 291; *Sleght v. Kane*, 1 Johns. Cas. 76.

Judgment reversed and cause remanded for new trial.

ROBINSON, C. J., and BRYAN and BRISCOE, JJ., dissented.

LIMITATIONS OF ACTIONS—NONRESIDENTS.—The saving clause in the statute of limitations extends to foreigners, or those who have never resided in the state, as well as to citizens who may be temporarily absent: *Ruggles v. Keeler*, 3 Johns. 263; 3 Am. Dec. 482; *Burrows v. French*, 34 S. C. 165; 27 Am. St. Rep. 811, and note. Although a nonresident debtor has property within the state, the operation of the statute of limitations is suspended while he is absent from the state: *Grist v. Williams*, 111 N. C. 53; 32 Am. St. Rep. 782. The statute of limitations of Massachusetts does not run in favor of one who has never been a resident of the state, when the plaintiff is also a nonresident, against whom the statute has not run in the state where he resides and where the cause of action accrued, although the statute of a third state to which the defendant has removed protects him from suit there: *McCann v. Randall*, 147 Mass. 81; 9 Am. St. Rep. 666, and note with the cases collected. See, further, the extended notes to *Moore v. Armstrong*, 36 Am. Dec. 73; *Langdon v. Doud*, 83 Am. Dec. 644, and the note to *Stanley v. Stanley*, 21 Am. St. Rep. 810.

LIMITATIONS OF ACTIONS—FOREIGN CORPORATIONS.—A foreign corporation is a person "out of the state," and cannot avail itself of the statute of limitations: *Larson v. Aullman etc. Co.*, 86 Wis. 281; 39 Am. St. Rep. 893, and note. See, also, the extended notes to *Clarks v. Bank*, 52 Am. Dec. 256, and *Moore v. Armstrong*, 36 Am. Dec. 73.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

MITCHELL v. MISSISSIPPI HOME INSURANCE Co.

[72 MISSISSIPPI, 58.]

INSURANCE—IRON-SAFE CLAUSE—DIVISIBILITY OF CONTRACT.—In a policy of insurance covering a stock of goods, as well as store fixtures and furniture, separately valued, an "iron-safe" clause requiring the books of account and last inventory of the business to be kept in a fire-proof safe does not apply to the furniture and fixtures. The contract is, therefore, divisible, and, in the absence of fraud, is good as to the furniture and fixtures, though it may be avoided as to the goods by a failure to observe such clause.

INSURANCE—ESTOPPEL—FRAUD.—An insurer is not permitted to collect premiums with full knowledge of the existence of facts which might avoid the policy, and of the purpose of the insured to continue to conduct the business in disregard of a provision working a forfeiture, and then to deny the validity of the policy should a loss occur.

INSURANCE—IRON-SAFE CLAUSE—ESTOPPEL.—An insurance company, having insured a stock of goods, cannot set up a breach of an "iron-safe clause" in its policy, requiring the books of account and last inventory of the business to be kept in a fire-proof safe, if its agent, when he issued the policy and collected the premium, knew that the insured had no safe, and did not intend to have one, but intended to keep the books of account at the store, as he had been doing.

INSURANCE.—AN INCREASE OF RISK, by the unauthorized addition to the building in which a business is conducted, is not shown by evidence that the addition brought the building a few feet nearer certain houses, if it is not shown how far distant these houses were, and that their proximity increased the danger of fire.

ACTION on a policy of fire insurance for five hundred dollars. Of this amount four hundred dollars was on a stock of merchandise, twenty dollars on store and office furniture and fixtures, and eighty dollars on furniture belonging to a restaurant conducted in connection with the store. The court ex-

cluded all the evidence for the plaintiff. There was a judgment for the insurance company, and Mitchell appealed.

Sweatman, Trotter & Knoz, for the appellant.

Hill & Thames, and Somerville & McLean, for the appellee.

50 Woods, J. This is an action on an insurance policy issued by the appellee to appellant. The declaration is in the usual form. The insurance company filed the plea of the general issue and three special pleas. The first special plea sets up the defense of what is now commonly known as the iron-safe clause; the second special plea sets up, by way of defense, that whisky was retailed on the premises in which appellant kept her store and conducted her other business, and where the property insured was kept; and the third special plea defends on the ground that an addition to the buildings on the premises where the property insured was kept had been made, which increased the risk. The appellant demurred to the first and second special pleas, and took issue on the third. The demurrer to the second special plea was properly sustained, and was improperly overruled as to the first special plea. The first ground of demurrer to this first special plea was that it interposed no defense to the whole action, and this ground of demurrer appears to have been well taken. The requirement of the iron-safe clause is that the last inventory, and the books of account of sales and purchases, shall be kept in such safe, or in some secure place other than on the premises where the insured property was kept, and that a failure to produce the inventory and books after loss shall avoid the policy; but all this has reference only to such articles of merchandise as constitute the stock in trade. The store fixtures and furniture, and the restaurant furniture, including the cooking stove, were never designed to be embraced ⁵⁷ in the inventory of stock on hand, or to be entered and carried on the books of account showing purchases and sales of goods by the insured. As to these, the policy was not avoided by appellant's failure to observe the iron-safe clause. The contract was divisible, and it may be true that appellant could be defeated of a recovery for the sum for which the stock of goods was insured, and yet might have been entitled to recover for the furniture and fixtures of the store and restaurant. The case is not to be confounded with those in which any recovery for any part of the sum

insured has been denied because of misrepresentations or frauds of the insured: *Home Ins. Co. v. Delta Bank*, 71 Miss. 608.

The refusal of the court to permit appellant to file her first replication to the first special plea was error. This replication set up, in substance, that, when the contract for insurance was made, the defendant knew plaintiff had no safe, and did not intend to keep a safe, and that defendant knew that plaintiff intended to keep her books in the store and at her dwelling-house, just as they were kept when the contract for insurance was made, and this was substantial matter in avoidance of the defense made by the plea. To ask us to hold that an insurance company shall ostensibly contract for keeping an inventory and books of account in an iron safe, or at some secure place apart from the premises on which the property insured is kept, and, yet, with full knowledge that the insured had, and intended to have, no safe, and with full knowledge that such inventory and books of account had been kept, and were to be continued to be kept at the store, to receive the insured's premiums as for a valid policy, the company intending to deny its validity if loss should occur, is to ask us to sanction trickery and fraud. The insurer cannot be permitted to collect premiums with the full knowledge of the existence of facts which might avoid the policy, and with full knowledge of the insured's purpose to continue, in disregard of a provision working a forfeiture, to conduct the business as theretofore in such disregard. We cannot legalize by our sanction such perfidy: See *Rivara v. Queen's Ins. Co.*, 62 Miss. 720.

It is said by counsel for appellant that the court below was moved to exclude all the evidence of appellants, in part, because the appellant was shown to have kept gasoline in the store where her business was carried on. The pleadings nowhere present such issue. On this point, the issue made by the pleadings was, that the risk had been increased by the unauthorized addition to the building in which the business was conducted. On this issue, as to the addition, the evidence did not clearly show that the risk had been increased by the addition. The evidence showed only that the addition brought the building in which the business was conducted a few feet nearer to the negro houses referred to by the witnesses; but whether these negro houses were ten feet or a thousand yards distant does not appear, and whether

the risk was increased by the addition was left uncertain. The exclusion of appellant's evidence was erroneous.

Reversed and remanded.

INSURANCE—DIVISIBILITY OF CONTRACT—ESTOPPEL—INCREASE OF RISK.—A contract of insurance on two or more kinds of property, specifically appraised and valued in the policy, will be deemed severable and not entire, unless there is something in the terms or nature of the particular contract, or in the circumstances of the case, or in the nature of the different subjects of insurance, from which it may be inferred that the insurer would not have been likely to assume the risk on one of several of them, unless induced by the advantage and profit of having a risk on all: Note to *Bills v. Hibernia Ins. Co.*, 47 Am. St. Rep. 125. This subject is discussed in the monographic note to *Gould v. Mutual Fire Ins. Co.*, 74 Am. Dec. 498, on whether a policy of insurance, void as to a part of the property, is void in toto. An insurance company, which knowingly takes a premium for a policy under conditions which render it invalid, is estopped from urging those conditions to release it from its contract: *Germania Fire Ins. Co. v. Hick*, 125 Ill. 351; 8 Am. St. Rep. 384. The forfeiture of a policy for a default of the assured is waived by recognizing the continued validity of the policy: Note to *Enos v. St. Paul etc. Ins. Co.*, 46 Am. St. Rep. 813. The burden of proof to show that an insurance is avoided by an alteration of the insured premises, whereby the risk is increased, contrary to a stipulation of the policy, is on the insurance company: *Padelford v. Providence etc. Ins. Co.*, 3 R. I. 102; 67 Am. Dec. 496; as no alterations or repairs not increasing the risk shall affect the insurance: *Merriam v. Middlesex etc. Ins. Co.*, 12 Pick. 162; 32 Am. Dec. 252.

NORTON v. STATE.

[72 MISSISSIPPI, 128.]

INDICTMENT.—IF THE DESCRIPTION OF THE OFFENSE charged in an indictment, taking into consideration its nature and the natural and legal import of the terms used in designating it, is such as to convey a certain, clear, and full idea of the offense charged, it is sufficient.

INDICTMENT—DEFECTIVE ALLEGATIONS CURED BY VERDICT.—Though an allegation in an indictment is defective, it is sufficient, after verdict, if it was not demurred to, and its meaning is made to appear by necessary implication.

SEDUCTION UNDER PROMISE OF MARRIAGE—INDICTMENT.—Under a statute making the seduction of females over sixteen, under promise of marriage, punishable, an indictment alleging that defendant obtained carnal knowledge of a woman or female child over the age of sixteen years "by virtue of a false or feigned promise of marriage," though it fails to make expressly the necessary averment that the promise was made to her, is sufficient after verdict, if no demurrer was interposed, and such averment appears by necessary implication.

INDICTMENT—FORMAL DEFECTS, HOW REACHED.—A defect apparent on the face of an indictment, but which does not go to the substance thereof, may be reached by demurrer, but not by a motion to quash.

SEDUCTION UNDER PROMISE OF MARRIAGE—ESSENTIALS OF OFFENSE.—It is essential to the statutory offense of seducing a female over sixteen, under promise of marriage, that the woman seduced be unmarried and of chaste character at the time of the intercourse, though it is not so expressed in the statute.

SEDUCTION UNDER PROMISE OF MARRIAGE.—IN AN INDICTMENT for the statutory offense of seducing a female over sixteen, under promise of marriage, it is not necessary to allege that the man was unmarried, though, if married, and the woman knew it, no conviction can be had. Neither is it necessary to allege that the woman was unmarried, though it is the better practice to make the averment.

SEDUCTION. The defendant was convicted under section 1298 of the Mississippi Code of 1892, which reads as follows: "*Seduction of females over age of sixteen, by frauds, etc.* If any person shall obtain carnal knowledge of any woman or female child over the age of sixteen years, by virtue of any feigned or pretended marriage, or any false or feigned promise of marriage, he shall, upon conviction, be imprisoned in the penitentiary not more than five years; but the testimony of the female seduced alone shall not be sufficient to warrant a conviction." The accused offered some testimony to the effect that the prosecutrix, Katie Douglass, was engaged to marry another man, and had sexual intercourse with him about the time the accused began his visits to her. The following instruction was given on behalf of the state: "It is no defense to the indictment that Miss Katie Douglass was engaged to another man, or had illicit connection with another man. If you believe from the evidence that the defendant obtained illicit connection with her by a false or feigned promise of marriage, he is guilty as charged." The defendant appealed.

George S. Dodds and Willing & Ramsey, for the appellant.

Frank Johnston, attorney general, for the state.

130 WHITFIELD, J. We cannot treat the motion to quash as a demurrer. The language of sections 1354 and 1355 of the code of 1892 is plain and binds us. If a demurrer had been interposed below it should have been sustained and the indictment quashed, unless amended for the averment, which ought to be clearly set forth in every indictment, under section 1298 of the code of 1892—that the defendant made the promise to the woman of whom he had the carnal knowledge—whilst set forth here in such wise as to prevent

objection after verdict, is not set forth with such clearness as to sustain the indictment, against objection properly taken before verdict by demurrer. But, whilst we cannot treat the motion to quash as a demurrer, yet if the indictment omits altogether any averment that the defendant made the promise to the woman of whom he had carnal knowledge, which averment we hold to be essential in such an indictment, there would be a total omission of a matter of substance—of an element of the very essence of the offense—and the indictment would be void as charging no offense, and the judgment and sentence of the law could not follow upon a conviction had under it; and, a matter of constitutional right being thus involved, the point could be raised here, and section 1341 of the code of 1892 would not apply, as held in *Lewis v. State*, 49 Miss. 356, and *Newcomb v. State*, 37 Miss. 397. The whole pith of the matter is put by Chief Justice Shaw (*Commonwealth v. Odlin*, 23 Pick. 275) in this language, approved by this court in *Sullivan v. State*, 67 Miss. 351: "The verdict of a jury does nothing more than verify the facts charged; and, if these do not show the party guilty, he cannot be considered as having violated the statute." There can be no doubt that it is of the essence of the offense denounced by section 1298 of the code of 1892 that the defendant should make a false or feigned promise of marriage to the woman in the case, and that the indictment should aver ¹³¹ this: 4 Park. Cr. 528. In Bishop's Directions and Forms, section 950, the proper form of indictment under this statute is specifically set forth, the language being "that A did obtain carnal knowledge of one X, . . . by virtue of a false express promise of marriage to her previously made by the said A."

In *Callahan v. State*, 63 Ind. 199; 30 Am. Rep. 211; *Cheney v. State*, 36 Ark. 75; *Grant v. State*, 4 Park. Cr. 528 (which see specially); *Cole v. State*, 40 Tex. 148; *State v. Bryan*, 34 Kan. 68, and many others, it is expressly averred that the carnal knowledge was obtained by virtue of a promise made by the defendant to the woman in the case. The indictment in *Ferguson v. State*, 71 Miss. 805, 42 Am. St. Rep. 492, follows Mr. Bishop's form exactly, and this book is presumably in the library of every district attorney in the state. The allegation in this indictment does not use the language "promise previously made by said defendant to said Katie Douglass," but it does allege that defendant had carnal knowledge of her "by virtue of a false or feigned

promise of marriage." We think this is a very defective allegation in the particular under consideration; but still there is, by necessary implication, the allegation that the promise was one made by defendant to Katie Douglass. No other construction not too fanciful to serve as the basis of a judgment of reversal can be made. "When the description of the offense, taking into consideration its nature and the natural and legal import of the terms used in designating it, is such as to convey a certain, clear, and full idea of the offense charged, it is sufficient," says this court in *Jesse v. State*, 23 Miss. 109. There can be no sound and satisfactory meaning given to this allegation, looking to the whole indictment, other than that the promise in question was one made by the defendant to Katie Douglass, defective as the allegation manifestly is. In *State v. Bryan*, 34 Kan. 68, the indictment did not, in terms, charge that the woman seduced was a single woman, but it did charge that she was of the age of only seventeen years. The court ¹³² said: "The allegation that Bryan, being a male person, seduced her under a promise of marriage, inferentially charged that the female was a single woman. It would conform to the better practice if the information contained an express averment that the prosecutrix was at the time a single woman; but as the language used necessarily implies that she was single at the time stated, and as appellant could not have been misled or prejudiced by anything in the information, we think it was not fatal for omitting the direct averment that the prosecutrix was a single woman."

We hold in this case that the allegation is very defectively made, but is set out by reasonable implication in such sense and with such sufficiency that, after verdict, it is aided by section 1341 of the code of 1892: See 1 Saunders' Reports, 227, note 1.

But it is insisted that the court below erred in granting the instruction given for the state. We think this instruction, applied to the facts of this case, squarely presents the question whether the woman should be of previous chaste character under this statute. We have found, after careful examination, but two statutes identical with ours, and those are the statutes of Arkansas and Texas; and in the case of *Polk v. State*, 40 Ark. 482, 48 Am. Rep. 17, a case strikingly like this in its facts, speaking of testimony offered by defendant to show previous unchaste character, which 1

been excluded by the court below, the court says: "In every prosecution for seduction, the character of the seduced female is involved in the issue. . . . It is not, indeed, expressed in our statute, as it is in the statute of New York, and of some of the other states, that the woman should have been of previous chaste character, but it is plainly implied. The legislature never intended to send a man to the penitentiary for having had illicit connection with a prostitute or a woman of easy virtue, where she had consented, even under a promise of marriage." And the supreme court of Michigan, construing a statute identical with ours in leaving out the words "of previous ¹³³ chaste character," and in a prosecution for "seducing and debauching an unmarried woman," says: "In most of the states these statutes make the seduction of a woman of previous chaste character indictable, while there are no such words, nor any of like import, in ours. If, however, we are correct in what we have already said upon the question as to what is necessary to make an act of illicit intercourse seduction, then the chastity of the female, at the time of the alleged act, is in all cases involved. This, upon principle, we consider the correct doctrine": Citing many authorities.

In an elaborate note to *State v. Carron*, 87 Am. Dec. 408, it is declared that "the evident design of the laws on this subject is to protect virtuous unmarried females." The Texas statute, practically identical with ours, also omits the words "of previous chaste character." But the supreme court of that state, in two well-considered cases, reported in *Putman v. State*, 29 Tex. App. 454, 25 Am. St. Rep. 738, and *Mrows v. State*, 31 Tex. Cr. Rep. 597, 37 Am. St. Rep. 834, expressly held that the previous chaste character is involved in the very constitution of the offense, and the want of it a perfect defense. In the last case, decided in March, 1893, the trial court charged that, "if the jury believe defendant and Tina Garzell were well acquainted with each other, and defendant, knowing her character, promised to marry her, and subsequently seduced her by virtue of said promise, he could not avail of her want of chastity as a defense." The supreme court held it error, and reversed the case. A stronger and more pointed announcement of the view we are putting forward can hardly be imagined, the charge in that case being, as here, in the very language of the statute. It is true that in nearly all the states the statutes making punishable the

seduction of women under promise of marriage have in the statutes the words "of previous chaste character," or "of good repute," or similar words; but this legislative consensus, aided, too, by almost universal judicial consensus of opinion upon the identical subject, only emphasizes the accuracy of Mr. Freeman's statement, *supra*, that it is "the evident ¹³⁴ purpose of these laws to protect virtuous unmarried females." This statute (Code 1892, sec. 1298) is a statute against the seduction of females over sixteen by a promise of marriage. It is none the less seduction, which is the thing denounced, because it is seduction in a specified mode—by the promise of marriage. We must not confuse ourselves by arguing that, because the seduction made punishable here is seduction under promise of marriage, that the seduction is not still the substantive thing denounced. The definition of seduction is necessarily at the threshold of the inquiry. The legislature, doubtless, properly thought that a woman may much more readily yield to this particular mode of seduction—the promise of marriage—than to any other; but it is seduction still, in its legal import, though accomplished in this particular mode, which is here denounced. There can be no such thing as the seduction of a woman at the time of seduction of unchaste character. The supreme court of Wisconsin say, in *West v. State*, 1 Wis. 216: "A prostitute may be the subject of rape, but not of seduction." And Chief Justice Brickell, in the course of an admirable opinion in *Wilson v. State*, 73 Ala. 533, says: "The word 'seduce,' as found in the statute [one on this subject], imports not only illicit sexual intercourse, but it imports also a surrender of chastity. The statute is for the protection of the chastity of unmarried women, and the existence of the virtue at the time of the intercourse is a necessary ingredient of the offense; for, as has been often said, the prostitute may be the victim of rape, but is not the subject of seduction. By this is not meant, however, that the woman who may, at some time, have fallen cannot be the subject of seduction. That may be true, and there may be reformation; and, at the time she yields to the man's embraces, she may have the virtue of chastity, not in the high degree of the woman who has not strayed, but yet within the meaning of the statute entitling her to protection." The Alabama statute originally did not have the words "of previous chaste character" in it, but, by

amendment, had them when this opinion was delivered. But the ¹³⁵ opinion on the point of what seduction is, is directly relevant.

It is abundantly settled that a woman who has fallen and has really reformed is chaste, as Chief Justice Brickell says, within the meaning of all these statutes; for she is then chaste when the second time seduced by the feigned promise: *Patterson v. Hayden*, 17 Or. 238; 11 Am. St. Rep. 822; *Bowers v. State*, 29 Ohio St. 545; *People v. Clark*, 38 Mich. 117. She, thus restored, is protected, because chaste then; but the prostitute who is such at the time of the promise cannot then be seduced; she is already at the time without chastity: See, also, *People v. De Fore*, 8 Am. St. Rep. 870, note; *Baird v. Boehner*, 72 Iowa, 318. The statute under consideration first appears in the laws of 1888, page 89, under the title "An act to prevent the seduction of females." Section 1298 of the code of 1892 is captioned: "Seduction of females over the age of sixteen by fraud," and the last clause in it uses the expression, "the female seduced." Section 1004 of the code of 1892 is captioned: "Seduction of female child under sixteen." These two statutes are the necessary complements of each other. One punishes the seduction of girls under sixteen by any means; the other seduction of females over sixteen by means of a promise of marriage. But seduction is the substantive thing punished. Now, section 1004 requires the girl under sixteen years of age to be "of previous chaste character" before she can invoke the arm of the criminal law. Can it be possible that the legislature meant that the girl under sixteen should be required to show "previous chaste character," but the experienced nymph du pavement not? That the prostitute can invoke the vindicating power of the law on terms more favorable to success than the girl under sixteen? When Mrs. Quickly conceals from the lad who sails between Sir Jack's "East and West Indies" the contents of the notes, on the ground that it is not well children should know any wickedness, we have the great master of human nature raising into relief the truth universally recognized that childhood is, in the estimation of even the most hardened, the period of purity; and when we have the supreme court of ¹³⁶ Wisconsin telling us "If Joseph Andrews had yielded to the salacious solicitations of Lady Booby as she lay naked in her bed, he would have been guilty of debauch-

ing her person, but certainly not of corrupting her mind," we have presented to our consciousness the other picture of the woman long past childhood with chastity gone.

Can the same act be a felony, punishable by five years' imprisonment in the penitentiary, if the female be a prostitute over sixteen years of age, but nevertheless innocent, and dispunishable if only the victim be a girl under sixteen? To hold that, in a prosecution of one for seducing a girl under sixteen, not yet imperiled by contact with the vicious, previous chastity is essential to conviction, but that, in a prosecution for seducing a woman long conversant with the existence of libertinism, chastity is not essential, is an obvious inversion of nature, for the presumption of purity must be strongest in the childhood period. If law is the perfection of reason, this construction must be discarded. There must be seduction—a leading aside from the path of virtue. She who is, at the time of the alleged seduction, already unchaste, may be still further debauched, but not seduced. It is a contradiction in terms to say that she who is already, at the time of the act, unchaste can be seduced. The transaction should not "smack of bargain and barter," but should speak the tragedy of betrayal. It will be specially noted that all the decisions referred to in this opinion, except those from Michigan, are on statutes for seduction under promise of marriage, like ours, and that the statutes of Arkansas and Texas are identical—the one literally, the other substantially—with ours.

As the case must go back for a new trial, we add that we do not regard the evidence in this record as sustaining the plea of the statute of limitations. Katie Douglass testified that the promises were continued up to the fall of 1893, and on this point the case of *People v. Millspaugh*, 11 Mich. 278, is decisive that the prosecution is not barred.

¹²⁷ It is not necessary to allege that the man was unmarried, though, if married and the woman knew it, no conviction could be had. Nor, it seems, is it essential that the indictment should aver that the woman was a single woman, this, it is said, being matter of defense: Bishop's Directions and Forms, sec. 950, note 3. But, as held in *Ferguson v. State*, 71 Miss. 805, 42 Am. St. Rep. 492, it is better practice to make the averment.

The learned judge below, in granting the instruction com-

plained of, very naturally misconceived the concurring opinions in the Ferguson case, and gave them a broader meaning than was intended.

For the error indicated the judgment is reversed and the cause remanded.

COOPER, C. J., specially concurring. In *Ferguson v. State*, 71 Miss. 805, 42 Am. St. Rep. 492, in which the question as to whether the female, carnal knowledge of whom the defendant had obtained by promise of marriage, must have been of previous chaste character, was not necessarily involved. Judge Campbell and I doubted whether, under our statute, this fact was essential, and, in a concurring opinion therein, I expressed the opinion that such previous chaste character was not required. On a more careful examination of the question, I have reached the opposite conclusion. I am largely influenced by the fact that, in another section of the statute (Code 1892, sec. 1004), where the seduction of females under sixteen years of age is denounced, the female must have been of previous chaste character. I cannot believe that the penalty of the law is denounced against the seducer of a female under the age of sixteen only when she is of previous chaste character, and yet that previous chaste character is not essential when the woman is above that age.

INDICTMENT.—In charging a criminal offense it is necessary to use only such description as will fully inform the person charged as to what he has to meet, and of the nature of the accusation against him: *Haskins v. Ralston*, 69 Mich. 63; 13 Am. St. Rep. 376. An indictment is sufficient if every fact necessary to constitute the offense is charged, or necessarily implied: *State v. Campbell*, 29 Tex. 44; 94 Am. Dec. 251. Objections to an indictment or presentment after verdict come too late, and will not be considered: *Conner v. State*, 25 Ga. 515; 71 Am. Dec. 184. An objection to an indictment must be taken by demurrer: *Kellenbeck v. State*, 10 Md. 431; 69 Am. Dec. 166. It can be quashed only for defects apparent upon its face, and not for extraneous facts, although constituting a good defense: *Commonwealth v. Church*, 1 Pa. St. 105; 44 Am. Dec. 112.

SEDUCTION UNDER PROMISE OF MARRIAGE—INDICTMENT.—Seduction by means of a promise to marry is committed if the man has carnal intercourse to which the woman's assent was obtained by a promise of marriage, made by the man at the time, and to which, without such promise, she would not have yielded: *Puinam v. State*, 29 Tex. App. 454; 25 Am. St. Rep. 738. The fact that the prosecutrix was an unmarried female is an essential element of the crime: Note to *Ferguson v. State*, 42 Am. St. Rep. 503. The fact that she was also chaste is another essential element: *Mrous v. State*, 31 Tex. Cr. Rep. 597; 37 Am. St. Rep. 834; note to *Ferguson v. State*, 42 Am. St. Rep. 503. The fact that the indictment fails to distinctly and positively aver that she was unmarried at the time the offense was committed is

not ground for setting aside a verdict of conviction when the indictment and evidence reasonably show that the female seduced was unmarried: *Ferguson v. State*, 71 Miss. 805; 42 Am. St. Rep. 492. Whether the accused was married or unmarried at the time the offense was committed has been said to be wholly immaterial in such a prosecution: *Ferguson v. State*, 71 Miss. 805; 42 Am. St. Rep. 492. But, where the promise of marriage is made by a man already married, to the knowledge of the prosecutrix, and by means of such promise she is seduced, the fact of the man's marriage would be material, because no indictment for seduction under promise of marriage could be sustained under such circumstances, as sexual intercourse would then be regarded as purely voluntary, and springing from criminal desire, and not as the result of any betrayal of confidence: See monographic note to *Weaver v. Bachert*, 44 Am. Dec. 164, on what constitutes action for seduction.

LEPNICK v. GADDIS.

[72 MISSISSIPPI, 200.]

REAL PROPERTY—NEGLIGENCE—DANGEROUS PREMISES.—If a store on a lot burns, leaving a cistern under the store open and in dangerous proximity to paths across the lot, which the owner has, both before and after the fire, allowed the public to use as a highway, and the owner removes all guards and protection from the cistern, he is liable to one who, using reasonable care, strays in the dark from one of the paths and is injured by falling into the cistern.

H. B. Greaves, for the appellant.

W. J. Croom, for the appellee.

202 **WHITFIELD, J.** The plaintiff rests the cause of action, in the first count, upon this state of case: That defendant had long owned a lot in Flora bounded by two of the main thoroughfares; that the lot was vacant, except for his storehouse, which covered a cistern; that the storehouse had long been used as a place of business; that the entire public used, at defendant's invitation, knowledge, and consent this vacant lot as a thoroughfare and common in passing from street to street, and also so used two paths over said lot within three and eleven feet, respectively, of the cistern; that the cistern was within twenty-three feet of the pavement; that, in the winter of 1890 the store was burned, but for some time thereafter defendant kept it guarded and advertised so as not to be dangerous to passers-by and himself, and continued to use it as a cistern for some time, still guarding and advertising it; that it finally caved in and he abandoned its use and removed the guards and advertisements which would warn and protect those using the highway, or unconsciously straying

therefrom, from danger, but wantonly and carelessly left said cistern as a "menace to the lives and safety of man and beast, within such close proximity to the highway that, under ordinary circumstances, he knew it was dangerous to those using the highway," etc.; "that, during the winter of 1893, appellant, a stranger, while carefully using the highway, the night being dark, rainy, and cloudy, and there being nothing to show where the highway ended and the vacant lot begun, strayed therefrom, and, whilst so bewildered and lost, fell into said cistern and was injured."

The second count varies the cause of action by adding that the defendant, while using the store and the vacant lot, constructed, within three or four feet of said cistern, then protected, a hitching post for horses and mules, and invited and induced ²⁰³ the public to come upon his said lot, and not to follow the sidewalks, but to come by paths and a wagon road, being within three and eleven feet, respectively, of said cistern, and fasten their horses to said hitching post, and that, in consequence of such invitation and inducement thus held out by defendant, "a part of the public sidewalks fell into disuse," which disuse of the sidewalks and use of the paths, being a source of profit to defendant, he had encouraged and invited, and that the paths had been so constantly used for years as a common and constant passway by everybody, at defendant's invitation and request, etc.; and that plaintiff, "while passing along the sidewalk and the path leading across defendant's lot, thinking the same was the highway, being the way apparently commonly used," etc., fell into the cistern and was injured, "complainant being a comparative stranger, and seeing no other used sidewalk."

The third count proceeds on the ground that the cistern was a public nuisance. A demurrer was interposed on the grounds that the declaration showed no negligence on defendant's part, but contributory negligence on plaintiff's part. The demurrer was sustained and the suit dismissed, and this action of the court is the error assigned.

In *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175, Carter owned the United States Hotel. There was a vacant space of forty or fifty feet between the hotel and Buell street, and "this vacant space was used as a public place, and as part of the street." The hotel was burned in 1868, and rebuilt in 1872, and, in the interim, the same use was continued. The court says: "It is manifest that if the plaintiff had kept

within the original bounds of the alley, he could not have fallen into the excavation. It was because he strayed and deviated therefrom, and went upon the defendant's lot, that he was injured. But it cannot be held, upon the evidence, that the plaintiff was a trespasser in going there. There was, it is true, no public easement or right of way over the defendant's lot. It was his private property, and ²⁰⁴ he had the right to its exclusive possession. He could have inclosed it, and excluded the plaintiff and all other persons from going upon and passing over it. But . . . the public had been permitted to pass over the vacant part of the lot without objection. . . . This part of defendant's lot was traversed by foot passengers, and was used as a part of the street. . . . The public used it, and the defendant, by his silence, assented to its use. This use was not occasional or infrequent. The same use was permitted and continued after 1868, when the hotel was burned, until a new building was erected. The public still continued to use the lot. There was no revocation of the license or permission." And the court proceeds, after laying down the general rule and reviewing the cases of *Hardcastle v. South Yorkshire Ry. etc. Co.*, 4 Hurl. & N. 67, and *Binks v. South Yorkshire Ry. etc. Co.*, 113 Eng. Com. L. 242—both relied on by appellee here—and distinguishing them, says: "In this case we think the circumstances imposed a duty on the defendant to protect the excavation. . . . It was not the case of a bare permission by the owner to cross his land adjoining a public street. The land had, by use long continued, been made, for the time being, a public place and part of the highway. It was very probable that injury would occur if the area was left uncovered. It is quite conceivable that, so long as the hotel building stood, it was an advantage to the owner that the unoccupied part of the lot should be open to the public. We think the defendant could not, under the circumstances, make a dangerous excavation [and leaving the cistern here unprotected after the fire is equivalent, in principle, to making an excavation], and leave it unprotected, without responsibility to those accustomed to use the lot as part of the highway, and who, while using due care, were injured by falling into it." It will be noted that the lot, in that case, lay vacant four years, and that circumstance was held not to vary defendant's liability in the case made by the facts.

In the case of *City of Norwich v. Breed*, 30 Conn. 535, the

court reviews and distinguishes the English cases referred to, ²⁰⁵ and, on the point of mere distance from the highway, says: "Distance is one, and but one, of the elements which enter into the calculation. . . . Whether the excavation could, with a due regard to the rights of passengers on the streets, be left unguarded, or could not, depended upon the question whether, being unguarded, it endangered the travel or not. If it did not, no matter how near it was to the line of way. If it did, no matter how far it was removed." This proposition is put thus in the very accurate note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 802: "It seems to be very generally agreed that the proximate cause has no necessary connection with time or distance. It means closeness of causal relation, not nearness in time or distance": Citing many authorities. In *Graves v. Thomas*, 95 Ind. 361, 48 Am. Rep. 727, the defendant had a store on a lot, and another vacant lot bordered his on the north. "There were two paths, one being along the sidewalk proper, and the other diverging from it, and returning to it, passing over said vacant lot on the north of defendant's lot, and also over the defendant's lot, the latter path being upon higher ground than the path along the sidewalk proper." The plaintiff, on a dark night, without a lantern, took this path, and fell into an excavation on defendant's lot. This path had been used by the public for eight years, in wet weather, instead of the sidewalk. The court put the liability of defendant upon the ground that the "probability that such an accident might happen from thus leaving the pit exposed was so strong as to make it the duty of the owner of the lot, as a member of the community, to guard the community from the danger to which the pit exposed its members," and added: "In the case at bar we think that the fact that for a long period the public using the sidewalk had been permitted to use the place where the plaintiff fell, as a part of the sidewalk, made it the duty of the defendant to guard the excavation made at that place, and that the jury were authorized to find from the evidence that the plaintiff did not, by her own negligence, contribute to her injury." Reaffirmed in *Evansville etc. R. R. Co.* ²⁰⁶ *v. Griffin*, 100 Ind. 221; 50 Am. Rep. 783. In Mr. Beach's recent work on Contributory Negligence, page 335, note 2, it is said, citing many authorities: "Where one allows a portion of his premises adjoining the street to be used by the public as part of the highway, and makes an excavation near by, he

will be liable, if he does not take reasonable care in protecting passers-by from falling in." This principle is carried very far in *Campbell v. Boyd*, 88 N. C. 129; 43 Am. Rep. 740. In *Sanders v. Reister*, 1 Dak. 151, on the question of trespass, it is said: "Stress is laid on the fact that the appellant had a legal right to dig a cellar on his own premises. Certainly he had. So has a man a right to keep a dog, and make a sunk flat within the inclosure of his unfinished building; but he must take care of the one, if ferocious, and guard the other, if dangerous, so that harm may not come to others thereby. I apprehend the particular character of the instruments, as causes of injury, is unimportant, in contemplation of law, except so far as it may affect the question of the degree of care or negligence with which they are used, kept, or constructed. It would seem to me to be a strange rule of law that would permit the owner to sink dangerous excavations on his uninclosed premises, near to a public highway, in a densely populated city, leave it without guard or protection, and hold him not liable in case a person accidentally or unintentionally steps across the line, falls in and is killed, simply on the ground that the party injured was guilty of a technical trespass, and yet make the proprietor respond in damages who places spring guns in his inclosed vineyard, whereby a willful trespasser is shot and wounded." In the well-considered case of *Harriman v. Pittsburgh etc. Ry. Co.*, 45 Ohio St. 11, 4 Am. St. Rep. 507, cited in *Schmidt v. Kansas etc. Distilling Co.*, 90 Mo. 284, 59 Am. Rep. 25, in discussing "invitation," the court says: "In the late case of *Heaven v. Pender*, 11 Q. B. Div. 503, it is said that a more accurate and satisfactory ground of recovery, embracing all cases of implied invitation, is to be found in the proposition that whenever one person is, by circumstances, placed in such a position with regard to another ²⁰⁷ that every one of ordinary prudence would recognize that, if he did not use ordinary care and skill in his own conduct with regard to these circumstances, he might cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." However this may be, the phrase, "implied invitation," in its real value and significance, as derived from its application in the adjudged cases, imports knowledge by the defendant of the probable use by the plaintiff of the defendant's property so situated and conditioned as to be open to, and likely to be subjected to, such

use. This is the principle of the case of *Mackey v. City of Vicksburg*, 64 Miss. 777, cited with distinct approval in *Schmidt v. Kansas etc. Distilling Co.*, 90 Mo. 284; 59 Am. Rep. 25, and in *Cooley on Torts*, 721, note 1: See, also, *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332.

These authorities clearly establish the principle that if the defendant here, while using his lot and store, invited and induced the public to use his lot and the two paths as part of the highway, having his cistern then guarded, and after the fire left it open, still, however, for some time, guarding it, but afterward removed the guards and advertisements, so as to leave the cistern dangerous to those who, exercising ordinary care, used either the highway or the paths as parts or part of the lot allowed by him to be used as part of the highway by the public, such use of such paths as part of the highway having been uninterruptedly continued, he is liable, unless the plaintiff's own conduct was the proximate cause of the injury; and to this we limit our decision in this case. It need only be said further that, in this view, plaintiff, in no proper sense, can be deemed a trespasser without reference to whether the other facts alleged, that he "strayed, a stranger, bewildered and lost, from the highway, thinking the path he took was the highway, it being apparently the commonly used way, and there being nothing to show where the highway ended and the vacant lot begun." Whether these facts would take him out of the category of trespasser, on the reasoning of *Sanders v. Reister*, 1 Dak. 151, ³⁰⁸ we do not now say. Clearly, the facts above set out as the ground of our decision would. We shall not here add to the innumerable efforts at definition of "proximate and remote cause"—a task well characterized by an eminent English judge as "something like having to draw a line between night and day"—but content ourselves with saying that we think the first two counts of this declaration stated good causes of action; wherefore, the judgment is reversed, demurrer overruled, and the cause remanded.

REAL PROPERTY — LIABILITY FOR INJURIES SUFFERED BY PERSONS ON ONE'S PREMISES BY HIS INVITATION.—The owner or occupant of land who, by invitation, express or implied, induces or leads others to come upon his premises for any lawful purpose, is liable in damages to such persons, they using due care, for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public or to

those who were likely to act upon such invitation: See *Sweeney v. Old Colony etc. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644; *Atlanta etc. Oil Mills v. Coffey*, 80 Ga. 145; 12 Am. St. Rep. 244; and monographic notes to *Hayward v. Miller*, 34 Am. Rep. 235; *McAlpin v. Powell*, 26 Am. Rep. 562, discussing the subject. It is his duty, under such circumstances, to exercise ordinary care and prudence to render the premises reasonably safe for the visit: *Atlanta etc. Oil Mills v. Coffey*, 80 Ga. 145; 12 Am. St. Rep. 244. The owner of land or of a building does not, however, owe to persons coming there for their own convenience, or as mere licensees, the duty of keeping it in a safe condition: *Plummer v. Dill*, 156 Mass. 426; 32 Am. St. Rep. 463; *Benson v. Baltimore Traction Co.*, 77 Md. 535; 39 Am. St. Rep. 436.

JACKSON v. CITY OF GREENVILLE.

[72 MISSISSIPPI, 220.]

MUNICIPAL CORPORATIONS—NEGLIGENCE—DEFECTIVE SIDEWALK—PLAYING WITH DOG.—It is the duty of a city to keep its streets and sidewalks in repair only for those who use them for the purposes of their creation. Hence, an adult who uses a sidewalk for the sole purpose of playing with a dog cannot recover of the city for injuries occasioned by a defect in the sidewalk while he is so engaged. The street or sidewalk is not to be used as a playground.

Jayne & Watson and S. Akin, for the appellant.

J. H. Wynn, for the appellee.

229 WOODS, J. This action was brought by the appellant for the recovery of damages for injuries sustained by him in consequence of defects in a sidewalk in the city of Greenville, negligently suffered to exist. To the declaration filed appellee interposed the plea of the general issue, and gave notice thereunder: 1. That the injury complained of was the result of plaintiff's own negligence; and 2. That, at the time of the injury, and for a reasonable time before, the defendant city had exercised and exhausted all its powers, under the law, to raise money for the repair of its streets, and that all its funds were, at the time mentioned, exhausted. After all the evidence on both sides had been introduced, at the request of appellee, the court instructed the jury, peremptorily, to find for the defendant city, and from the judgment of the court following such instruction this appeal is prosecuted.

We shall disincumber our consideration of the appeal by omitting any reference to the notice of exhaustion of power and funds on the part of the municipality, as no evidence to support it was offered, and by omitting any discussion of the

question of the contributory negligence of the appellant, and confine ourselves to this single question, viz.: Was the appellant, ²²³ at the time of receiving the injury, making such use of the street and sidewalk as will entitle him to a recovery for hurt suffered by reason of defects in the sidewalk?

It is elementary law that streets are primarily designed to be used for purposes of transportation and travel, and the authorities are uniform to the effect that, in the absence of any express statute creating liability, municipal corporations, clothed with plenary and exclusive control over their streets, are yet liable, by implication, for injuries resulting to persons properly using such streets, for failure to maintain the same in a reasonably safe condition for travel. That the rule, as stated, is substantially recognized and applied by the courts in cases of statutory and of implied liability, will appear by examination of the adjudications of courts of last resort in both classes, and any seeming want of harmony will, in most instances, appear to have arisen from failure to confine the language of the several courts to the facts of the particular case.

What are the facts, as shown in the evidence introduced on trial below by the appellant, which are supposed by counsel for appellee to bar any recovery herein? We quote from the testimony of the appellant: "The accident occurred in this way: I had a puppy there, and I took the puppy out on the sidewalk, and was playing with him, and he jerked loose from me, and I made a step to catch it, and my foot slipped into one of those cracks, and jerked me down, and, before I could recover, the plank flew up and struck me on my leg. My foot was fastened in the crack. It was my right foot in the crack. I had my left foot on the ground, and I jerked my right foot up, and the plank flew up and struck me on the left leg. It produced a compound fracture of my leg."

On cross-examination, the appellant said: "I was playing with a dog when the accident happened. I went out to the sidewalk. I had a pointer puppy there, and was playing with it. It tried to get away from me, and my foot slipped off the plank and went into the crack, and, in reaching over, I tried to ²²⁴ pull my foot out, and the plank flew up and struck me on the leg. My leg was broken. . . . The plank ran on the walk crosswise. My foot was caught crosswise. . . . Was standing rather crosswise; was not walking along when the accident occurred; was playing with the dog; was

going nowhere. . . . My face was turned toward the fence—turned south. The dog was running between me and the palings, and I stooped to catch him, and my foot slipped.”

The case thus presented is that of a man of full age using the sidewalk, not for the purpose of travel, either for business or exercise or pleasure, but for the sole purpose of playing with a dog. The appellant had come out of his boarding-house to the sidewalk. He was standing, and was not going anywhere. He was playing with the dog, and was standing with his back to the roadway and his face turned toward the palings, when, in an effort to catch the dog, running between him and the fence, he slipped, and received his injury. Can it be satisfactorily gathered from the above statement that the appellant, when hurt, was making such reasonable use of the street or its sidewalk, at the time of receiving the injury complained of, as will bring him in the category of those for whom streets and sidewalks are designed? Was he a traveler on or along the street who, incidentally halting or turning aside upon his way, received his hurt? Was the municipality under any duty to appellant to keep in repair the sidewalk so that he might safely use it for the purposes of his play with the dog? Streets, we repeat, are designed for travel, primarily, and, though it must be conceded that one using the street for travel may incidentally cease to move on continuously, and yet not lose his rights as a traveler on the highway, yet it cannot be deduced from this concession that one not using the street for travel may, nevertheless, convert it, or a part of it, into a playground, and, in so using it, if injury occur while so using or misusing the street, by reason of defect in it, hold the negligent municipality liable. To recover, the injured party must ²²⁵ fix liability upon the municipality; and, to fix liability, the sufferer must show a failure on its part to discharge a duty to him. But the duty to repair and keep in reasonably safe condition streets and sidewalks is due only to those using the highways for the purposes of their creation. If a football team appropriate a street to its uses in playing a game, and one of the players fall into a hole in the roadway, and injury result, would anyone be found to say that he could rightfully complain and recover? In such case, the injured player clearly would be frustrating the very end for which highways are ordained, viz., the convenient and safe transportation and travel of property and persons. It seems to us indisputable

that one contravening the law of the creation, and the ends for which it was created, cannot be heard to complain if ill befall him because of his own wrongdoing.

Many cases have been examined by us where liability was imposed and recovery had for injuries to children, not of the age of discretion, when playing on streets or highways; but all such cases, on well-understood legal principles, are readily distinguishable from the case at bar. *Chicago v. Keefe*, 114 Ill. 222, 55 Am. Rep. 860, and *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65, cited in the brief of appellant's counsel, are of this character. Our own adjudications are along the same line, in like cases: *Mackey v. Vicksburg*, 64 Miss. 777; *Vicksburg v. McLain*, 67 Miss. 4.

When we come to consider the cases referred to by counsel, wherein adults received injuries in streets, we shall discover that none of them, on their facts, at all resemble the case at bar. The sinewy, lucid, and caustically humorous opinion in *Varney v. Manchester*, 58 N. H. 430, 42 Am. Rep. 592, was upon these facts, in a word, viz.: Varney, the plaintiff, went to a certain street in Manchester for the purpose of seeing a procession form on Decoration Day. He went down one side of the street to the place where the procession was forming, and crossed over the street to get a better view. He stood, looking at the forming of the procession, near a pile of timber, and, after so standing ²²⁶ and looking from three to five minutes, the lumber fell and crushed his foot. Held, a person is "traveling upon a highway" when he is making a reasonable use of a highway as a way, and that the law does not prescribe how long one may stand on a street without ceasing to use the way as a way, but that the question was one of reasonable use, and this was for a jury's determination, if there is any evidence on which they could properly find the use was reasonable.

The case of *Murray v. McShane*, 52 Md. 217, 36 Am. Rep. 367, is that of an adult lawfully passing along a street and stopping for an instant on a doorsill of a house fronting the street for the purpose of adjusting his shoe, and suffering injury in consequence of a brick falling from a dilapidated wall negligently permitted to remain there. Held, that travelers on a street have not only the right to pass, but to stop on necessary and reasonable occasions, so they do not obstruct the street or doorways.

In *Duffy v. City of Dubuque*, 63 Iowa, 171, 50 Am. Rep. 743,

the facts were that Duffy, who was a workman, went to the corner of two intersecting streets for the purpose of doing some work on a house there situate. After he had unloaded some stuff from a wagon, he went along the sidewalk to a by ra t eight feet in the rear of the house, and a foot or two from the line of the sidewalk. While in the act of drawing water from the hydrant, with one foot on the ground and the other on the sidewalk, a section of a roof, negligently left standing near, was blown over by a gust of wind, fell on Duffy and inflicted the injuries of which he complained. Held, that Duffy's stopping to draw water as stated was the exercise of a privilege which he might lawfully enjoy, and was a mere incident to the general use of the street which he was making.

The opinions of the New England courts, where liability, in the character of cases which we are considering, is of statutory creation, and, in which, as is sometimes charged, extreme and antiquated views are announced, it will be found, on careful analysis, are not out of general accordance with the spirit of ³²⁷ most, not to say all, of the decisions elsewhere which we have examined. In the case of *Blodgett v. City of Boston*, 8 Allen, 237, while the court denies the liability of the city for injuries received by a boy eleven years old who was using the plank sidewalk on the street, with another boy, for purposes of play only, yet the opinion is careful to limit the effect of the decision by saying: "We do not certainly think any narrow or restricted signification should be given to the word 'traveler' as used in the statute. It may well embrace within its meaning, as applied to the subject matter, every one, whatever may be his age or condition, who has occasion to pass over the highway for any purpose of business, convenience, or pleasure. . . . We by no means intend to say that a child who receives an injury caused by a defect or want of repair in a road or street, while passing over or through it, would be barred of all remedy against a town merely because, at the time of the occurrence of the accident, he was also engaged in some childish sport or amusement. There would exist, in such case, the important element that the person injured was actually traveling over the way. But this element is wholly wanting in the case at bar."

Here, as in the case just quoted from, the important element of actual use of the way for the purpose of travel is wholly absent. Here, as there, the case shows an appropria-

tion of a sidewalk to a use other than, and inconsistent with, that for which the highway was established. Here, however, the offender against the rights of the public was an adult, and not a child of debatable discretion. Here, in addition, the play with the dog was not a mere incident to the general and proper use of the sidewalk by the appellant in passing along or over it. The city owed him no duty in his situation and using the street as he was doing. The duty was on the municipality to keep and maintain the street in reasonably safe repair for travel, and liability ensued upon injury befalling one going along over it, whether for purposes of business or pleasure, ²²⁸ by reason of failure to keep and perform this duty. But to one simply using the street or sidewalk as a playground, the city owed no duty to keep its streets for him so engaged in any repair.

Affirmed.

MUNICIPAL CORPORATIONS—KEEPING SIDEWALKS IN REPAIR—DUTY AND LIABILITY.—The duty of a city to keep its streets in repair is performed when they are free from obstructions, and safe and commodious highways for public travel: *Campbell v. City Council*, 53 Ala. 527; 25 Am. Rep. 656. If, therefore, a person using a city highway simply for the purpose of play, horseracing, or other purposes than travel, meets with a personal injury by a defect therein, he cannot maintain an action against the city or town therefor: *McCarthy v. Portland*, 67 Me. 167; 24 Am. Rep. 23. But, while these cases are authority for the doctrine that only those using the streets for their appropriate and normal purposes are within the rule of protection, it is held in other states that the duty exists not merely as to travelers, but as to all persons lawfully in the street, and that there is imposed upon a city a liability for negligence where the person injured was in no sense a traveler: Note to *Varney v. Manchester*, 42 Am. Rep. 601.

WILDBERGER v. HARTFORD FIRE INSURANCE CO.

[72 MISSISSIPPI, 338.]

AN AGENT CANNOT ACT FOR BOTH PRINCIPAL AND THE ADVERSE PARTY in the same transaction, unless by the consent of his principal, given after a full knowledge of all the facts and circumstances.

RECEIVER IS NOT AN AGENT.—A receiver of property appointed by court is not an agent. He is an indifferent person holding the property for those ultimately entitled to it, and his possession is that of the court.

INSURANCE—VALIDITY OF POLICY ISSUED BY AGENT AND RECEIVER TO HIMSELF.—If an insurance agent is appointed a receiver of a stock of merchandise, and issues a policy of insurance thereon to himself without the consent of his principal, it is void.

SUIT to enjoin an action on a policy of fire insurance and to have it canceled. An attachment having been levied on a

stock of merchandise, Wildberger was appointed receiver thereof. He was, at the time, the local agent of the defendant insurance company. The goods were, by order of court, assigned to him as receiver, and he issued to himself, as receiver, a policy of insurance covering the goods. He at once reported to his company, but on the next morning the goods were destroyed by fire. The report was not received by the company until after the fire, and it promptly repudiated any liability under the policy. An action was commenced to recover on the policy, and the insurance company filed the bill in this case seeking to enjoin the suit and to have the policy canceled upon the ground, among others, that Wildberger, as agent of the company, had no authority to issue the policy to himself, covering a stock of goods held by him as receiver. There was a decree for the complainant holding the policy void, and Wildberger appealed.

Sam C. Cook and Mayes & Harris, for the appellant.

Miller, Smith & Hirsh, for the appellee.

341 WHITFIELD, J. The cases mainly relied on by counsel for appellant are *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287, and *Northrup v. Germania Fire Ins. Co.*, 48 Wis. 420; 33 Am. Rep. 815. The former is wholly inapplicable. Kearney never was the agent of the insurance company, nor was Thompson. But Kearney, being receiver, was approached by the agent of the insurance company, and solicited to insure the trust property, which he did, and paid the premium out of the trust funds prior to any order directing him to do so, and the company when sued set up as one defense that he had no authority so to use the trust funds in paying the premium before such order, and that the contract was void as to the company on that ground, which defense was, of course, scouted. The cases are utterly unlike. The court held that the title of property in a receiver's hands is in its owner, and the possession is the possession of the court; but these matters are aside from the real point under discussion. In the other case, the owner of the property insured sent his sons to the insurance agent, Edwards, to get insurance, and after it was gotten put the insurance agent in charge to guard and watch it, and without compensation, so far as appears. The insurance agent was not the general agent of the owner of the property. That this case is understood to hold that the guarding the property was a collateral matter, aside from the in-

insurance, is shown by what Mr. Biddle says about this case in his work on Insurance, volume 1, section 497, when he observes: "Of course a mere employment by the other party, in another matter, would not be material." The opinion in the case confines it strictly within its own limits, and cites no authorities.

We have examined all the authorities cited in 1 American and English Encyclopedia of Law, pages 380, 381, note 1, and find them to be cases ³⁴² where a "middleman" receives commissions from both parties merely for bringing them together. He was not the agent of either party in the contract made by and between them after they met. Of this class of cases, Dixon, C. J., is quoted in *Barry v. Schmidt*, 57 Wis. 174, 46 Am. Rep. 35, as saying: "A broker, whose undertaking is merely to find a purchaser at a price fixed by the seller, or at a price which shall be satisfactory to the seller when he and the purchaser meet, is in reality only a 'middle man,' whose duty is performed when the buyer and seller are brought together, and as to whom the policy of the law which excludes double compensation has been considered inapplicable." But where the agent of the seller is the agent of the buyer in the sale itself, a different principle obtains, as is clearly shown in *Rupp v. Sampson*, 16 Gray, 398; 77 Am. Dec. 416. The true doctrine governing here is thus expressed in an elaborate note to *Potter's Appeal*, 7 Am. St. Rep. 281: "Therefore, it is an undisputed rule of law that unless, with the free and intelligent consent of his principal, given after full knowledge of all the facts and circumstances, the agent cannot, in the same transaction, act for both principal and the adverse party." This is the principle which must control here. The receiver here, of his own motion, issued these policies to himself as receiver, acting in their issuance as the agent of the companies. The companies knew nothing of it till after the property was destroyed. A receiver is not an agent. The very term "receiver" negatives such an idea. He is an indifferent person, holding the property for the parties ultimately entitled. But he receives a commission as receiver which gives him a direct, personal, pecuniary interest. As agent of the insurance company it is his duty to look with the clearest and most critical eye to the risk, moral and physical. As a receiver it is his personal interest to keep in existence the property in his custody, so as to increase his commissions by the increased labor bestowed upon

the property. Besides, it is to be noted in this case that an assignment was executed to Wildberger as ³⁴³ assignee, and he therefore had the legal title and possession for the purposes of the trust, under the assignment, in addition to the possession which he had as receiver, which last is really the possession of the court.

Counsel on neither side have furnished us with an identical case, and we have been unable to find one. It may very well be that the general principle set forth in *Mechem on Agency*, sections 66-68, so manifestly covers the case at bar that it has not been seriously questioned. It was very pertinently observed by Sir W. M. James, L. J., in *Panama etc. Tel. Co. v. India Rubber etc. Co.*, L. R. 10 Ch. App. 515: "The clearer a thing is, the more difficult it is to find any express authority or any dictum exactly to the point."

We are clearly of opinion that an insurance agent who has been appointed receiver of property cannot, of his own motion, without the consent of his principal, issue, as such agent, to himself, as such receiver, a policy of insurance valid against such principal, because the duties of the two positions are inconsistent, and he does have a direct, personal interest, to the extent at least of his commissions. "A contrivance," it has been pithily put, "which reduces the two parties to one, and admits an agent representing antagonistic interests to make a bargain by himself, is so far against the policy of the law that the contract is held to be void, unless the principal chooses afterward, and with a knowledge of all the circumstances that affect his position, to ratify the act of his agent": *Mercantile etc. Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 411, cited in *Potter's Appeal*, 7 Am. St. Rep. 281, note. The two parties principal here are the insurance company and Wildberger—acting for himself. And it may with equal force be said that the same human being—subject to the temptations springing from that self-interest which leaves the balance so "rarely right adjusted" in the best of men—cannot, by some magical process, separate himself into two wholly distinct characters, and, in one character as agent of an insurance company, contract ³⁴⁴ with himself, in another character, as receiver, or otherwise, having always a personal interest in the contract adverse to his principal. It would require a faculty for judicial analysis which could

. . . sever and divide

A hair twixt north and northwest side—

a casuistry too refined and sublimated for the practical affairs of business life—to find in a doctrine that would uphold such a contract a rule of action safe for common-sense dealing. “No man can serve two masters.”

The decree in each case is, therefore, affirmed.

COOPER, C. J., specially concurring. I concur in the result announced in this cause, for the reason that, in my opinion, Wildberger, as agent of the insurance company, could not contract with himself as receiver unless the contract should be approved by his principal, with full knowledge of all the facts. In the opinion of my brother Whitfield, I think too much prominence is given to the fact that Wildberger, as receiver, was entitled to commissions on the property administered by him as receiver. That fact is not, in my opinion, influential: *Badley v. Ladd*, 70 Miss. 688. If the receiver was not entitled to any commissions, the same rule of disqualification to make the contract would control. The opposing interests represented by him, the adverse duties he owed under the circumstances, in my opinion, precluded him from making the insurance contract sued on, without regard to whether he was or was not entitled to compensation as receiver.

A RECEIVER IS MERELY A MINISTERIAL officer of the court: *Bell v. American Protective League*, 163 Mass. 558; 47 Am. St. Rep. 481. He is not an agent of the owner, but is an agent of the court appointing him: *Brown v. Warner*, 78 Tex. 543; 22 Am. St. Rep. 67, and note. Any person lawfully in the possession of property may insure it in his own name for the benefit of the owner, when the insurance is effected with that purpose and intention, and is expressed in apt terms in the policy, and may recover as trustee for the real owner, to the extent of the value of the property, as measured by the policy, whether he personally has any interest therein or not: Monographic note to *Strong v. Manufacturers' Ins. Co.*, 20 Am. Dec. 516, on insurable interest in property. It would seem, therefore, that, ordinarily, a receiver should have power to insure the property in his charge; but, where he is an agent for an insurance company, and issues a policy to himself, the question of his right to do so would involve a question of agency standing in the way; for it is well settled that an agent cannot represent both parties without their consent. If he does so, he commits a fraud; but, in such a case, the principal may rescind or repudiate the contract. It has also been settled by a long course of adjudications in the courts of equity that a trustee or agent of one person cannot make a valid contract respecting the subject matter to which the trust or agency relates where he has a personal interest: Monographic note to *Potter's Appeal*, 7 Am. St. Rep. 280, on the rescission of a transaction by a principal where the agent has an adverse interest, or is in the secret employment of the other party.

BURT v. STATE.

[72 MISSISSIPPI, 408.]

INSTRUCTIONS—REASONABLE DOUBT.—It is error to instruct the jury that while they must, in order to convict, believe the accused guilty beyond a reasonable doubt, this requirement is met if they "conscientiously" believe him to be guilty.

HOMICIDE—INCOMPETENT EVIDENCE.—A witness for the state, after testifying to a threat made by the accused against the deceased, should not be permitted to testify that he remonstrated with the accused therefor, if the remonstrance evoked no reply.

INSTRUCTIONS—DISTINCTION BETWEEN CIRCUMSTANTIAL AND POSITIVE EVIDENCE.—It is misleading and erroneous to instruct, on behalf of the state, that the law makes no distinction between circumstantial and positive evidence in the absence of any caution as to the care to be used in applying circumstantial evidence.

INSTRUCTIONS—WEIGHT OF EVIDENCE—SINGLING OUT TESTIMONY.—Instructions for the defendant are erroneous, as being on the weight of evidence, if they single out a part of the testimony and inform the jury that it alone is not enough to warrant a conviction.

CONVICTION for murder. Burt, the appellant, was convicted of the murder of Jesse Evans, mainly on circumstantial evidence, but there was some testimony tending to show a threat by the accused against the deceased. Evans had been charged with the killing of one Ryals, a half-brother of Burt, and one McGlaum, a witness for the state, testified that soon after Ryals was killed he met the accused and remarked to him that he had heard that his half-brother had been killed, and that Evans had killed him. Burt replied: "Yes, but there is a hereafter." The witness was asked by the state if he did not remonstrate with Burt. The defense made an objection to this question, but it was overruled by the court, and the question was permitted, to find out what, if anything, the defendant said in reply. The witness answered that he did remonstrate with the accused, and told him he ought not to talk in that way, and that the accused said nothing, "but kinder laughed." The second instruction given for the state was: "While it is the law that before the jury can find the defendant guilty they must believe him so from the evidence beyond a reasonable doubt, still, if they conscientiously believe him guilty, all requirements of the law are met, and they believe him guilty beyond a reasonable doubt." The seventh, eighth, and ninth instructions asked by the defendant, and refused, each singled out a part of the testimony, and informed the jury that it alone was not enough to warrant a conviction.

W. A. Haden, for the appellant.

Frank Johnston, attorney general, for the state.

410 **WHITFIELD, J.** It is assigned for error that the court erred in granting the second instruction asked by the state. We held at this term, in *Brown v. State*, 72 Miss. 95, that this instruction is erroneous. The facts of this case, a case in which the evidence consists of vague threats and circumstantial evidence, emphasize with peculiar force the correctness of that ruling. This certainly is a case in which we cannot say such charge was not material, reversible error. The many unwise efforts to define a reasonable doubt are very remarkable, in view of the previous decisions of this court, and of other courts, and of the fact that the phrase itself, "beyond a reasonable doubt," is "an expression invented by the common-law judges for the very reason that it was capable of being understood and applied by plain men in the jury-box": 2 Thompson on Trials, sec. 2463. If the common-law judges in their wisdom settled on this expression—"beyond a reasonable doubt"—as the one most easily understood by "plain men in the jury-box," can we not accept this refined gold without seeking to "gild" it—this "lily" without "painting"? Campbell, J., in *Hamilton v. People*, **411** 29 Mich. 193, says: "If a jury cannot understand their duty when told they must not convict when they have a reasonable doubt of the prisoner's guilt, they can very seldom get any help from such subtleties as require a trained mind to distinguish. Jurors are presumed to have common sense and to understand common English, but they are not presumed to have professional or any high degree of technical or linguistical training." Mr. Thompson says (2 Thompson on Trials, sec. 2463, p. 1817): "Most American courts have, however, felt called upon, in instructing juries in criminal cases, to explain this expression, although it is one of the most exact expressions known to the law, and to define this definition, although the words convey a more exact idea to the minds of average men than can be derived from any attempt to define them. In so doing they have attempted to lead juries into mazes of subtlety and casuistry in which they were lost themselves, and into which the minds of plain men were incapable of following them." Mr. Stephens tells us that the effort to define a reasonable doubt is an effort "to compute that which is not number and to measure that

which is not space." It ought, it seems to us, to be sufficient in all cases to say: "If the jury, from the evidence, believe beyond a reasonable doubt that," etc. If this course were observed, would there be a conviction less? Would there not be many reversals saved? We do not say a case may not occur in which it would be well to go beyond this, but we doubt if it would not be best to adhere to it in far the larger number of cases; and the representatives of the state—an able and accomplished body of gentlemen—should heed the voice of wisdom and caution saying to them, as to this brief and plain formula: "This is the way. Walk ye in it." There may have been cases in which instructions in similar language, in this court, have not secured reversal, because no error was predicated of them, or they were cured by other instructions. The charge in *Taylor v. State*, 52 Miss. 88, whilst in one sentence containing the phrase, "conscientiously believe," in other ⁴¹² parts of the same charge expressly declares that "the guilt of the accused must be fully and conclusively established to a moral certainty," and "to the exclusion of every reasonable doubt." There is nothing in this record to cure the error here. "Conscientiously," in a charge on this subject, is inapt, is erroneous. One may "conscientiously"—that is, sincerely, honestly—believe, having reference to the quality of his belief, a thing to be true, which he does not, having reference to the strength or degree of his belief, believe beyond a reasonable doubt. In many cases the expression, "the evidence must satisfy your minds and consciences beyond a reasonable doubt," is used, and that form is correct enough, because of the latter qualification. "Satisfy" alone will not do: *Hawthorne v. State*, 58 Miss. 778. "Conscientiously" is a word of quality rather than quantity, and the rule of evidence differentiating criminal procedure from civil, in this regard, is a rule of quantity—a rule not as to the sincerity of a belief, however weak, though real, but as to the strength of his belief.

We also think the first instruction given for the state is misleading. The statement that "the law makes no distinction between circumstantial and positive evidence" is too broad as it stands in this instruction. If it was meant that there is no such distinction as that there may be a conviction on positive testimony of witnesses speaking to the act, and not on circumstantial evidence rising high enough in probative force to exclude every reasonable hypothesis other

than that of guilt, it is of course correct; but if it was meant that the two kinds of evidence are to be treated as in all respects identical, it is misleading and erroneous, especially in the absence of any caution from the court as to the care to be used in applying such evidence—caution such as was approved by this court in the first instruction given for the state in *Josephine v. State*, 39 Miss. 613; 2 Thompson on Trials, sec. 2500.

We think it was error not to have excluded that part of McGlaum's testimony objected to by defendant. The record ⁴¹³ shows that the learned judge below only admitted it "to see what defendant said in reply"; and the witness immediately proceeded to say that he said nothing in reply, "but kinder laughed." We think this was erroneous. It may have had undue weight given it for so inconclusive a statement. This error, of itself, however, we would not hold reversible.

There was no error in refusing the seventh, eighth, ninth, and tenth instructions asked by defendant. The last three are on the weight of evidence. The tenth is not very intelligible as it appears in the record, but, as set out, is erroneous.

For the errors indicated the judgment is reversed and cause remanded.

REASONABLE DOUBT.—Upon this point the principal case was approved and followed in *Brown v. State*, 72 Miss. 997, in which it was held to be error in a criminal case to instruct the jury that, if they "conscientiously" believe the defendant to be guilty, he should be convicted.

INSTRUCTIONS upon the weight of evidence are erroneous: *Harkey v. State*, 33 Tex. Cr. Rep. 100; 47 Am. St. Rep. 19. Instructions which single out and unduly emphasize any one or more facts are bad: *Prince v. State*, 100 Ala. 144; 46 Am. St. Rep. 28.

DEFINITIONS OF REASONABLE DOUBT—DIFFICULTY OF DEFINITION—STATUTES.—In view of the fact that a failure to tell the jury in a criminal case what a reasonable doubt is is not error, especially where the defendant does not request such a definition: *State v. Robinson*, 117 Mo. 649, 661; *People v. Christensen*, 85 Cal. 568, 571; *Dunbar v. United States*, 156 U. S. 185, 199; and of the further fact that the court is not bound to instruct the jury as to what leaves room for a doubt: *Pool v. State*, 87 Ga. 526; it is surprising to see how often an effort has been made to define these simple words, and nearly every attempt to explain them renders an explanation of the explanation necessary. It is exceedingly difficult to define them, and no one but a master hand in the use of words should attempt it; yet many ostentatious trial judges have devoted themselves to the self-imposed task of defining the expression—a task not unlike that of trying to divide a hair "twixt north and northwest side," and the result has been a sea of confusion, more dangerous, however, to lawyers than to jurymen, for it is an imposition upon

credulity to have us believe that jurymen have ever been influenced to any very great extent by the nice discriminations made by the judges in their attempts to define "reasonable doubt." The jury is presumed to understand the English language, and to be able to comprehend the term: *People v. Waller*, 70 Mich. 237. As said by Danforth, J., in *State v. Reed*, 62 Me. 129, 142: "The explanations of the meaning of this phrase have been almost innumerable, and the best jurists have found it difficult to convey to their own satisfaction the idea in their own minds expressed by its use—not that there is any considerable difficulty in understanding its meaning, but rather in not conveying it. It may, indeed, admit of grave doubt whether the proposition is in itself so simple, and the words so well calculated to express a state of mind so easily felt, though difficult to describe, that in most cases it is sufficient to use the expression alone without any attempt at explanation. All such attempts must result in simply stating the same proposition in a different form of words, and words which are, perhaps, no more easily understood. There is no exact mathematical test by which we may certainly know whether a doubt, entertained in any given case, is reasonable or otherwise. What would be reasonable to one person might be far otherwise to another. Therefore, no certain line, as upon a plan, can be drawn that shall be recognized by every one as the dividing line between the mere skeptical doubt, and that which has the sanction of reason. Hence, whatever explanations may be given to the phrase, its meaning practically must depend very largely upon the character of the mind of the person acting. Lexicographers tell us that 'reasonable' is that which is 'agreeable or conformable to reason.' The doubt, therefore, which conforms to the reason of the person examining is to him a reasonable doubt. If it does not so conform to him it is unreasonable, and will not be entertained. We must assume that the jurors are reasonable men, and, as such, they must be addressed. When told that, in order to convict, the proof must remove every reasonable doubt of guilt from their minds, whatever the form of words used, if any heed is given to the instruction, the result must be that each individual juror will understand it, and act according to the dictates of his own reason; and if, tried by that test, the doubt is reasonable, conviction must fail; otherwise it would follow." Hence, as it is impossible to define precisely, especially in a few words, what a reasonable doubt is (*Miles v. United States*, 103 U. S. 304, 312; *Dunbar v. United States*, 156 U. S. 185, 199; *State v. Morey*, 25 Or. 241, 258), courts instructing juries in criminal cases should make no such attempt, but merely follow the language of the statute that "where there is a reasonable doubt of the defendant being proven guilty, he is entitled to an acquittal": *Mickey v. Commonwealth*, 9 Bush, 593; or, if there is no such statute, let the words themselves carry their own definition: *People v. Coz*, 70 Mich. 247, 257. These statutes vary some, of course, in their phraseology, but the meaning is alike in all. It has not only been held, but recommended, by courts that reasonable doubt should be charged in the exact language of the statute: *State v. Potts*, 20 Nev. 389. But a substantial compliance with the statute is sufficient. Thus, an instruction that the "defendant is presumed to be innocent until his guilt is established by the evidence, to the satisfaction of the jury, beyond a reasonable doubt," is a substantial compliance with the statute, though the word "legal," as used in the statute, is omitted before the word "evidence": *McDule v. State*, 27 Tex. App. 641; 11 Am. St. Rep. 216. Reasonable doubt is sometimes defined by statute. For example, the statutory definition in the state of Nevada is as follows: "A rea-

sonable doubt is one based on reason. It is not mere possibility, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt, to be reasonable, must be actual and substantial; not mere possibility or speculation": See *Stats.* 1839, p. 27. And the same statute provides that no other definition of "reasonable doubt" shall be given in criminal actions in that state. In a case where the prosecution relied on circumstantial evidence for a conviction, the court, after giving this statutory definition of "reasonable doubt," and informing the jury as to the law of circumstantial evidence, instructed them "that the doubt which the juror is allowed to retain on his own mind, and under the influence of which he should frame a verdict of not guilty, must be a reasonable one. A doubt produced by undue sensibility in the mind of any juror, in view of the consequences of his verdict, is not a reasonable doubt; and a juror is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to possible state of facts, differing from that established by the evidence. You are not at liberty to disbelieve as jurors if, from the evidence, you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered." This instruction was objected to on the ground that it was another and different definition of "reasonable doubt" from that required by the statute; but the court held that it related merely to the rules by which the jury ought to be governed in their consideration of the evidence in the case, and was not prejudicial to the defendant: *State v. Potts*, 20 Nev. 389. To authorize a conviction in a criminal case, the law merely requires that the jury shall be satisfied "beyond a reasonable doubt." It would therefore be error to charge that "clear and distinct proof" is required: *Griffith v. State*, 90 Ala. 583. And it is error to apply the doctrine of "reasonable doubt" to the innocence instead of the guilt of the accused. For example, in a case of theft, it is error to tell the jury that, "if you believe from the testimony beyond a reasonable doubt that the defendant did not take the property fraudulently, but took the property under an honest claim of right, he would not be guilty of theft, and you should acquit him": *Lewis v. State*, 29 Tex. App. 105.

APPLICATION OF THE RULE.—The doctrine of "reasonable doubt," as a rule, has no proper application to mere matters of subsidiary evidence, taken item by item, but is applicable always to the constituent elements of the crime charged, and to any fact, or group of facts, which may constitute the entire proof concerning any of the constituent or elementary facts: *Wade v. State*, 71 Ind. 535. And it is proper, as a general rule, to instruct that "the reasonable doubt the jury are permitted to entertain must be as to the guilt of the accused on the whole of the evidence, and not to any particular fact in the case": *Carlton v. People*, 150 Ill. 181; 41 Am. St. Rep. 346; *Hornish v. People*, 142 Ill. 620. The following instruction was approved in *Fowler v. State*, 100 Ala. 96, 97, viz.: "While the law requires the guilt of the accused to be proved beyond a reasonable doubt, it does not require that each fact which may aid the jury in reaching the conclusion of guilt shall be clearly proved, but that, on the whole evidence, the jury must be able to pronounce that guilt is proved to a moral certainty." It has been held not error to instruct the jury that it is not necessary to prove each link in the chain of circumstances relied on, or every fact in the

case, beyond a reasonable doubt; but it is sufficient if, taking the evidence as a whole, they are satisfied, beyond a reasonable doubt, of the defendant's guilt: *Siebert v. People*, 143 Ill. 571. But, on the other hand, it has been held that, if the evidence in a criminal case is wholly circumstantial, it is error to instruct the jury that they need not be satisfied, beyond a reasonable doubt, of each link in the chain of circumstances relied upon to establish the defendant's guilt: *Graves v. People*, 18 Col. 170. The true rule is, that where the state relies upon circumstantial evidence of such kind that each circumstance or material independent fact is a necessary link to complete the chain or series of independent facts showing guilt, an instruction to the jury that it is incumbent on the state to establish each circumstance or material independent fact, beyond a reasonable doubt, would be proper, because, in such a case, each circumstance or material independent fact should be established to the same degree of certainty as the main fact: *State v. Crane*, 110 N. C. 530; *People v. Ah Chung*, 54 Cal. 398. The desire of a juror for more evidence tending to show the guilt of the defendant is not equivalent to the reasonable doubt which the law requires, and it is not error to refuse a request for such a charge: *Shepperd v. State*, 94 Ala. 102.

WHAT IS A REASONABLE DOUBT, GENERALLY.—While a reasonable doubt is difficult to define accurately, all the authorities agree that such a doubt must be actual and substantial, as contradistinguished from a mere vague apprehension: *Carlton v. People*, 150 Ill. 181; 41 Am. St. Rep. 346; *Fowler v. State*, 100 Ala. 96, 97; *State v. Rounds*, 76 Me. 123; *United States v. Cassidy*, 67 Fed. Rep. 698; *United States v. Barrett*, 65 Fed. Rep. 62, 67; *Earll v. People*, 73 Ill. 329; *People v. Cox*, 70 Mich. 247, 257; *Langford v. State*, 32 Neb. 782; *State v. Turner*, 110 Mo. 196, 199; *State v. Bodie*, 33 S. C. 117; *Billard v. State*, 30 Tex. 367; 94 Am. Dec. 317; *Lovett v. State*, 30 Fla. 142, 162; *State v. Nueslein*, 25 Mo. 111; *Welsh v. State*, 96 Ala. 92; *McGuire v. People*, 44 Mich. 286, 290, note; 38 Am. Rep. 265; *People v. Finley*, 38 Mich. 482, 483; *United States v. Jones*, 31 Fed. Rep. 718, 724; and must arise out of the evidence, or want of evidence: *Carlton v. People*, 150 Ill. 181; 41 Am. St. Rep. 346; *United States v. Cassidy*, 67 Fed. Rep. 698; *Earll v. People*, 73 Ill. 329; *People v. Cox*, 70 Mich. 247, 257; *Langford v. State*, 32 Neb. 782; *State v. Turner*, 110 Mo. 196, 199; *State v. Bodie*, 33 S. C. 117, 126; *Lovett v. State*, 30 Fla. 142, 163; *United States v. Knowles*, 4 Saw. 517; *People v. Finley*, 38 Mich. 482, 483; *United States v. Jones*, 31 Fed. Rep. 718, 724. The doubt to acquit the defendant must be actual and substantial, not mere possibility or speculation. It is not a mere possible doubt because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt: *Fowler v. State*, 100 Ala. 96, 97; *United States v. Barrett*, 65 Fed. Rep. 698; *United States v. Cassidy*, 67 Fed. Rep. 698; *Earll v. People*, 73 Ill. 329; *State v. Jefferson*, 43 La. Ann. 995; *State v. Turner*, 110 Mo. 196, 199; *State v. Van Winkle*, 6 Nev. 340; *Billard v. State*, 30 Tex. 367; 94 Am. Dec. 317; *Lovett v. State*, 30 Fla. 142, 162; *State v. Nueslein*, 25 Mo. 111; *United States v. Knowles*, 4 Saw. 517; *McGuire v. People*, 44 Mich. 286, 290, note; 38 Am. Rep. 265. The two phrases "proof beyond a reasonable doubt," and "proof to a moral certainty," are synonymous, and the legal equivalents of each other: *Jones v. State*, 100 Ala. 88; *Carlton v. People*, 150 Ill. 181; 41 Am. St. Rep. 346; *Commonwealth v. Costley*, 118 Mass. 1. Proof "beyond a reasonable doubt" is such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof "to moral certainty," as distinguished from an absolute certainty. Each phrase signifies such

proof as satisfies the judgment and conscience of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfy them as to leave no other reasonable conclusion possible: *Carlton v. People*, 160 Ill. 181; 41 Am. St. Rep. 346. The jury may be said to have a reasonable doubt, when, after the entire comparison and consideration of all the evidence, they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge: *Carlton v. People*, 130 Ill. 181; 41 Am. St. Rep. 346. The term "reasonable doubt" implies that there may be doubt which is not reasonable or rational. Hence, the doubt justifying an acquittal is not a vague, whimsical, or merely possible one, but an actual, substantial, and well-founded doubt: *State v. Rounds*, 76 Me. 123. It must not be an imaginary doubt, a fanciful conjecture, or strained inference: *United States v. Cassidy*, 67 Fed. Rep. 698. The jury should not refuse to convict because of a remote, far-fetched, or merciful suggestion or conjecture that possibly the defendant may be innocent. "Absolute certainty is rarely possible, and those vague uncertainties to which some minds are always, and all minds are sometimes, liable, are not within the contemplation of the law when it directs that the accused shall have the benefit of the doubt. It is not every doubt, however slight or however founded, which should prevent a verdict of guilty. It is not the mere possibility of innocence, or vague notions, or capricious, or captious doubt, that is intended": *United States v. Barrett*, 65 Fed. Rep. 62, 67. A reasonable doubt must be a fair one "based upon reason and common sense." A doubt must be built upon something. It cannot stand without any basis, and the basis must be something substantial in the sense that it is not based on fancy, or imagination, or caprice": *People v. Cox*, 70 Mich. 247, 257; *People v. Finley*, 38 Mich. 482. It is error to instruct that: "By 'reasonable doubt' is ordinarily meant such a one as would govern or control you in your business transactions or usual pursuits of life": *State v. Rover*, 11 Mont. 343, overruling *State v. Millain*, 3 Nev. 409; but not that: "If the jury are satisfied from the evidence, beyond a reasonable doubt, that the defendant committed the crime charged against him, they are not legally bound to acquit him, because they may not be entirely satisfied that the defendant, and no other person, committed the alleged offense." If a jurymen believes that a defendant may possibly be innocent, he cannot be said to be "entirely satisfied" of his guilt; yet he may be satisfied of it beyond a reasonable doubt, and may convict: *State v. Nelson*, 11 Nev. 334. A reasonable doubt is a conscious uncertainty in the mind of the jury, after a fair consideration of all the proofs in the case, respecting the guilt of the accused: *State v. Ching Ling*, 16 Or. 419. So long as moral certainty is not reached, a reasonable doubt may be said to remain on the mind: *Territory v. Owings*, 3 Mont. 137. The reasonable doubt that the law in its mercy gives the benefit of to the accused is not a weak or slight doubt, but a serious or strong and well-founded doubt as to the truth of the charge: *State v. Bodie*, 33 S. C. 117. As the law requires only a belief in the minds of the jurors to that degree of moral certainty which excludes all reasonable doubt of the guilt of the accused, an instruction that there must be a conviction in their minds so perfect, complete, and unconditional as to exclude the possibility of a doubt is properly refused: *People v. Smith*, 105 Cal. 676. So it is error to limit a reasonable doubt to something which is suggested by, or arises from, or springs out of the evidence adduced, as this gives too narrow a definition of a reasonable doubt. Such a doubt may arise from a want of evidence as to some fact

having a natural connection with the cause. It has reference to that uncertain condition of mind which may remain after considering what has not been proved, as well as that which has: *Wright v. State*, 69 Ind. 163; 35 Am. Rep. 212; *Denamore v. State*, 67 Ind. 306; 33 Am. Rep. 96. And it has been held error to define a reasonable doubt in an instruction as a "real" doubt: *State v. Smith*, 21 Mo. App. 595. The evidence in a criminal case must produce a conviction of the truth of the charge with that degree of certainty on which the mind reposes with satisfaction. In this connection the use of the phrases "reasonable doubt" and "moral certainty" are correct expressions in instructing juries, but to use the terms "it is possible," or "it may be," or "perhaps" the defendant is not guilty, as the equivalent of reasonable doubt, is erroneous, as such terms imply only a possible or imaginary doubt. It is, therefore, proper to refuse charges in which they are so used: *McKleroy v. State*, 77 Ala. 95; *Young v. State*, 95 Ala. 4. A reasonable doubt is not far-fetched, speculative, or arbitrary, but is such that, after looking over the testimony and considering all the facts proven to their satisfaction, and the natural circumstances surrounding the facts, the jury are still unable to say that the accused is guilty: *McGuire v. People*, 44 Mich. 286, 290, note. It is a doubt founded upon a consideration of all the circumstances and evidence, and not a doubt resting upon mere conjecture or speculation: *United States v. Knowles*, 4 Saw. 517; *Welsh v. State*, 96 Ala. 92. It means that the evidence of guilt "must be clear, positive, and abiding, fully satisfying the minds and consciences of the jury": *United States v. Babcock*, 3 Dill. 581, 622. It does not mean a doubt which arises from some mere whim or vagary, or from any groundless surmise or guess; nor does reasonable doubt mean an absolute certainty: *Welsh v. State*, 96 Ala. 93. It "is an honest misgiving as to the guilt of the defendant upon the proof, which the reason entertains and sanctions as a substantial doubt": *Purkey v. State*, 3 Heisk. 26, 28. "A mere misgiving of the imagination, suggestion of ingenuity, or sophistry, or misplaced sympathy, is not a reasonable doubt, to which the law accords any influence": *Coleman v. State*, 59 Ala. 52, 54. It is not "a mere guess or surmise that the man may not be guilty. It is such a doubt as a reasonable man might entertain after a fair review and consideration of the evidence": *People v. Guidici*, 100 N. Y. 503. Moral certainty may be said to bear the same relation to moral subjects, or matters relating to human conduct, that absolute certainty does to mathematical subjects. It is a state of impression produced by facts, in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it. It is that state of the judgment, grounded upon an adequate amount of appropriate evidence, which induces a man of sound mind to act without hesitation in the most important concerns of human life. And a juror may be said to be morally certain when he is so fully convinced by the evidence of the truth of the fact sought to be proved, that he would venture to act on his conviction in matters of the highest importance to his own interests: See monographic note to *Rippey v. Miller*, 62 Am. Dec. 184, discussing circumstantial evidence.

BAD INSTRUCTIONS ON REASONABLE DOUBT, GENERALLY.—It is proper to refuse a charge asserting the right to an acquittal if the jury "have reason to believe" certain facts hypothetically stated, as this expression is not the equivalent of "belief," and does not correctly state the doctrine of reasonable doubt: *Munkers v. State*, 37 Ala. 94. So, a charge, instructing the jury in a murder case to acquit, unless "indubitably certain" of de-

defendant's guilt, or if, from the evidence, they are unable to say "where the truth indubitably lies," is properly refused, as not sufficiently defining reasonable doubt, and as making any possible speculative or imaginary doubt sufficient to acquit: *Ross v. State*, 92 Ala. 23; 25 Am. St. Rep. 20. It is error to instruct the jury that if there is any fact or facts in evidence which if true, would cause them reasonably to doubt the guilt of the accused, and that if they are uncertain whether such fact or facts are true, they should acquit, as such an instruction involves a doubt upon a doubt: *Shubert v. State*, 66 Miss. 446. And it is error to instruct the jury that the defendant is entitled to an acquittal, "unless they seriously believe he is guilty," as such a qualifying clause is too ambiguous, doubtful, and uncertain in its import to be clearly consistent with the rule that the evidence must satisfy the jury of the guilt of the defendant to a moral certainty, and beyond a reasonable doubt: *People v. Ferry*, 84 Cal. 31. An instruction is erroneous which limits a reasonable doubt in a criminal case to one element of the proof, instead of requiring it to arise out of the whole evidence: *Lyons v. People*, 137 Ill. 602.

GOOD INSTRUCTIONS ON REASONABLE DOUBT, GENERALLY.—No set formula is required in defining reasonable doubt. It means fully satisfied, or satisfied to a moral certainty: *State v. Wilson*, 111 N. C. 693. It is not error for a court, in an instruction, to define a reasonable doubt as follows: "A reasonable doubt is not every doubt; it is not a captious doubt. It is such a condition of mind resulting from the consideration of the evidence before you as makes it impossible for you, as reasonable men, to arrive at a satisfactory conclusion. It is not a consciousness that a conclusion arrived at may possibly be erroneous, but such a state of mind as deprives you of the ability to reach a conclusion that is satisfactory": *State v. Roberts*, 15 Or. 187. Nor to instruct the jury that if, from the evidence, they were "satisfied beyond a reasonable doubt, and believed as reasonable men," that the defendant did the acts charged, they should find him guilty: *State v. Grant*, 86 Iowa, 216. Nor to define a reasonable doubt as one "which a reasonable man of sound judgment, without bias, prejudice, or interest, after calmly, conscientiously, and deliberately weighing all the testimony, would entertain as to the guilt of the prisoner": *State v. Reed*, 62 Me. 129. Nor to instruct that a reasonable doubt must be "actual and substantial," and "not a mere possibility or speculation": *Hornsby v. State*, 94 Ala. 55; *Little v. State*, 89 Ala. 99. The expressions "unless the evidence against the defendant is such as to exclude to a moral certainty every hypothesis but that of his guilt," and "the evidence should be so convincing as to lead the minds of the jury to the conclusion that he cannot be guiltless," only mean that the jury must be convinced beyond a reasonable doubt of the defendant's guilt, and may properly be used in defining reasonable doubt to the jury: *Hornsby v. State*, 94 Ala. 55. An instruction that a reasonable doubt must be a substantial doubt based upon the evidence or lack of evidence in the whole case, and not a mere possibility of defendant's innocence, properly states the law: *State v. Wells*, 111 Mo. 533; *State v. Robinson*, 117 Mo. 649. It is held that there is no error in defining a reasonable doubt to be a "strong, substantial, well-founded doubt, founded in the evidence": *State v. Senn*, 32 S. C. 392; but trial courts should not whittle away the phrase "reasonable doubt" by the use of qualifying expletives. A case will not be reversed because the word "doubt" is qualified by the word "real" or "well-founded," in giving an instruction, but the use of such adjectives is not approved: *State v. Young*, 105 Mo. 634, 639; *State v. Gamm*.

72 Mo. 374. It is proper to instruct the jury that they must convict if they should, from all the evidence, believe beyond a reasonable doubt that the defendant is guilty, "although they may also believe that it is possible that he is not guilty": *Boulden v. State*, 102 Ala. 78. A correct charge on reasonable doubt followed by the phrase, "I charge you, however, that in legal investigations mathematical certainty is not attainable," is not vitiated by the use of the word "however": *McTyier v. State*, 91 Ga. 254. An instruction, in a capital case, defining reasonable doubt as follows is good, viz.: "If you have a reasonable doubt of defendant's guilt, you should acquit; but a doubt, to authorize an acquittal on that ground, ought to be a substantial doubt touching defendant's guilt, and not a mere possibility of his innocence": *State v. Nueslein*, 25 Mo. 111.

MISLEADING INSTRUCTIONS.—To instruct the jury that "a reasonable doubt is such a doubt as fairly and naturally arises in the minds of the whole jury," is liable to mislead them, and it is, therefore, erroneous, as they are liable to conclude that unless the doubt arises in the minds of all the jurors, it is something less than a reasonable doubt, and should be disregarded, whereas the jury should acquit if a reasonable doubt arises in the mind of one juror: *State v. Sloan*, 55 Iowa, 217. After charging a jury that, if they have a reasonable doubt of the guilt of the accused, they must acquit, it is confusing and misleading to add: "A reasonable doubt is one that must satisfy a reasonable mind after a full comparison and consideration of all the evidence." The two instructions, taken together, are calculated to create the impression that there must be such a doubt as must satisfy reasonable minds that the accused was not guilty: *Wood v. State*, 31 Fla. 221. So, a charge that, "If the jury believe from the evidence in the case, the whole evidence, that it is barely probable the defendant is not guilty, the jury ought to find him not guilty," is misleading and erroneous, because, while the jury may consider it barely probable that the defendant is innocent, they may still believe, beyond all reasonable doubt, that he is guilty: *Carpenter v. State*, 98 Ala. 31. And it is misleading to tell the jury to give the defendant "the benefit of every rational doubt" growing out of certain circumstances of the case, as they cannot tell whether the "rational doubt" must be of the defendant's guilt or some other matter of an uncertain character: *People v. Lee Gum*, 69 Cal. 532. After a correct charge upon the question of reasonable doubt, it is meaningless and confusing to add that "mere possible doubts, however reasonable, which beset some minds on all occasions," should not prevent a verdict of guilty, but is not prejudicial error: *People v. Chun Heong*, 86 Cal. 329; *People v. Lee Sare Bo*, 72 Cal. 623.

CONSCIENTIOUS BELIEF.—It is error to define a want of reasonable doubt to the jury as follows: "You are not required to know that defendant is guilty; but if you conscientiously believe, from all the testimony, he is guilty, you should convict, for then you have no reasonable doubt, and the case is made out to a moral certainty"; because conscientious belief is not necessarily belief beyond a reasonable doubt: See principle case; *Brown v. State*, 72 Miss. 95, 997.

"ENTIRELY SATISFIED."—It is error to refuse to instruct the jury that "the evidence in a criminal case must satisfy the jury to a moral certainty and beyond a reasonable doubt—that is, it must entirely satisfy the jury—of the guilt of the defendant before they can convict. If the jury are not entirely satisfied, they should acquit": *People v. Cheon Foon Ark*, 61 Cal. 527. They must be satisfied beyond a reasonable doubt, before they can

convict, that the defendant, and no other person, committed the offense: *People v. Kerrick*, 52 Cal. 446. It is, therefore, error to instruct the jury, in effect, that they may find the defendant guilty, although they may not be "entirely satisfied" that he, and no other person, committed the alleged offense: *People v. Kerrick*, 52 Cal. 446; *People v. Carrillo*, 70 Cal. 643.

CIRCUMSTANTIAL EVIDENCE.—In a case where the evidence as to the defendant's guilt is purely circumstantial, the evidence must lead to the conclusion so clearly and strongly as to exclude every reasonable hypothesis consistent with innocence. In a case of that kind an instruction in these words is erroneous: "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty." It is not enough that the evidence necessarily leads the mind to a conclusion, for it must be such as to exclude a reasonable doubt. Men may feel that a conclusion is necessarily required, and yet not feel assured, beyond a reasonable doubt, that it is a correct conclusion: *Rhodes v. State*, 128 Ind. 189; 25 Am. St. Rep. 429. A charge that circumstantial evidence must produce "in" effect "a" reasonable and moral certainty of defendant's guilt is probably as clear, practical, and satisfactory to the ordinary juror as if the court had charged that such evidence must produce "the" effect "of" a reasonable and moral certainty. At any rate, such a charge is not error: *Loggins v. State*, 32 Tex. Cr. Rep. 364. In *State v. Shaeffer*, 89 Mo. 271, 282, the jury were directed as follows: "In applying the rule as to reasonable doubt you will be required to acquit if all the facts and circumstances proven can be reasonably reconciled with any theory other than that the defendant is guilty; or, to express the same idea in another form, if all the facts and circumstances proven before you can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty, you must adopt the theory most favorable to the defendant, and return a verdict finding him not guilty." This instruction was held to be erroneous, as it expresses the rule applicable in a civil case, and not in a criminal one. By such explanation the benefit of a reasonable doubt in criminal cases is no more than the advantage a defendant has in a civil case, with respect to the preponderance of evidence. The following is a full, clear, explicit, and accurate instruction in a capital case turning on circumstantial evidence: "In order to warrant you in convicting the defendant in this case, the circumstances proven must not only be consistent with his guilt, but they must be inconsistent with his innocence, and such as to exclude every reasonable hypothesis but that of his guilt, for, before you can infer his guilt from circumstantial evidence, the existence of circumstances tending to show his guilt must be incompatible and inconsistent with any other reasonable hypothesis than that of his guilt": *Lancaster v. State*, 91 Tenn. 267, 285.

REASON FOR DOUBT.—To define a reasonable doubt as one that "the jury are able to give a reason for," or to tell them that it is a doubt for which a good reason, arising from the evidence, or want of evidence, can be given, is a definition which many courts have approved: *Vann v. State*, 83 Ga. 44; *Hodge v. State*, 97 Ala. 37; 38 Am. St. Rep. 145; *United States v. Cassidy*, 67 Fed. Rep. 698; *State v. Jefferson*, 43 La. Ann. 995; *People v. Stubenvoll*, 62 Mich. 329, 332; *Welch v. State*, 96 Ala. 93; *United States v. Butler*, 1 Hughes, 457; *United States v. Jones*, 31 Fed. Rep. 718; *People v. Guidici*, 100

N. Y. 503; *Cohen v. State*, 50 Ala. 108. It has, therefore, been held proper to tell the jury that a reasonable doubt "is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give good reason for": *State v. Jefferson*, 43 La. Ann. 995. So, the language, that it must be "not a conjured-up doubt—such a doubt as you might conjure up to acquit a friend—but one that you could give a reason for," while unusual, has been held not to be an incorrect presentation of the doctrine of reasonable doubt: *Vann v. State*, 83 Ga. 44, 52. And in *State v. Morey*, 25 Or. 241, it is held that an instruction that a reasonable doubt is such a doubt as a juror can give a reason for, is not reversible error, when given in connection with other instructions, by which the court seeks to so define the term as to enable the jury to distinguish a reasonable doubt from some vague and imaginary one. The definition, that a reasonable doubt means one for which a reason can be given, has been criticized as erroneous and misleading in some of the cases, because it puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty required by law before there can be a conviction; and because a person often doubts about a thing for which he can give no reason, or about which he has an imperfect knowledge: *Siberry v. State*, 133 Ind. 677; *State v. Sauer*, 38 Minn. 438; *Ray v. State*, 50 Ala. 104; and the fault of this definition is not cured by prefacing the statement with the instruction that "by a reasonable doubt is meant not a captious or whimsical doubt": *Morgan v. State*, 48 Ohio St. 371. Spear, J., in the case last cited, very pertinently asks: "What kind of a reason is meant? Would a poor reason answer, or must the reason be a strong one? Who is to judge? The definition fails to enlighten, and further explanation would seem to be needed to relieve the test of indefiniteness. The expression is also calculated to mislead. To whom is the reason to be given? The juror himself? The charge does not say so, and jurors are not required to assign to others reasons in support of their verdict." To leave out the word "good" before "reason" affects the definition materially. Hence, to instruct a jury that a reasonable doubt is one for which a reason, derived from the testimony, or want of evidence, can be given, is bad: *Carr v. State*, 23 Neb. 749; *Cowan v. State*, 22 Neb. 519; as every reason, whether based on substantial grounds or not, does not constitute a reasonable doubt in law: *Ray v. State*, 50 Ala. 104, 108.

"HESITATE AND PAUSE"—"MATTERS OF HIGHEST IMPORTANCE," ETC. A reasonable doubt has been defined as one arising from a candid and impartial investigation of all the evidence, such as "in the graver transactions of life would cause a reasonable and prudent man to hesitate and pause before acting": *Gannon v. People*, 127 Ill. 507; 11 Am. St. Rep. 147; *Dunn v. People*, 109 Ill. 635; *Wacaser v. People*, 134 Ill. 438; 23 Am. St. Rep. 683; *Bowlden v. State*, 102 Ala. 78; *Welsh v. State*, 96 Ala. 93; *State v. Gibbs*, 10 Mont. 213; *Miller v. People*, 39 Ill. 457; *Willis v. State*, 43 Neb. 102. And it has been held that it is correct to tell the jury that the "evidence is sufficient to remove reasonable doubt when it is sufficient to convince the judgment of ordinarily prudent men with such force that they would act upon that conviction, without hesitation, in their own most important affairs": *Jurrell v. State*, 58 Ind. 293; *Arnold v. State*, 23 Ind. 170; *State v. Kearley*, 26 Kan. 77; or, where they would feel safe to act upon such conviction "in matters of the highest concern and importance" to their own dearest and most important interests, under circumstances requiring no

compulsion or coercion upon them to act at all: *Garfield v. State*, 74 Ind. 60. Neither is it error, it is said, after a correct instruction on reasonable doubt, to add: "If you are not so satisfied and convinced of the defendant's guilt that you would act upon that conviction in matters of highest importance to yourselves, you should give the defendant the benefit of the doubt, and acquit; if you are so satisfied, you should convict him": *State v. Schaffer*, 74 Iowa, 704. And, while not wholly satisfactory, it is not error to state to the jury, as a definition or test of what is a reasonable doubt, that they should require equally as strong and conclusive evidence of defendant's guilt as they would require to induce them to enter upon the great and most important acts of their lives, always remembering that their verdict must be the truth: *Ryan v. State*, 83 Wis. 486. There is no error in defining or describing to the jury a reasonable doubt as follows: "A reasonable doubt is such a doubt as the term itself implies. It is difficult to explain what a reasonable doubt is; it means a doubt that has something to rest upon; some reason that it is based on; such a doubt as would control you, and you would be governed by in your own important business affairs; it means such a doubt as a sensible, honest-minded man would reasonably entertain in an honest investigation after truth—a doubt that would arise from the evidence, or the want of evidence, in the case. It does not mean a mere vague conjecture, or a bare possibility, of the innocence of the accused": *Fletcher v. State*, 90 Ga. 468. Neither is there any substantial error in defining or describing to the jury a reasonable doubt thus: "Defendants in all criminal cases are presumed to be innocent until the contrary appears, and it is your duty to give the defendants the benefit of this presumption, and this presumption follows the defendants all through the trial and until the proofs satisfy the mind of the jury of the guilt of the accused beyond a reasonable doubt—that is, a moral certainty. That does not mean that the state should demonstrate to a mathematical certainty the defendant's guilt; that would scarcely be possible in any human trial. It means that the evidence must be of such a character as to leave the minds of the jury settled as to the conviction of the defendant's guilt. It must not leave the minds of the jury wavering, unsettled, hesitating, or unsatisfied, because, if it does, the law says the defendant is entitled to that doubt, and to an acquittal. It does not, on the other hand, mean a vague, conjectural doubt, the doubt of a 'crank,' a doubt conjured up in the mind of any man. It means a doubt that grows out of the evidence in the case, or the want of evidence. It means such a doubt as a juror would hesitate to act on in the most important business affairs of his own in the ordinary walks of life": *Butler v. State*, 92 Ga. 601.

On the contrary, it is held that an instruction to the jury defining a reasonable doubt as "such a doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself," is erroneous: *People v. Bemmerly*, 87 Cal. 117. And an instruction that "the proof is deemed sufficient when the evidence is sufficient to impress the judgment of ordinarily prudent men with a conviction on which they would act in an important affair of their own," does not correctly state the law of reasonable doubt: *Palmerston v. Territory*, 3 Wyo. 333. The trouble with such instructions is, that the judgment of reasonable men in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence. But in criminal cases something more is required. There must be in the minds of the jury an abiding conviction, to a moral

certainty, of the truth of the charge, derived from a comparison and consideration of the evidence: *People v. Bemmerly*, 87 Cal. 117; *Palmerston v. Territory*, 3 Wyo. 333; *Territory v. Bannigan*, 1 Dak. 451. In the case last cited an instruction charging the jury, in determining the question of doubt, to "act as a prudent, careful business man would in determining an important matter pertaining to his own affairs," was held erroneous, as the conviction reached by each of the jurors must be such as would lead him to venture to act upon it, in matters of the "highest concern and importance," to his own interest; but the instruction even with this qualification has been disapproved, as requiring no higher degree of proof than a preponderance of evidence, as giving the juror no definite idea of his duty, and as calculated to mislead him: *Lovett v. State*, 30 Fla. 143. So, in *Commonwealth v. Miller*, 139 Pa. St. 77, 23 Am. St. Rep. 170, it is held erroneous to instruct the jury that a reasonable doubt "is such a doubt as would influence or control you in your actions in any of the important transactions of life." "Our actions," says Mr. Justice Williams, in the case last cited, "are determined by the preponderance of considerations. We doubt, hesitate, examine, balance the argument for and against the given action, and act as the preponderance indicates. A doubt that would control our actions in the important transactions of life would be one that was so strong as not to be overcome by the balancing process. Such a doubt would be practically an unconquerable one. It would lead us, not simply to refrain from acting, but to act."

PROBABLE DOUBT—POSSIBILITY OR PROBABILITY OF INNOCENCE.—An instruction that, if there is a probability of defendant's innocence, the jury must acquit, is proper, and should be given if requested; but an instruction that, if there is a probable doubt of the guilt of the accused, the jury must acquit, is properly refused: *Prince v. State*, 100 Ala. 144; 46 Am. St. Rep. 28; *Carpenter v. State*, 98 Ala. 31. It is proper to refuse a charge that, "if from the evidence in the case, there is a reasonable possibility of the defendant's innocence," the jury should acquit him, as there may be evidence to suggest a "possibility" of innocence, and yet, from the whole evidence, no reasonable doubt of defendant's guilt. There is a wide difference between a "probability" of innocence and "possibility" of innocence: *Sims v. State*, 100 Ala. 23. "A reasonable possibility" is, and in the nature of things can be, no more or less than a possibility; and a possibility of innocence does not require and will not justify acquittal: *Nichols v. State*, 100 Ala. 23. A charge, therefore, that "a reasonable doubt of the defendant's guilt is not the same as a probability of his innocence, but may exist when the evidence fails to convince the jury that there is a probability of defendant's innocence," asserts a correct legal proposition. It is not ambiguous, argumentative, or misleading, and its refusal is reversible error: *Croft v. State*, 95 Ala. 3. A charge that the evidence in all criminal prosecutions "to justify a conviction should be such as to exclude a rational probability of innocence," is inapt, confusing, and misleading, and is properly refused; but a charge instructing the jury that they "must believe from the evidence beyond a reasonable doubt and to a moral certainty that the defendant is guilty as charged, to the exclusion of every probability of his innocence and every reasonable doubt of his guilt, and if the prosecution has failed to furnish such measure of proof, and to impress the minds of the jury with such belief of his guilt, they should find him not guilty," is correct and ought to be given: *Gilmore v. State*, 99 Ala. 154.

WHAT DEFINITION SHOULD BE GIVEN.—When instructing jurors upon the subject of reasonable doubt, it is not error for the court to say to them: "You are not at liberty to disbelieve as jurors, if from the evidence you believe as men": *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320. An instruction that, upon the facts stated, the jury must find defendant guilty, unless they have a reasonable doubt of his guilt, and if so, they must give him the benefit of the doubt, but not telling in what way or to what extent, is erroneous. They must be told that if they entertain such doubt, it is their duty to acquit: *State v. Hickam*, 95 Mo. 322; 6 Am. St. Rep. 54. And it is proper to tell them that they have no right to go outside of the evidence to search for or hunt up doubts, in order to acquit the defendant, not arising from the evidence or want of evidence: *Eurli v. People*, 73 Ill. 329. No exception lies in a capital case to a refusal to use the term "moral certainty," if an equivalent expression, such as "proof beyond a reasonable doubt," is used: *Commonwealth v. Costley*, 118 Mass. 1. And a general instruction as to reasonable doubt is sufficient without repeating it in other instructions relating to the separate facts of the case: *State v. Hennessy*, 55 Iowa, 299.

It is evident, from what has been said above in this note, that the courts have put in about as much time criticising each other's definitions of reasonable doubt, as in formulating definitions of their own. They have told us, times without number, what is not a reasonable doubt, and their failure to tell what is reasonable doubt probably grows out of the inadequacy of language to make plainer, by further definition or refining, a term, the meaning of which is within the comprehension of every person capable of understanding the English language. In fact, it is easier to state what it is not than what it is; and it may be doubted whether any attempt to define it will not be more likely to confuse than to enlighten a jury. Trial courts should, therefore, adopt instructions on this point which have become stereotyped by use and approval. "It is always safer," says Bean, J., in *State v. Morey*, 25 Or. 241, 257, "to follow the plainly marked path, than to venture on byways strewn with the wrecks of those who have unsuccessfully attempted to follow them, and this is particularly true when attempting to define a reasonable doubt."

Shaw, C. J., in *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 711, defined a reasonable doubt as "that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge"; and this definition, though sometimes criticised, is generally considered as good a definition of the term as was ever given, and has been approved and adopted by many of the courts as sound: *State v. Morey*, 25 Or. 241, 256; *Billard v. State*, 30 Tex. 368; 94 Am. Dec. 317; *Carleton v. State*, 43 Neb. 373, 417; *State v. Talmage*, 107 Mo. 543, 551; *People v. Finley*, 38 Mich. 482; *People v. Wintere*, 93 Cal. 277, 282; *State v. Gibbs*, 10 Mont. 213; *Miller v. People*, 39 Ill. 457; *Territory v. McAndrews*, 3 Mont. 158; *Ernest v. State*, 20 Fla. 383; *Donnelly v. State*, 26 N. J. L. 601, 615; *Woodruff v. State*, 31 Fla. 320. But it is not, of course, error to so define the term where the jury have already been told in different language what amounts to one and the same thing: *Woodruff v. State*, 31 Fla. 320, 336. All the definition of reasonable doubt which a court can be required to give is embodied in an instruction that "a reasonable doubt is not an unreasonable doubt; that is to say, by a rea-

reasonable doubt you are not to understand that all doubt is to be excluded. You are required to decide the question submitted to you upon the strong probabilities of the case, and the probabilities must be so strong as not to exclude all doubt or possibility of error, but as to exclude reasonable doubt": *Dunbar v. United States*, 156 U. S. 185.

KANSAS CITY, MEMPHIS AND BIRMINGHAM RAIL-ROAD COMPANY v. SMITH.

[72 MISSISSIPPI, 677]

WATERS—OVERFLOW—RIPARIAN RIGHTS—ENGLISH DOCTRINE.—In England, it seems that riparian owners are entitled to have streams flow in their usual course, whether in times of low or flood water, and that flood water, overflowing the banks and following the course of the stream along the valley, but without the channel, is a part of the stream, against which one owner may not protect himself to the injury of another.

COMMON LAW, APPLICABILITY OF—WATERS.—It is a mistake to assume that the common law of England, though adopted and accepted as the law of the state, and though unchanged by statute, is, under all circumstances and conditions, to be applied as the local common law. In many instances a directly opposite rule is the common law of the state, and the opposite rule applies to injuries occasioned by overwhelming flood waters.

SURFACE WATERS—DISTINCTION BETWEEN CIVIL AND COMMON LAW.—There seems to be no good reason for drawing a distinction between the civil and the common law in reference to surface waters.

WATERS—OVERWHELMING FLOOD—IMMATERIALITY OF NAME.—In determining the relative rights and duties of parties in cases of injury from overwhelming flood waters, it is unimportant whether such waters be dealt with as surface water, channel water, the water of a stream, or as a separate and distinct sort. It is the thing that must be dealt with, and not its name.

WATERS—RIGHT TO OBSTRUCT EXTRAORDINARY FLOOD.—The waters of an extraordinary flood may be obstructed, impeded, or turned aside without liability to adjacent proprietors where they in reality suffer no real injury.

WATER RIGHTS—RULES AND PRINCIPLES GOVERNING.—The rules governing the rights and duties of individuals in reference to waters rest upon principles which underlie very many other property rights. They depend, at last, upon the two legal maxims that one may make such use as he will of his own, and that he must so use his own as not to impinge the legal rights of others.

WATERS—FLOODS—HOW CASES ARE TO BE DETERMINED.—It is difficult, if not impossible, to formulate exact rules by which the rights of parties injured by periodically recurring floods, under varying circumstances, may be adjusted. Hence, such rights must be determined by flexible, rather than rigid, rules applicable to the conditions and circumstances of the case under consideration.

WATERS—OVERFLOWED VALLEY AS A RUNNING STREAM OR WATERCOURSE.

The whole valley through which runs an overflowing stream is not necessarily land within a watercourse. Hence, if the flood waters of a creek, having a channel about twenty feet deep and one hundred and twenty-five feet wide, periodically overflow its valley from two to three miles in width, the whole valley cannot be considered a running stream, though such flood waters flow with the stream.

WATERS—RAILROAD EMBANKMENT AS AN OBSTRUCTION OF STREAM OR WATERCOURSE—NONLIABILITY OF COMPANY.—If a railroad properly constructed is built about three-fourths of a mile from, and parallel with, the channel, leaving a valley for the flow of the water over a mile wide, it does not obstruct a running stream or watercourse, and the company is not liable to one owning land on the other side of the channel, upon which the overflow water is made deeper and the current stronger, by reason of the railroad embankment.

WATERS—RAILROAD EMBANKMENT—EXTRAORDINARY FLOOD—NONLIABILITY OF COMPANY FOR INJURY.—If a railroad, properly constructed, is built about three-fourths of a mile from, and parallel with, the channel of a creek, leaving a valley over a mile wide for the flow of water, and there is no trouble from ordinary recurring floods, but injury is caused by an extraordinary flood, which would, however, have resulted even if the railroad had not been built, a recovery will be denied where no improper construction of the roadway, or no causal connection between the act of the company and the injury resulting from the flood, is shown.

ACTION to recover damages caused by an overflow resulting from an obstruction of waters. There was a judgment for the plaintiff and the defendant appealed.

Wallace Pratt, Buchanan & Minor, and Sykes & Bristow, for the appellant.

J. A. Blair and Brame & Alexander, for the appellee.

COOPER, C. J. This is an action brought by the appellee to recover against the appellant damages alleged to have resulted to his lands and crops from an overflow caused by obstructing the waters of Town creek by the roadbed of appellant's railway.

It appears from the evidence that the valley through which Town creek flows is from two to three miles wide, and that the plaintiff's farm is situated adjacent to and in a bend of the creek, and the land for injury to which, and the crops thereon, this suit is brought is south of the creek, while the roadbed of the defendant company is on the north side, and about three-fourths of a mile distant. The road runs down the valley, and on a line parallel with the general course of the stream, and is upon an embankment from three to four feet high. There are, within the distance of two or three

miles opposite the appellee's land, three streams, which flow from the north across the railroad and into Town creek. Where they cross the road, bridges and trestles were put in of sufficient dimensions to permit the free flow of the water coming down these streams, but there was no outlet between these bridges. Town creek is a stream nearly twenty miles long, and empties into the Tombigbee river, some three miles east of the plaintiff's farm. Its banks are about twenty feet high, and its channel one hundred and twenty-five feet wide. It drains in its course a large section of country, and, in times of heavy rains, its valley is inundated to a greater or less degree annually, and in some years of excessive rains the whole valley is submerged to a depth of from two to four feet on the more elevated portions. The floods of the year 1874, and those of April and July, 1892, were the heaviest ever ⁶⁸¹ known by those familiar with its history. The damages for which the plaintiff sues resulted from the flood of July, 1892, and consisted in the loss of his crops, and injury to a portion of his cultivated lands, the soil of which was washed away.

The plaintiff's contention is that, but for the railroad embankment, the overflowing waters from Town creek would have passed farther to the north, and then have returned to the channel of the creek below his farm, or would have flowed down the valley, north of the creek, to the Tombigbee river; that by reason of the roadbed, and a want of proper and sufficient openings therein, the flood water was thrown back and a cross current created, by reason of which the quantity of water south of the creek was materially increased, and that the erosion by which his land was injured resulted from the increased current. The evidence for the plaintiff tends to support his contention. For the defendant, evidence was introduced that before the building of the Mobile & Ohio Railroad, Town creek was worked as a public highway, and depended upon by the community as its means of shipping out crops and getting in supplies; that, after the Mobile & Ohio Railroad was constructed, the creek was abandoned as a highway until, in the year 1883, it was cleaned out by the United States, but, not being greatly used, was again abandoned, and bushes and trees permitted to grow in its channel, and drift to accumulate; that early in the year 1892 a large quantity of timber, growing between the creek and the roadbed, had been felled by the Nettleton Hardwood Company, the logs and tops of which were left on the ground. And so

the defendant contended that, if there had in fact been any increase in the quantity of the flood waters upon the valley, it was caused by the obstructions in the channel of the stream, and, if the current was changed, this could as reasonably be attributed to the act of the Nettleton company in cutting timber and leaving the tops thereof in the valley as to the roadway of the defendant.

For the plaintiff, it is argued that the defendant's roadway ⁵⁸² obstructed the waters of a stream which the plaintiff was entitled to have flow according to its usual course; that, though the water, by reason of its volume, had overflowed the banks of Town creek, it was yet a part of that stream, and ought to have been permitted by the defendant to pursue its flow according to nature, unimpeded by any artificial obstruction. For the defendant, it is contended that the water, having left the channel of the stream and spread over the adjacent valley, was surface water, and, as such, the defendant might lawfully repel it from its roadway, and for any injury resulting therefrom no right of action exists.

In England, it seems to be settled that riparian owners are entitled to have streams to flow in their usual course, whether in times of low or flood water, and that flood water, overflowing the banks, and following the course of the stream along the valley, but without the channel, is a part of the stream, against which one owner may not protect himself to the injury of another: *Rex v. Trafford*, 1 Barn. & Adol. 874; *Attorney General v. Lonsdale*, L. R. 7 Eq. 387; *Mason v. Shrewsbury etc. Ry. Co.*, L. R. 6 Q. B. 581; *Lawrence v. Great Northwestern Ry. Co.*, 16 Q. B. (71 Eng. Com. L.) 643.

In *Attorney General v. Lonsdale*, L. R. 7 Eq. 387, while the jurisdiction of the court of equity to grant the injunction prayed against an obstruction in the river was upheld only on the ground that the obstruction impeded navigation, it was said, in effect, that the extent of the injury sustained by the plaintiff, which was nominal, did not affect his right as riparian owner to object to the obstruction placed in the stream by, and which was of great value to, the defendant. There is some conflict of authority in this country, but the decided preponderance is with the English cases: *Crawford v. Rambo*, 44 Ohio St. 279, 287; *Barden v. City of Portage*, 79 Wis. 126; *O'Connell v. East Tennessee etc. Ry. Co.*, 87 Ga. 246; 27 Am. St. Rep. 246, in which many cases are reviewed; *Byrne v. Minneapolis etc. Ry. Co.*, 38 Minn. 212; 8 Am. St. Rep. 668;

Carriger v. East Tennessee etc. R. R. Co., 7 Lea, 388; *Burwell v. Hobson*, ⁶⁸³ 12 Gratt. 322; 65 Am. Dec. 247; *Cairo etc. R. R. Co. v. Brevoort*, 62 Fed. Rep. 129, and note thereto. But there are some authorities holding that flood water is surface water: *Morris v. Council Bluffs*, 67 Iowa, 843; 56 Am. Rep. 843; *Cairo etc. R. R. Co. v. Stevens*, 73 Ind. 278; 38 Am. Rep. 139; *Shelbyville etc. Turnpike Co. v. Green*, 99 Ind. 205; *Taylor v. Fickas*, 64 Ind. 167; 31 Am. Rep. 114.

In *Sinai v. Louisville etc. Ry. Co.*, 71 Miss. 547, we had occasion to consider the right of a railway company to obstruct, by its embankment, a body of water consisting of overflow and surface water, and decided that, under the circumstances of that case, the company was liable to an adjoining proprietor for injury caused by throwing back such water on his lands. It may well be doubted whether the radical differences sometimes asserted between the rule of the civil law and that called the common-law rule, in reference to surface waters, exists to the extent indicated by the general language of the text-books and expressions to be found in many decisions.

In *Boyd v. Conklin*, 54 Mich. 583, 52 Am. Rep. 831, Judge Campbell, in an exhaustive and able opinion, affirms that both rules rest upon substantially the same principles, and that from the time of Brackton down, the common-law courts have referred to the civil law writers as having defined the subject of rights of water in substantial agreement with the recognized rules of the common law, and concludes his opinion with the declaration that: "There seems to be no reason for attempting to draw distinctions between the civil and the common law on the subject. The authorities recognize the principles as in no sense conventional, or derived from any school of jurisprudence, but as resting on the immunity of one man's property from injury by another in violation of natural justice, and in disregard of the relative conditions arising from its position. Each may do with his own what is consistent with the fair interests of the other." It is a mistake to assume that the common law of England, though adopted and accepted as the law of the state, and though unchanged by statute, is, under all ⁶⁸⁴ circumstances and conditions, to be applied as the local common law. In many instances a directly opposite rule is the common law of the state. In *Vicksburg etc. R. R. Co. v. Patton*, 31 Miss. 156, 66 Am. Dec. 552, the rule of the common law that a man

should fence in his cattle was declared to be inapplicable to our condition, and the right of free pasturage was held to exist as a part of our common law, and the duty of fencing them out was devolved upon other landowners desiring to exclude them from cultivated or other lands: See, also, *Green v. Weller*, 32 Miss. 650; *Crane v. French*, 38 Miss. 503.

In *Sinai v. Louisville etc. Ry. Co.*, 71 Miss. 547, we declared that the supposed rule of the common law, under which it was there claimed that each proprietor had the absolute right of excluding surface water from his premises regardless of any injury to an adjoining proprietor, could not be invoked (if it in fact existed) by a railroad company asserting a right to submerge hundreds of acres of adjoining land with surface water by its embankment. It is apparent that a rule intended to regulate the correlative rights of adjoining landowners, whose property is devoted to agriculture or residence purposes, could not be applied to the same extent, either in favor or against a railroad company owning a strip of land one hundred feet wide and hundreds of miles long. The duty imposed by law upon these corporations to provide suitable and safe roadways, over which ponderous engines and trains are to be driven, carries with it, from necessity, the right to erect great embankments, on which the rails are set, and when this is done with due regard to the rights of owners of adjacent and proximate lands, any necessary and consequent injury to such lands must be borne by the owner. But such companies may not, under a claim of being absolute owners of their roadways, so construct them as to unnecessarily impair the value of adjacent property.

In this view of the relative rights and duties of the parties, it is not of controlling importance to hold that the flood water from which the plaintiff claims to have suffered be dealt with ⁶⁸⁵ as surface water, or as the water of a stream, or as a separate and distinct sort. It cannot be the law, however, in this state that the flood waters of the large streams which are within or along the borders of this state are to be dealt with as the waters of a stream, not to be obstructed, impeded, or turned aside under any circumstances, except upon condition that the person so doing shall respond in damages for all injury sustained by another riparian owner, and be liable for nominal damages as for the infringement of the legal right of adjacent proprietors who in truth suffer no real injury. In *Chapman v. Copeland*, 55 Miss. 476, it was held that the

diversion of a watercourse gave to the plaintiff a right of action and the recovery of nominal damages, whether any real injury had or had not resulted.

If the waters of the Mississippi river, which at flood sometimes spread in width from twenty to forty miles and flow in a continuous and unbroken body down the valley, are to be dealt with as the waters of a stream, and the whole valley is to be given up as the courseway of the stream, the most fertile portion of our state may at once be abandoned. From Memphis to Vicksburg, and from the foothills to the river, there is not a square yard of land that was not deposited by the overflowing waters of the river. If the course usually pursued by the ordinary flood waters is the channel of the stream, the whole valley is the channel. It is evident that to so declare would be to announce as a positive rule of law, and as an indisputable fact, that which is not true, and which, if put into practical operation, would relegate prosperous and fertile districts to the condition of a wilderness. There are farms innumerable, and railroads, villages, towns, and cities situated in a watercourse if the usual flow of the flood waters of the Mississippi river mark and define the course of that stream. It is manifest that to apply the strict rules of law controlling in cases of streams, and the obstructions thereof, to such a river and to such conditions is, in the very nature of things, impracticable and impossible. Calling these overwhelming floods surface or channel ~~etc~~ water for the purpose of dealing with them under rules applicable to entirely different conditions, advances us no step in the solution of the questions involved. We must deal with things, and not names, and conditions inherently and radically different cannot be assimilated by mere terminology.

The rules governing the rights and duties of individuals in reference to waters rest upon principles which underlie very many other property rights. At last they depend upon the two legal maxims that one may make such use as he will of his own, and that he must so use his own as not to impinge the legal rights of others. As to surface water and streams flowing along their channels, general rules have been formulated, which are usually applicable, and under which the relative rights and duties of parties may be adjusted; but to apply these rules to waters of a radically different class is to measure different conditions by a single standard. To say that flood waters are surface waters, and may always be dealt

with as such, or that they may be fenced against as may the waters of the sea, regardless of consequences, would be to give to one riparian owner the power and right of benefiting and preserving his own property at the direct expense of another. But, on the other hand, if it be the rule that alluvial lands subject to occasional floodings are to be dealt with as comprising the bed of a stream, the beneficial ownership therein is practically destroyed in the interest and for the benefit of other riparian owners. The difficulty or impossibility of formulating exact rules, by which the rights of parties under varying circumstances may be adjusted, is of but little importance in view of the fact that it is not the less difficult to determine such rights by the application of those already existing, and which were formulated for the control of somewhat analogous, but not similar, conditions. It is but the usual difficulty of applying legal principles to varying facts. Along the lines which separate what is clearly the exercise of a legal right from the commission of actionable injury, there are often found circumstances in which it cannot be ⁶⁸⁷ said with confidence to which class the particular act should be assigned; but this difficulty is not peculiar to the class of cases now under consideration, and suggests rather the propriety of resorting to more flexible, rather than more rigid, rules. But, on the clearly shown facts of the case now before us, we think no right of recovery is disclosed: 1. Because no failure of duty by the defendant in the construction of its roadway is established; and 2. Because no causal connection is proved between the act of the defendant and the injury resulting from the flood. The roadway of the defendant company is not shown to be of sufficient height to obstruct the waters of Town creek, so as to deflect them upon the land of the plaintiff at times of ordinary or periodically recurring floods. The witnesses speak of the floods of 1874, and those of April and July, 1892, as having been the highest ever known. It is not claimed by the plaintiff that his lands would not have been submerged by the flood of July (for injury by which he sues) if no railroad had been built in the valley. His contention is, that the water was somewhat deeper on his land than it would have been; that it remained longer, and flowed with a stronger current. But it must be borne in mind that all the evidence relates to an exceptional condition of affairs—to a flood equaled but twice, and exceeded but once, in the memory of the inhabitants—

and against such contingency it would, in no event, be negligence not to provide.

But we are not disposed to rest our conclusions on this ground alone, for it involves the concession that, as against the overflowing waters of alluvial streams, a riparian owner may do nothing to protect himself against periodically recurring floods; but, so long as they continue as a part of the moving mass of waters of which the stream is the thread, must give way to them as flowing in a watercourse. To so hold would, in our opinion, be to apply to bodies of water of a distinctive class, rules which were formulated for entirely different conditions, and which, if followed, will lead away from the principles upon which the rules rest. Some part of the valleys of alluvial ~~are~~ streams must be land not within a watercourse. How much it may be difficult to determine, but surely something may be withdrawn by man from the natural condition of things for his own use. We think it may with safety be said that a valley of a mile, or a mile and a half, along streams of the class of Town creek goes far beyond any requirement of the law for the course of the stream. How much less than this would be sufficient we need not attempt to declare. That the embankment of the railway has not obstructed the course of the stream is demonstrated by the fact that no injury has resulted to any one during the ordinary floods, which have passed harmlessly away. It is the extraordinary, the exceptional, the unexpected, which has caused the injury for which the plaintiff sues.

Upon what theory the jury proceeded in finding that the increased depth of the water caused by the embankment was an injury to the standing green crops of the plaintiff we cannot perceive. Under all the testimony it is evident that the crops must have been covered with water long before any water deflected by the embankment of the defendant could have reached the land. Of what value a field of corn was in the green ear, and covered by water to a depth of two or three feet, or how the injury thereto was increased by piling upon it a few tons more of water, it is difficult to see. One witness, it is true, seems to say that the plaintiff's crop was worth fifty cents per bushel in the field, and that it was damaged to that extent by the water forced thereon by the defendant's embankment; but this witness evidently meant that this would have been the value of the crop but for the overflow, and it is not to be doubted that the crop would

have been as completely destroyed by the flood if the railroad had never been constructed.

We need not review the evidence to show the want of causal connection between the act of the defendant and the injury to the plaintiff. We dispose of the cause on the ground above indicated—i. e., that, on the facts proved, no liability rests upon the defendant as for the obstruction of a watercourse.

The judgment is reversed.

WATERS AND WATERCOURSES—SURFACE WATERS—CIVIL AND COMMON LAW.—At common law surface water, like the waters of the sea, is regarded as a common enemy, and any landowner has the right to expel it from his own land without regard to the injury thereby occasioned to another proprietor: *Mayor v. Sikes*, 94 Ga. 30; 47 Am. St. Rep. 132; but, under the civil law, he has no right to do this. He must receive the surface water naturally flowing from the estate above, and cannot burden with it the estate of his neighbor below: *Mayor v. Sikes*, 94 Ga. 30; 47 Am. St. Rep. 132; note to *Cairo etc. R. R. Co. v. Stevens*, 38 Am. Rep. 144. But an overflow is not surface water: *O'Connell v. East Tennessee etc. Ry. Co.*, 87 Ga. 246; 27 Am. St. Rep. 246. Only so much of English law as is adapted to our circumstances and customs is properly recognized as part of our common law: *City of Parsons v. Lindsay*, 41 Kan. 336; 13 Am. St. Rep. 290; *Vicksburg etc. R. R. Co. v. Patton*, 31 Miss. 156; 66 Am. Dec. 552; *Harkness v. Sears*, 26 Ala. 493; 62 Am. Dec. 742; *Pennock's Estate*, 20 Pa. St. 268; 59 Am. Dec. 718. To that extent the common law prevails in Mississippi and many other states of the American Union: *Hemingway v. Scales*, 42 Miss. 1; 97 Am. Dec. 425, and note. The common law of England is not, therefore, to be taken in all respects to be that of America: *Harkness v. Sears*, 26 Ala. 493; 62 Am. Dec. 742. For a discussion of this topic, see note to *City Council v. Benjamin*, 49 Am. Dec. 618. This inapplicability of the common law extends particularly to questions concerning waters in this country, and the common-law doctrine of riparian rights is inapplicable, or applicable only to a very limited extent, by reason of the wants and necessities of the people in many of the states, and of the physical condition of the states: *Reno Smelting Works v. Stevenson*, 20 Nev. 269; 19 Am. St. Rep. 364; *Jones v. Adams*, 19 Nev. 78; 3 Am. St. Rep. 783.

WATERS AND WATERCOURSES—OVERFLOWS OR FLOODS—LIABILITY OF RAILROAD COMPANY.—A railroad company is liable in damages for obstructing the surplus waters of a river or watercourse in time of flood by an embankment on its own land, thus throwing excessive waters upon the land of an adjacent or opposite owner, to his injury: *O'Connell v. East Tennessee etc. Ry. Co.*, 87 Ga. 246; 27 Am. St. Rep. 246. A railroad company in building its road is not bound to provide against an unprecedented flood, but must provide against ordinary storms: Note to *Columbus etc. Ry. Co. v. Bridges*, 11 Am. St. Rep. 65. A watercourse must have a flow of water in a definite channel, having a bed, sides, or banks, and the water must usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a

tract of land, occasioned by unusual freshets or other extraordinary causes: Note to *Goddard v. Inhabitants of Harpswell*, 30 Am. St. Rep. 392. Every one has a right to protect his land, but in doing so he must not injure his neighbor: Note to *O'Connell v. East Tennessee etc. Ry. Co.*, 27 Am. St. Rep. 253. A railroad company is not liable for any injury to land arising from surface water diverted by a railway embankment that would have resulted by reason of the natural flow of the water had the embankment not been built: *Austin etc. Ry. Co. v. Anderson*, 79 Tex. 427; 23 Am. St. Rep. 350.

KANSAS CITY, MEMPHIS AND BIRMINGHAM RAILROAD COMPANY v. LACKEY.

[72 MISSISSIPPI, 881.]

SURFACE WATERS—DISCHARGE OF, UPON ANOTHER'S LAND.—One cannot collect surface water and lawfully discharge it injuriously upon the lands of another.

SURFACE WATERS—DISCHARGE OF, BY RAILROAD COMPANY, THROUGH NARROW TRETTLE, ON ANOTHER'S LAND.—A railroad company is liable for damages occasioned by cutting the embankment of its road running through a valley, and putting in a narrow trestle through which water, accumulated for a long distance along one side of its track, pours upon adjoining land, thereby causing the water thereon in times of overflow to be deeper, and to run more swiftly than it otherwise would, to the injury of crops.

RAILROAD COMPANIES—EMINENT DOMAIN—COMPENSATION FOR CONSTRUCTION DOES NOT INCLUDE SUBSEQUENT DAMAGES.—Compensation made by a railroad company when its road is built includes simply damages arising from the proper construction of the road, and does not relieve it from subsequent damages occasioned by its cutting the embankment of its road, and putting in a narrow trestle through which accumulated water flows to the injury of a landowner who has been thus compensated.

ACTION by Lackey against the railroad company for injuriously discharging water upon his land. He recovered a judgment for two hundred and seventy-five dollars, and the company appealed.

Wallace Pratt, Buchanan & Minor, J. Q. Robins, and J. L. Finley, for the appellant.

J. A. Blair and Brame & Alexander, for the appellee.

884 Woods, J. The evidence in this case shows with reasonable certainty that the roadbed of appellant's railway rests upon an embankment extending through the entire farm of appellee, and for an undisclosed distance on both sides. Town creek is a considerable stream running through the valley in which the farm lies, and the line of the railway runs, in

general terms, parallel with the creek and separated from it in distances varying from two hundred to ⁸⁸⁵ six hundred feet. Between the lands shown to have been damaged and Town creek runs the railway line on the continuous embankment before referred to. Before the construction of the railroad in 1866, and afterward, until the cutting of its embankment and the putting in by the appellant of the trestle in its roadbed in appellee's farm, good crops were uniformly made, notwithstanding the fact of the overflow of the lands by waters from the creek in time of freshet. These overflows spread gently and evenly to the depth of about twelve inches over the lands, and speedily and without damage to the soil or its productive capacity flowed off.

In the year 1889 the trestle complained of was put in, and about fifteen acres of the cultivated field has been rendered useless ever since, by reason of the waters flowing through this trestle with great force and in large volume on appellee's place. From the nearest trestle in the embankment on the north (about twelve hundred yards) to the nearest trestle in the embankment on the south (about a quarter or half mile) the trestle in the embankment in appellee's field affords the only way of escape for the overflow waters from Town creek, dammed by the long embankment. Through this opening (sixteen feet in width) the confined overflow waters pour, and the entire waters which, before the construction of the railway's embankment, gently and evenly spread out over all of appellee's field, now are discharged through this single outlet in great quantities and with much violence upon the few acres adjacent to the trestle, whereby it is manifest the appellee has been really damaged. Call the waters thus dammed and discharged through this small trestle overflow or surface waters, and the merits of the controversy will not be at all affected, for one may not collect surface water and discharge it injuriously upon the lands of another. This point is distinctly settled in *Illinois Cent. R. R. Co. v. Miller*, 68 Miss. 760.

The contention of appellant's counsel that no recovery should be had in this case, because of compensation once made the owner of these lands in condemnation proceedings, is not sound. In ⁸⁸⁶ the condemnation proceedings, the owner received compensation from the railroad company only for such damages as he would sustain by the proper construction of its line. Neither the owner nor the commissioners who

condemned the right of way and awarded compensation would have been justified, the owner in asking, or the commissioners in imposing, any sum of money for damages to be done by an improper construction of the railroad thereafter. The presumption was that the railroad would properly construct its road, and hence no damages could properly have been awarded for injuries that could never occur if appellant properly constructed its road: *Sinai v. Louisville etc. Ry. Co.*, 71 Miss. 547. We find no error in the case.

Affirmed.

SURFACE WATERS—RAILROAD COMPANIES—CULVERTS.—A party has no right to collect surface water and discharge it on the land of another, to his damage, and, if he does so, he will be liable for the damage sustained: *Mayor v. Sikes*, 94 Ga. 30; 47 Am. St. Rep. 132. A railroad company is not bound to construct waterways and culverts to carry off surface water, in the absence of any channel or ravine crossing and closed by its embankment: *Missouri Pac. Ry. Co. v. Renfro*, 52 Kan. 237; 39 Am. St. Rep. 344; *Rowe v. St. Paul etc. Ry. Co.*, 41 Minn. 384; 16 Am. St. Rep. 706, and note; *Cairo etc. R. R. Co. v. Stevens*, 73 Ind. 278; 38 Am. Rep. 139. *Contra*, *Little Rock etc. Ry. Co. v. Chapman*, 39 Ark. 463; 43 Am. Rep. 280; *Louisville etc. R. R. Co. v. Hays*, 11 Lea, 382; 47 Am. Rep. 291. And the company is not liable to a landowner for an injury by an overflow of surface water occasioned by the roadbed skillfully constructed: *Abbott v. Kansas City etc. R. R. Co.*, 83 Mo. 271; 53 Am. Rep. 581; note to *Pittsburg etc. Ry. v. Gilleland*, 94 Am. Dec. 97. Damages are recoverable by a landowner against a railway company for maintaining an insufficient culvert in an embankment, whereby his lands are flooded: *Ohio etc. Ry. Co. v. Wachter*, 123 Ill. 440; 5 Am. St. Rep. 532, and note. *Contra*, *Missouri Pac. Ry. Co. v. Renfro*, 52 Kan. 237; 39 Am. St. Rep. 344; *Edwards v. Charlotte etc. R. R. Co.*, 39 S. C. 472; 39 Am. St. Rep. 746, and note. If a railway embankment and culvert divert surface water from its natural and usual course, and cause it to flow over a party's land, and permanently injure the same and destroy his crops, the company will be liable for the injury so caused: *Austin etc. Ry. Co. v. Anderson*, 79 Tex. 427; 23 Am. St. Rep. 350.

EMINENT DOMAIN—RAILROAD COMPANIES—SUBSEQUENT DAMAGES.—The payment of damages by a railroad company under condemnation proceedings does not relieve it from liability for damages resulting from its negligent acts committed after it makes the appropriation, as, in such cases, regard is had only for the immediate consequences of the appropriation: *Hunt v. Iowa Cent. Ry. Co.*, 86 Iowa, 15; 41 Am. St. Rep. 473, and note; *Ohio etc. Ry. Co. v. Wachter*, 123 Ill. 440; 5 Am. St. Rep. 532; *Emery v. Raleigh etc. R. R. Co.*, 102 N. C. 209; 11 Am. St. Rep. 727. The damages recoverable for the location of the road are estimated upon the theory that the road will be constructed and maintained in a reasonably proper and skillful manner: *Ohio etc. Ry. Co. v. Wachter*, 123 Ill. 440, 5 Am. St. Rep. 532, and monographic note, showing what damages are recoverable by a landowner for injuries resulting from the maintenance and operation of railways and like public improvements, although the right to maintain such roads or improvements has first been secured in exercise of the right of eminent domain.

PEEVEY v. HAUGHTON.

[72 MISSISSIPPI, 918.]

VENDOR AND PURCHASER—FAILURE OF VENDEE TO SIGN CONTRACT FOR SALE OF LAND—STATUTE OF FRAUDS—OFFER TO PERFORM—MUTUALITY.—If one signs a writing, offering to sell land, and the vendee afterward offers, in writing, to perform, the agreement may be enforced against the vendor, though neither it nor any promise to pay the price was signed, at the time, by the vendee, as the offer makes the contract mutual, and there is no want of consideration.

VENDOR AND PURCHASER—STATUTE OF FRAUDS IS SATISFIED AS TO MEMORANDUM BY VENDEE'S BILL FOR SPECIFIC PERFORMANCE.—After land has been sold, an offer contained in a bill, properly signed and verified, and brought by the vendee for specific performance, is sufficient as an offer to perform, and makes him chargeable as on a memorandum of the contract signed by him. Hence, if the land is to be paid for in cotton, to be delivered at certain times in certain quantities, an offer to pay its money value, to be ascertained by an accounting, is sufficient, though the bill is filed after the date at which the consideration was, by the terms of the contract, to be paid.

BILL for the specific performance of an agreement to sell land. It was filed by Haughton against Mrs. Peevey, in 1894, and alleged that in September, 1890, she signed a written agreement, whereby she sold to him a certain tract or parcel of land in Monroe county, Mississippi, for forty bales of cotton of five hundred pounds each, ten bales to be paid each year for four years, with the understanding that possession was to be given on January 1, 1891. The bill, signed and sworn to, alleged that Haughton had always been ready and willing to comply with the terms of the contract on his part, whenever the defendant should make and deliver to him a sufficient deed to the land. It contained a present offer to specifically perform the agreement on the part of the complainant, and prayed that if the defendant was unable to specifically perform, that she should be required to pay damages for a breach of the contract. It was alleged by way of demurrer to the bill that the alleged promise of complainant to deliver cotton in payment of the land was void, being a promise not to be performed in a year, and was not signed by the complainant, or anyone by him authorized, and because the instrument sought to be enforced was founded on no consideration good or valuable in law. The demurrer was overruled, and the defendant appealed.

E. H. Bristow, George C. Paine, and R. E. Houston, for the appellant.

E. O. Sykes and W. H. Clifton, for the appellee.

§23 WHITFIELD, J. "The offer to perform," referred to in the original opinion as satisfying the statute, is, of course, not a verbal offer, but the offer made in the bill signed in writing by the complainant. §23 The case of *Metcalf v. Brandon*, 58 Miss. 841, announcing that, "if he [complainant] admits it in writing, over his signature, the terms of the statute are met," was not referred to by us, because we did not think it would be seriously questioned; and, hence, we addressed ourselves to the task of satisfying counsel of the inapplicability of his authorities in other views. But, as the case does not pass unchallenged, as it would seem, we say only that it is certainly undoubted law, and thoroughly settled elsewhere. In *Sams v. Fripp*, 10 Rich. Eq. 447, the court say: "It has always been held that the requirements of the statute of frauds concerning agreements to convey lands were fulfilled by the signature to the contract of the party to be bound, where the adverse party, by bringing his bill or any writing, affirms the contract." In *Ives v. Hayard*, 4 R. I. 14, 67 Am. Dec. 500, the court say: "The respondent objects that there was no consideration expressed in the instrument moving from the complainant to the defendant. A promise without consideration, or a nude pact, is void. We do not understand this promise to be of that character. The defendant agrees with the plaintiff to sell the land in question for the sum of fifteen thousand dollars, the said sum to be paid on the 25th of March, when possession is to be given. True, no consideration had passed from the plaintiff to the defendant; neither had the land, which was the subject of the agreement, passed. The consideration of the agreement to sell the land for fifteen thousand dollars was the agreement of the other party to buy it for fifteen thousand dollars, and the agreement was thus mutual. It is no objection that the defendant had no power to enforce the contract at the time it was made. If he had chosen to have that power he might have obtained it, or refused to give such power to the plaintiff. . . . If the defendant had chosen to have his remedy, or his right to enforce the contract by action, he should have obtained this requisite wherewith to charge the complainant, as he gave it to the plaintiff whereby he made himself chargeable. It is now well settled, by authority, that . . . where there is a bill for specific performance in a court of equity, the §24 bringing of the bill makes the complainant chargeable as on a memorandum of the contract signed by him."

In *Evans v. Williamson*, 79 N. C. 86, the same doctrine is strikingly enforced. In *Vassault v. Edwards*, 43 Cal. 458, the same rule is declared, "that the statute is fully complied with if the agreement . . . be signed by the party to be charged, or the party by whom the sale is to be made," and the court adds: "It was, accordingly, held, from an early day, that when the action for a specific performance was instituted by the party who had not signed the agreement, the act of filing the bill made the remedy mutual." And many other cases to the same effect could be cited. We specially refer counsel to two: *Ivory v. Murphy*, 36 Mo. 534, and *Roberts v. Griswold*, 35 Vt. 496, 84 Am. Dec. 641, cited in 1 Reed on Statute of Frauds, sec. 363. The very argument made by counsel here was made in both those cases: See brief of G. P. Strong, 36 Mo. 536. "Now, a consideration," says Mr. Strong, "is of the very essence of a contract; and, with or without the statute of frauds, no contract wanting this element can be enforced." Says counsel, in his suggestion of error: "If Mrs. Sartor had sued Haughton on his promise to deliver this cotton, she could not have recovered, because the promise was not in writing, and was, consequently, void (unenforceable rather) under the statute of frauds. Then, this promise being the sole consideration for her promise to convey the land, the latter is void for want of consideration"; but the supreme court of Missouri said (*Ivory v. Murphy*, 36 Mo. 542): "Where the party files a bill, he does an act that will bind him, and from that time there is mutuality, and the other party cannot plead the statute of frauds, because the words of that statute only prevent an action from being brought when the agreement is not signed by the party to be charged. When the bill is filed, it is an attempt to charge the defendant, and if he has signed the agreement, it is signed by the party to be charged, and it follows that he cannot take advantage of the statute." Mr. Reed ²²⁵ says of the latter case (1 Reed on Statute of Frauds, sec. 363, pp. 588, 589): "In a Vermont case the nonmutuality was made a ground of defense, but counsel, with an obscured perception of the real difficulty, urged the defect as being a want of consideration. The defendant had promised plaintiff by letter that, if he would continue as counsel for defendant's brother, the defendant would guarantee the fee. The court, going directly to the point, said: 'But it is claimed, again, that the consideration should appear in writing, in or-

der to give validity to the guaranty. This must either mean that the acceptance of the defendant's proposition must be in writing, or a correlative undertaking on the part of the plaintiff to render future services must be in writing. We can readily understand that this might be required in some cases, as when the guaranty itself did not embody substantially the material and effective terms of the contract, and where resort to parol evidence should be necessary to show what the contract was in its terms and effect; but we do not understand that this has ever been required where all that is to be done by the other party is merely to accept the proposition in the terms in which it is made, and to perform the consideration, either by paying or doing the thing proposed. In the present case the services thereafter to be rendered constitute the consideration, and this is clearly indicated on the face of the defendant's proposition.'"

It is not necessary to go so far here, where the consideration may be shown by parol. We decide merely that the filing of the bill satisfies the statute. We have quoted thus at large from these cases not merely to show that the principle of *Metcalf v. Brandon*, 58 Miss. 841, is thoroughly established, but to show that counsel's argument as to want of consideration is a misconception: See, also, 1 Reed on Statute of Frauds, secs. 361-365; *Smith's Appeal*, 69 Pa. St. 474; *Estes v. Furlong*, 59 Ill. 300. That our view of the decision in *Catlett v. Bacon*, 33 Miss. 269, is correct, appears by what is said by Mr. Reed of that case, in 2 Reed on Statute of Frauds, sec. 882, note *h*. He says: "As Catlett had no title in the land, he passed nothing to the bank by the deed of trust, he passed nothing to Winslow, so that (because of the want of title in Catlett, the absolute title being in the bank) their promise was without consideration. Query: Whether, if the bank had conveyed to the plaintiff, Bacon, their interest in the land, he would not have had the land, as the title seems never to have left the bank."

We have given the case a most thorough re-examination, induced thereto by the great respect felt by this court for the very accurate learning and the very great ability of the eminent counsel making the suggestion of error, as well as by our uniform anxiety to overlook nothing contributing to the ascertainment of the very right of the cause, and are constrained to overrule the suggestions of error.

VENDOR AND PURCHASER—STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDUM—SPECIFIC PERFORMANCE.—A memorandum of a contract for the sale of land signed by the vendor alone is sufficient, under the statute of frauds, to enable the vendee to enforce it; his own assent to the contract being provable by evidence aliunde: *Ives v. Hazard*, 4 R. I. 14; 67 Am. Dec. 500; *Worrall v. Munn*, 5 N. Y. 229; 55 Am. Dec. 330, and note; *McCrea v. Purmort*, 16 Wend. 460; 30 Am. Dec. 103; *Gartrell v. Stifford*, 12 Neb. 545; 41 Am. Rep. 767; *Bradford v. Parkhurst*, 96 Cal. 102; 31 Am. St. Rep. 189. If the vendor refuses to convey, the vendee may compel a specific performance: *Baldwin v. Munn*, 2 Wend. 399; 20 Am. Dec. 627. Mutual-ity of remedy at the time of action brought is all that is necessary to enable a plaintiff to maintain his action on a contract. The remedy becomes mutual by the filing of a bill for the specific performance of a contract for the sale of land upon a memorandum signed by the defendant alone, the bringing of the bill rendering the complainant chargeable as on a memorandum signed by him: *Ives v. Hazard*, 4 R. I. 14; 67 Am. Dec. 500, and note.

JACKSON BANK v. DURFEY.

[72 MISSISSIPPI, 971.]

PARTNERSHIP—RIGHT OF CREDITORS AS TO PAYMENT OF DEBTS.—Partnership creditors have an equitable right to have the partnership property applied to the payment of partnership debts, and it cannot be impaired by any alienation of the partnership property with intent to hinder, delay, or defraud them, unless it shall have passed into the hands of those whom the law protects.

PARTNERSHIP—RIGHT OF PARTNERS AS TO PAYMENT OF DEBTS.—The members of a partnership, as against one another, have an equitable right to have the partnership property applied to the payment of partnership debts, but they may waive it.

PARTNERSHIP—APPLICATION OF ASSETS IN EQUITY TO PAYMENT OF DEBTS. Equity, in applying partnership property to the payment of debts, will first liquidate the debts of the partnership and surrender the surplus only to the individual partners.

PARTNERSHIP—INSOLVENCY—APPROPRIATION OF ASSETS TO PAYMENT OF INDIVIDUAL DEBTS.—It is unlawful for the members of an insolvent partnership, or of one contemplating insolvency, to convert the joint estate into severalty and appropriate it to the payment of the individual debts of its members, leaving the firm debts unpaid, though they may lawfully do so if the partnership is a solvent and going concern.

PARTNERSHIP—INSOLVENCY—APPROPRIATION OF ASSETS TO PAYMENT OF INDIVIDUAL DEBTS—ILLUSTRATION.—Trust deeds executed by the members of an insolvent partnership conveying their respective interests in certain firm assets to secure their individual debts are fraudulent and void as to existing firm creditors, especially where the partners are themselves insolvent.

Nugent & McWillie, for the appellant.

Williamson & Potter, for the appellee.

974 COOPER, C. J. The appellant, a firm creditor of the appellees, Durfey & Ascher, exhibited its bill in chancery, seeking to annul as fraudulent two certain deeds of trust, whereby the firm assets were incumbered to secure the individual debts of the partners. The evidence, fairly construed, discloses these facts: Durfey, one of the partners, was indebted to the defendant, Caldwell, in the sum of five thousand dollars, and Ascher, the other partner, was indebted to Hart in the sum of five thousand five hundred and fifty dollars. The firm, and the individuals composing it, were insolvent. On October 8, 1893, Durfey executed a deed of trust on all property owned by him individually, and upon his undivided half interest in certain property, specifically described, owned by the firm, to secure the debt due by him to Caldwell. On the same day Ascher executed a deed of trust, conveying his individual property and his undivided half interest in certain property specifically described, owned by the firm, to secure the debt due by him to Hart. The book accounts, and certain horses which had been bought for resale, were not included in the conveyances, but the stock kept in livery, the carriages, feed, and other appurtenances were all incumbered. Forfeiture of both conveyances was fixed for the same date, January 1st following, at which time, the secured debts remaining unpaid, the trustees were authorized and directed to make sale of the mortgaged property, and out of its proceeds to pay the secured debts. The members of the firm testified that they expected, by the collection of the outstanding book accounts, by the sale of the stock not included in the 975 deeds, and from the profits of the business, to pay the firm debts, but a careful consideration of the evidence satisfies us that at the time the deeds were executed the firm and its members were hopelessly insolvent, and that no expectation could reasonably have been entertained that the firm debts could be paid after the firm property had been devoted to the individual debts of the partners. What followed the execution of the deeds was, at best, the struggle of mere hoping against hope and postponing for a short time the inevitable end. The issue is thus sharply presented whether it is lawful for the members of an insolvent firm to convert the joint estate into severalty and appropriate it to the payment of the individual debts of its members, leaving the firm debts unpaid. The question has never, so far as we are advised, been before the court, though expressions may

be found suggestive of the inclination of some of the judges who have been members of the court, to the view that the dominion of the partners over firm property is not limited by the existence of firm debts and the insolvency of the firm.

In *Schmidlapp v. Currie*, 55 Miss. 597, 30 Am. Rep. 530, a case of a solvent firm, Judge Chalmers, while carefully limiting the decision to the question involved—i. e., the right of a solvent firm to devote firm assets to the payment of the debts of one of the members—cites with apparent approval the cases of *Rice v. Barnard*, 20 Vt. 479; 50 Am. Dec. 54; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Allen v. Center Valley Co.*, 21 Conn. 130; 54 Am. Dec. 333, and *Sigler v. Knox County Bank*, 8 Ohio St. 511, which clearly hold that an insolvent firm may devote firm assets to the debts of its individual members; and, also, *Whitton v. Smith*, Freem. Ch. 231; *Freeman v. Stewart*, 41 Miss. 138; *Carter v. Beaman*, 6 Jones, 44; *Ex parte Ruffin*, 6 Ves. 119; *Campbell v. Mullett*, 2 Swan, 553, which are sometimes cited as supporting the same view. In *Hanover Bank v. Klein*, 64 Miss. 141, 60 Am. Rep. 47, it was sought by the creditors of a banking firm to subject to their demands the proceeds of insurance policies upon the life of ⁹⁷⁶ one of the members in favor of his wife, the premiums on which the bill averred had been paid with firm money while the firm was insolvent. The answer denied the insolvency of the firm at the times the premiums were paid, and there was no evidence on the point. The case was decided on this point. Judge Arnold, however, in delivering the opinion of the court, gave expression to an emphatic dictum that the insolvency of the firm and its members would not have changed the result. In addition to the cases cited by Judge Chalmers in *Schmidlapp v. Currie*, 55 Miss. 597, 30 Am. Rep. 530, he referred to the cases of *Case v. Beauregard*, 99 U. S. 119, and *Roach v. Brannon*, 57 Miss. 490.

In neither *Whitton v. Smith*, 1 Freem. Ch. 231; *Freeman v. Stewart*, 41 Miss. 138; *Roach v. Brannon*, 57 Miss. 490; *Schmidlapp v. Currie*, 55 Miss. 597; 30 Am. Rep. 530, nor *Hanover Bank v. Klein*, 64 Miss. 141, 60 Am. Rep. 47, was the question now involved presented for decision. In all of them the nature of the right of partnership creditors to resort to firm assets for the satisfaction of their demand was considered, and the decisions in the cases in which the point was involved were that the right, being a derivative one, and

resting on the rights of the partners, had been lost by the waiver of the partners, under the circumstances of the particular cases. The question involved is *res nova* in this state, and we deal with it as such. The authorities, with practical uniformity, agree that the right of partnership creditors to have the partnership property applied to the payment of partnership debts is a derivative one, resting upon the equities of the partners as between each other. The conflict of decision arises with the question, whether the partners may, by convention, waive their rights and convert the joint estate into severalty, thus subjecting it to the debts of the individual members, or, by direct appropriation, apply the joint estate to such debts. It is quite generally held that this may be done, so long as the partnership is a solvent and going concern. Some courts seem to hold that, if the partnership, though insolvent, is yet engaged in the prosecution of its business, it may thus deal with the partnership estate,⁹⁷⁷ and others, that this may be done even though the partnership is insolvent, contemplates dissolution, and converts the joint into separate estates for the purpose of applying it to the individual debts of its members. In *Case v. Beauregard*, 99 U. S. 119, the individual members of an insolvent firm had applied all the partnership property to the payment of their respective individual debts. The firm's creditors sought to subject it to their demands, but relief was denied, upon the ground that the right of firm creditors was a derivative one, and could not be enforced, except so long as the partners themselves retained their lien upon the property. Speaking on the precise point, the court said: "The bill, it is true, charges that the several transfers of the partners were illegal and fraudulent, without specifying wherein the fraud consisted. The charge seems to be only a legal conclusion from the fact that some of the transfers were made for the payment of the private debts of the assignors. Conceding such to have been the case, it was a fraud upon the other partners, if a fraud at all, rather than upon the joint creditors—a fraud which those partners could waive, and which was subsequently waived by the act of fusion." The clear effect of this decision is, that it is not a fraud upon partnership creditors for an insolvent firm to devote the joint estate to the payment of the separate debts of the partners, leaving no provision for firm creditors.

In no other case we have seen has the question been presented where the conversion of the whole assets into separate estates, or the devotion of all of them to individual debts, was involved. The reasoning of other courts, however, in the following cases, would seem to conduct to the same conclusion as that reached in *Case v. Beauregard*, 99 U. S. 119, viz.: *Sigler v. Knox County Bank*, 8 Ohio St. 511; *Rice v. Barnard*, 20 Vt. 479; 50 Am. Dec. 54; *Allen v. Center Valley Co.*, 21 Conn. 130; 54 Am. Rep. 333; *Winslow v. Wallace*, 116 Ind. 317; *Purple v. Farrington*, 119 Ind. 164; *Fletcher v. Sharpe*, 108 Ind. 276. See, also, other cases probably holding to the same effect, cited in notes to section 560 of 1 Bates on Partnership.

But the decided weight of authority is that, while the right of firm creditors to go against the firm property in postponement of the right of the creditors of the individual members is a derivative right, and rests on the right of the members of the firm, and while that right is lost by the bona fide waiver of their rights by the partners, it is not lawful for the members of the firm, in contemplation of insolvency, to divert the firm property, and apply it to the payment of the debts of the individual members, or to convert the joint estate into estates in severalty, to prevent its being subjected by firm creditors: *Ex parte Mayou*, 4 De Gex, J. & S. 663; *Ex parte Snowball*, L. R. 7 Cas. Ch. 534; *Cron v. Cron*, 56 Mich. 8; *Cribb v. Morse*, 77 Wis. 322; *Willis v. Brenner*, 60 Wis. 622; *Menagh v. Whitwell*, 52 N. Y. 146; 11 Am. Rep. 683; *Phelps v. McNeely*, 66 Mo. 554; 27 Am. Rep. 378; *Reyburn v. Mitchell*, 106 Mo. 365; 27 Am. St. Rep. 350; *Roop v. Herron*, 15 Neb. 73; *Arnold v. Hagerman*, 45 N. J. Eq. 186; 14 Am. St. Rep. 712; *Darby v. Gilligan*, 33 W. Va. 246; *Shackleford v. Shackleford*, 32 Gratt. 481; *National Bank v. Sprague*, 21 N. J. Eq. 530; *French v. Lovejoy*, 12 N. H. 458; *Flack v. Charron*, 29 Md. 311; *Clements v. Jessup*, 36 N. J. Eq. 569; *Elliot v. Stevens*, 38 N. H. 311; *Gallagher's Appeal*, 114 Pa. St. 353; 60 Am. Rep. 350; *Patterson v. Seaton*, 70 Iowa, 689; Parsons on Principles of Partnership, sec. 106; Bates on Partnership, sec. 563; Jones on Mortgages, sec. 120; Beach on Modern Equity, secs. 787, 788; Horr & Wallace's note to *Silk v. Prime*, 11 Lead. Cas. Eq., pt. 1, 353. The principle controlling in these cases is stated with precision by Judge Dixon, delivering the opinion of the court in *Arnold v. Hager-*

man, 45 N. J. Eq. 186; 14 Am. St. Rep. 712. We quote from that opinion at large, as we adopt and approve the reasoning of the court:

"In equity a partnership is, for some purposes, deemed a single entity. Thus, where partnership property invested in the business of a partnership is to be applied by a court of equity to the payment of debts, that property is treated as belonging, not to the persons composing the firm, but to a distinct debtor, the partnership, ²⁷⁰ and is used, first, to liquidate the debts contracted in the business of that debtor, and only the surplus, if any, is surrendered to the individual partners. This equitable practice rests upon the presumed intentions of the partners themselves, and hence is primarily considered as their equitable right against each other. Consequently, since the decision of Lord Eldon in *Ex parte Rufin*, 6 Ves. 119, it has been generally held that the partners could put an end to this right, and that if, by their agreement, the partnership is dissolved, and its property is assigned to one of their number, or to a stranger, as his own, without reservation of the right, the right to have partnership debts paid out of that property is extinct. . . . Growing out of this right of partners has arisen a corresponding equity in partnership creditors to have their debts first satisfied out of the firm property, which is now deemed a substantial element of their demands. Generally, it may be said that this equity of creditors continues only so long as the right of the partners against each other subsists, and perishes when that terminates; but this is not universally true, for this equity may survive the right to which it is ordinarily attached. In this respect it resembles the claim which the general creditors of an individual have upon his property. It is neither an estate nor a lien. It is, ordinarily, but a right by lawful procedure to acquire a lien during the ownership of the debtor, yet, under certain circumstances, that lien may be acquired after the debtor's ownership has ended. This results from the provisions of the ancient statute for the prevention of frauds and perjuries, by force of which, when a person has aliened his property with intent to hinder, delay, or defraud his creditors, the rights of those creditors remain as if no alienation had taken place, except against the claims of bona fide purchasers, for good consideration, without notice.

"Equity applies this statute to a partnership, its property and creditors, just as it would in the case of an individual;

and, therefore, while it is generally true that a partnership may defeat ^{see} the equity of its creditors by the alienation of its property and consequent extinguishment of the right of its partners inter sese, yet, if the alienation be effected with intent to hinder, delay, or defraud the firm creditors by defeating their equity, the claims of creditors will be unimpaired, and the property will be treated as partnership assets, unless it shall have passed into the hands of those whom the statute protects."

In *Clements v. Jessups*, 36 N. J. Eq. 569, it was said: "Partnership creditors in equity have an inherent priority of claim upon partnership property over individual creditors, and a transfer of partnership property by one partner, with the consent of the other partners, or by all the partners, to pay individual debts, is fraudulent and void as to firm creditors, unless the firm was then solvent, and had sufficient property remaining to pay the partnership debts."

The recognition of this equity in favor of firm creditors does not impair any proper exercise of the power of the partnership over its property or affairs, nor bring within the control of a court of equity all partnerships which are insolvent in fact, or in a condition of temporary inability to meet their obligations. The apprehension of this result seems to have been influential in leading the court, in *Sigler v. Knox County Bank*, 8 Ohio St. 511, to adopt the opposing view; but the statute against fraudulent conveyances does not operate to control the lawful dominion of individuals, though insolvent, over their property, nor does mere insolvency confer jurisdiction upon equity to take charge of and administer their estates; and yet it cannot be denied that the statute does restrain the insolvent from disposing of his estate for the purpose of withdrawing it from liability to his creditors. Why should a different rule be applied to an aggregation of individuals than to them separately? The inquiry must, in either case, be whether the purpose and effect of the act is lawful or forbidden. If lawful, it may be done by the individual, or by a firm; if unlawful, the act is equally void as to the creditor injured, whether it be done by the one or the ^{see} other; but, it is again said, that it cannot be a fraud for one to devote whatever right or property he has to the payment of an honest debt. This is true if one devotes his own property to his own debts, but is it not a fraud in law if A appropriates his property to pay B's debts, leaving his own

creditors unpaid? Take the case at bar. Durfey and Ascher appropriate one-half of their joint estate to pay Ascher's debt. Now, if this was all that had been done, it would be manifest that the creditors of Durfey could treat the conveyance as fraudulent, because it would have been a clear donation by Durfey to the creditors of Ascher, at the expense of his creditors, he being insolvent. But it is said that Ascher, at the same time, conveyed his interest in the other half of the joint estate to the creditors of Durfey, and so each conveyance became a consideration of the other, and each partner received a full consideration for his release of his right as a partner. The reply is that a full consideration does not make a contract, otherwise unlawful, valid. If A agrees to do one unlawful act if B will do another, of what avail is it that each will reap a benefit from such act of the other? Durfey had a right to have the partnership property applied to the partnership debts, and Ascher had a like right. While these reciprocal rights existed, they were of value as property rights of the debtors to a certain class of creditors—i. e., firm creditors. Now, it is manifest, that for the very purpose of preventing these creditors from resorting to these rights for the satisfaction of their demands, the rights themselves were waived, and attempted to be obliterated. We are unable to perceive any just principle upon which the right of a debtor can be recognized to thus deal with his estate for the very purpose of obstructing his creditors.

It is to be noted, also, that neither partner could make a cent by the transaction. Five thousand dollars' worth of property will pay only five thousand dollars of debts, whether its proceeds be applied to partnership or individual liabilities. The partners would, in either event, after the payment of debts ⁹⁸² of either class, owe precisely the same sums. To permit the consummation of the scheme would be of no benefit to them. Its sole effect would be to withdraw the property from one class of creditors, who had created the joint estate, had given credit on the faith of it, and had a right to resort to it, and to permit its appropriation to another class, who dealt with the individuals composing the firm with a full knowledge that all they could get out of the partnership assets was what remained after payment of the partnership debts. The complainant is entitled to the relief prayed by its bill.

The decree is reversed and cause remanded.

PARTNERSHIP—INSOLVENCY—PAYMENT OF DEBTS.—The property of an insolvent partnership must be applied to the discharge of the partnership obligations, before the separate creditors of either party can participate therein; and the right of the partnership creditors to have the partnership property applied to the satisfaction of the partnership debts is dependent upon the equity of a member of a partnership to have such application made: Monographic note to *Smith v. Smith*, 43 Am. St. Rep. 371, 372, on the rights and remedies of partnership creditors. Each of the partners has, in the absence of any contract or other transaction waiving it, the right to have the firm property applied to the payment of the firm obligations: *Robinson Bank v. Miller*, 153 Ill. 244; 46 Am. St. Rep. 883; and the creditors of the firm are for many purposes deemed subrogated to this right of the partners, and therefore entitled to insist, in the absence of a waiver of that right by the partners themselves, that the partnership property be applied to the extinction of the partnership obligations, before it shall be taken for the payment of the debts of the individual partners, or either of them: Note to *Smith v. Smith*, 43 Am. St. Rep. 371. In equity, partnership assets are first applied to the payment of the partnership liabilities: Note to *Smith v. Smith*, 43 Am. St. Rep. 371. A partner has no implied authority to apply the property of the firm to the satisfaction of other than firm obligations, and hence is not justified in making a payment of his individual debts out of the firm funds, or by a transfer of the firm property: Note to *Smith v. Smith*, 43 Am. St. Rep. 374.

SHINGLEUR v. WESTERN UNION TELEGRAPH CO.

[72 MISSISSIPPI, 1080.]

- A TELEGRAPH COMPANY**, as a transmitter of intelligence, is not an agent either for the sender or sendee of messages, but is an independent principal, owing a public duty.
- A TELEGRAPH COMPANY**, as a transmitter of intelligence, is liable as principal to the sender of a message in contract or in tort, but to the sendee only in tort.
- TELEGRAPH COMPANIES—ALTERATION OF MESSAGE.**—If a telegram is materially altered in transmission the sendee cannot hold the sender to its terms.
- TELEGRAPH COMPANIES—MISTAKE IN MESSAGE—EFFECT OF VOLUNTARY PAYMENT AFTER KNOWLEDGE OF ERROR.**—If a broker is directed by telegraph to sell cotton for the sender of the message, on the latter's account, at a designated price, and the company makes a mistake in sending the telegram, whereby the sendee contracts to sell for a less price, the sender is under no obligation to deliver the cotton; but, if he does so, constrained by a desire to maintain his business credit, or other reasons, he cannot recover of the telegraph company, for his payment of the loss is purely voluntary and gratuitous.

ACTION by Shingleur & Co. against the Western Union Telegraph Company, to recover for loss sustained through the delivery of an altered message. Plaintiffs were cotton buyers in Jackson, Mississippi, and had five hundred bales of cotton

to sell. They sent, by the defendant, a cipher dispatch to Appleton, Dickson & Co., Boston, Massachusetts, directing them to sell five hundred bales of cotton at eight and one-half cents per pound. In the transmission a word was altered, so that, as delivered, the message directed a sale at eight and five-sixteenths cents per pound. The sendees were brokers, and correspondents of the plaintiffs, acting as undisclosed principals. Upon receipt of the telegram they sold the cotton at eight and five-sixteenths cents. The contract was admitted to be that of the plaintiffs. The plaintiffs were immediately notified of the sale, and the error was detected, but it was too late for Appleton, Dickson & Co. to withdraw from the sale, as sale notes had been given to the purchaser. Shingleur & Co., after notice of the error, delivered the cotton to prevent an injury to their credit. It was agreed that the loss sustained by the plaintiffs was four hundred and seventy dollars, and that this was the measure of damages if the plaintiffs were entitled to recover. There was a judgment for the defendant, and the plaintiffs appealed.

Culhoon & Green, for the appellants.

Mayes & Harris, for the appellee.

¹⁰³³ WHITFIELD, J. The first contention of appellee is, that the sender does not make the telegraph company his agent in such sense that it renders him liable to the sendee in case an altered message is delivered to the sendee. The negative of this proposition is maintained by the English courts, which hold that the liability of the telegraph company arises entirely out of contract, and hence that the sendee, not being in privity with the company, can never sue the company: *Playford v. United Kingdom etc. Tel. Co.*, L. R. 4 Q. B. 706, *Allen's Telegraph Cases*, 437; *Henkel v. Pape*, L. R. 6 Ex. 7, *Allen's Telegraph Cases*, 567. This view is also urged with great clearness and power in *Gray on Telegraphs*, ¹⁰³⁴ secs. 78, 104 et seq., and in *Bigelow on Torts*, 621-626; but the strongest reasoning in support of this view which we have found in any case, English or American, is in *Pepper v. Telegraph Co.*, 87 Tenn. 551, 10 Am. St. Rep. 699, decided in 1889. This case contains an exhaustive review of the authorities, and holds that the minds of the parties in case of an altered message have never met, and that neither can be bound to the other, unless the telegraph company is

the agent of the sendee, and this is repudiated on principle and authority. The English view, in so far as it predicates the right of the sendee to sue on contract alone, leads to one very manifestly unjust result, to wit, that since the sendee cannot sue the company (as held in *Playford v. United Kingdom etc. Tel. Co.*, L. R. 4 Q. B. 706) nor the sender (as held in *Henkel v. Pape*, L. R. 6 Ex. 7), he is remediless.

According to what is called the American doctrine (Gray on Telegraphs, sec. 104, note 3; Thompson on Electricity, sec. 426), the affirmative of the proposition under discussion is maintained, representative among the cases so holding being *Rose v. United States Tel. Co.*, 3 Abb. Pr., N. S., 408, Allen's Telegraph Cases, 337, in which case the principal was disclosed and the agent not bound. In *De Rutte v. New York etc. Tel. Co.*, 30 How. Pr. 403, it was held that the party interested in the dispatch, whether sender or sendee, was the one who really contracted with the company, and that such person could sue in contract. In *New York etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298, 78 Am. Dec. 338, the supreme court held that the company was the agent of both sender and sendee upon very unsatisfactory reasoning, and hence either can sue in contract.

Turning from this view of the right of the sendee to sue the company in contract, and putting the right to sue on the ground that, in case of delivery of an altered message upon which the sendee has acted to his damage, the sendee's right to sue is in tort for the injury to him, the wrong and the consequent damage, we find this view clearly and universally upheld by the American authorities: Gray on Telegraphs, sec. 78; Thompson on Electricity, secs. 427, 428, 430, 448; *New York etc. Tel. Co. v. Dryburg*, 35 Pa. 1035 St. 298; 78 Am. Dec. 338, Sharswood's opinion; *Ros's case*, 3 Abb. Pr., N. S., 408; Allen's Telegraph Cases, 340; Bigelow on Torts, 614, et seq.; *Pepper v. Telegraph Co.*, 87 Tenn. 554; 10 Am. St. Rep. 699; *Western Union Tel. Co. v. Dubois*, 128 Ill. 248; 15 Am. St. Rep. 109. *Rose's case*, 3 Abb. Pr., N. S., 408, Allen's Telegraph Cases, 340, in so far as it held that the sendee could not sue in that case, because the principal was the injured party and could himself alone sue, is said by Mr. Gray (Gray on Telegraphs, sec. 78) to be open to criticism, and held unsound on that ground by other authorities. Mr. Thompson suggests (Thompson on Electricity, sec. 424) as an additional reason why the sendee

should be allowed to sue, the consideration that the sender might, in a given case, be insolvent, and in section 427 puts the matter on the best ground. He says: "The true view, which seems to sustain the right of action in the receiver of the message, or in the person addressed, where it is not delivered, is one which elevates the question above the plane of mere privity of contract, and places it where it belongs—upon the public duty which the telegraph company owes to any person beneficially interested in the message, whether the sender, or his principal where he is agent, or the receiver, or his principal where he is agent." This is the doctrine of this court in *Western Union Tel. Co. v. Allen*, 66 Miss. 549. This review of the authorities will sufficiently indicate how the courts, in dealing with this purely modern agency, have been groping their way in their search for the true ground of liability, uselessly conjuring up analogies that do not exist, and misled by the apparent applicability of the doctrines of agency as existing between private individuals. The view last above given discards absolutely the doctrine of agency, as applied between private individuals, as suiting the case of the liability of a telegraph company to sendee or to sender. It treats the telegraph company as an institution sui generis, a system unto itself, an independent transmitter of intelligence, an independent contractor, or (as Mr. Bigelow and Judge Sharswood most simply and best put it) as an independent principal. It is liable to the sendee in tort alone, as principal; it is liable to the sender in contract or in tort, as principal. It is not liable to either as agent in any proper sense: *Western Union Tel. Co. v. Brown*, 108 Ind. 538; 14 Am. & Eng. 1030 Corp. Cas. 147; *Western Union Tel. Co. v. Hope*, 11 Ill. App. 289, and authorities cited. "Whether the agency is special or general, the authority delegated governs in all questions arising between the principal and his agent out of the agency. Whether the agency is general or special, a principal is responsible to a third person dealing bona fide with his agent, either when the agent acts within the scope of the authority actually conferred upon him by the principal, or when the agent acts within the scope of the authority which he has been held out by the principal as possessing. But, whether the agency is general or special, a principal is not responsible to a third person dealing with his agent, where that agent acts beyond the scope of both these authorities. . . . It is clear that a telegraph company

is actually authorized by its employer to communicate a certain message, and a certain message only. It is also clear that it is not held out by him as possessing an authority to communicate any as distinguished from a certain message. The delivery, therefore, of an altered message is the delivery of a message which the company, neither as general nor special agent, had, or was held out as having, any authority to deliver; and the liability to the sender is that of an independent principal. It is perfectly obvious that the company is not the servant of the sender—the sender has no authority to control the company as to the manner in which it does the act”: Gray on Telegraphs, sec. 104, et seq. The steady growth of this view is shown by the statutes of all the states, imposing upon the company the duty of receiving and sending messages for all persons, with the various regulating provisions embraced in these statutes, thus making what had been, prior to such statutes, merely the duty implied by the law from the peculiar nature of the business of telegraphy, after such statutes a statutable public duty. And now we have gone the further and completer step indicated in section 195 of the constitution of 1890, all which enforces the justness of the declaration in *Western Union Tel. Co. v. Allen*, 66 Miss. 555: “The courts then [in the early history of the English law, ¹⁰³⁷ dealing with common carriers], as now, conscious of the needs of the public, expanded the principles of the law, fitted them to the exigencies of the occasion, and imposed a degree of liability unknown to other contract relations, but required for the safety and protection of the public.”

It is also true that the sender may sue the company in tort as well as in contract, in the case of an altered message. Mr. Cooley says: “In many cases an action as for a tort, or an action as for a breach of contract, may be brought by the same party on the same state of facts”: Cooley on Torts, 103, 104. So Mr. Bigelow says: “The fact that a contract existed, and was broken at the same time, and by the same act or omission, by which the plaintiff’s cause of action arose, is only one of the accidents of the situation. The defendant owed, in respect of the same thing, two distinct duties—one of a special character to the party with whom he contracted, and one of a general character to others. . . . The duty, therefore, does not grow out of the contract, but exists before and independently of it.” Again: “What does it mean when

it is said that even this contractee (appellant answering to the contractee) may sue in tort or in contract for his damages? Certainly, nothing, unless that the original duty which the defendant, before the contract, owed to all alike, still survives, even toward his contractee." And without prolonging this opinion on this point, it is sufficient to refer to Bigelow on Torts, 586, 587, 614, 617, and to the elaborate discussion in *Rich v. New York Cent. etc. R. R. Co.*, 87 N. Y. 382.

But whether looked at in the light of contract or of tort, plaintiffs' case comes inevitably to this: That plaintiffs, at a time when they knew fully of the mistake in the telegram, and when they could have delivered or refused to deliver the cotton, and when—the minds of plaintiffs and of Appleton, Dixon & Co. never having met, and there being, as to this sale, no contract made between them, plaintiffs being, therefore, under no legal liability to deliver the cotton—nevertheless, acting on the sentiment ¹⁸⁸⁸ that they would themselves protect their agent (already fully protected by the liability in tort of the company to such agent), and maintain their business credit, did deliver the cotton anyhow, and, having done so, now seek to hold the company. Can the action be maintained?

The only case holding that the action can be maintained, so far as our research has gone, is *Western Union Tel. Co. v. Shotter*, 71 Ga. 760. The facts in this case are identical with those in *Pepper v. Telegraph Co.*, 87 Tenn. 554, 10 Am. St. Rep. 699, where the court, after an elaborate review of the American authorities, say: "As already stated, Mr. Gray not only shows that, upon principle, the English holding is correct, but while listing the cases above cited as indicating a contrary view, states that most of them are dicta. There is but one case referred to by him which directly adjudges that the sender of a telegram is bound to the receiver by the terms of the message as negligently altered by the company. That is the case of *Western Union Tel. Co. v. Shotter*, 71 Ga. 760. With great respect for the high character of that learned tribunal, we cannot approve the line of reasoning pursued or the conclusion reached. The learned judge places his conclusion, in part, on the fact that in England the government has charge of the telegraph lines, and upon the idea that a merchant or business man would lose all credit and commercial standing were he to refuse to make good to his corre-

spondent the contract contained in his message as delivered. We cannot see how the fact of governmental charge of the telegraph system can make any difference, for in this country the sender is as impotent to control and direct the movements and conduct of the telegraph company as if it were under the government; nor can we see how the commercial standing of the sender who remits his correspondent to his recourse on the telegraph company for such injury as may result from the erroneous message, can be affected."

So the case of *Harrison v. Western Union Tel. Co.*, 10 Am. & Eng. Corp. Cas. 600, is a case directly in point and stronger in its facts for plaintiff ¹⁰³⁹ than this case. These plaintiffs, in Texas, wired Latham, Alexander & Co., in New York, to purchase one hundred bales of cotton. As delivered, the telegram directed them to sell one hundred bales. Latham, Alexander & Co. sold, without plaintiffs knowing anything of the error, and a loss resulted to plaintiffs of one hundred and twenty-nine dollars and fifty cents, which, later, on settlement with Latham, Alexander & Co., plaintiffs paid, claiming they were compelled to pay. The court say: "The mistake which occasioned the loss was a mistake of the telegraph company, and not of the plaintiffs, and plaintiffs were not bound to pay or make good said loss to Latham, Alexander & Co., and, if they made such payment, were not responsible or liable therefor, and could not hold the company liable over to them for repayment." This, too, in a case where the loss had been sustained without knowledge on plaintiffs' part of the error. To the same effect are *Henkel v. Pape*, L. R. 6 Ex. 7, Allen's Telegraph Cases, 567, and *Verdin v. Robertson*, 10 Ct. of Sess. Cas. (3d series), 35, Allen's Telegraph Cases, 697. It is not necessary to go so far, and we express no opinion as to what would be the law had plaintiffs here not known, before they acted, all about the mistake. In *Pepper v. Telegraph Co.*, 87 Tenn. 554, 10 Am. St. Rep. 699, and *Western Union Tel. Co. v. Shotter*, 71 Ga. 760, the goods had been shipped to the place of residence of the sendee, and loss, to some extent, was inevitable to the sender. As held in *Pepper v. Telegraph Co.*, 87 Tenn. 554, 10 Am. St. Rep. 699, it was the plaintiff's duty, in view of all the circumstances, to make the loss as small as possible, and that he could then recover for such loss, as being himself to that extent—a loss thus legally sustained—the injured party. Mr. Gray correctly remarks (Gray on Telegraphs, 185, note

1) that *Western Union Tel. Co. v. Shotter*, 71 Ga. 760, put the liability upon "a moral and not a legal ground." Here, appellants had shipped no goods, had incurred no legal liability, had merely to refuse to comply with the terms of a contract they had never made, and remit Appleton, Dixon & Co. to their adequate remedy against the company. Their payment was voluntary and gratuitous, and cannot, on any sound or just principle, create for them a cause of action where none existed prior to such voluntary payment.

1040 The declaration in this case recognizes the fact that plaintiffs would have to be legally bound to Appleton, Dixon & Co., and alleges that plaintiffs were so bound. Shingleur, in his testimony, says: "There was no agreement that they [Appleton, Dixon & Co.] could, or could not, enforce a contract with us to deliver cotton, where there was a mistake in a telegram. That is a mere business obligation, and we had to fulfill or lose our credit. It was a moral sentiment. It was to our interest to do it."

Under the view we have taken, it becomes unnecessary to consider the stipulations in the telegram, or section 195 of the constitution. The judgment is affirmed.

COOPER, C. J., dissents. —

TELEGRAPH COMPANIES.—It has been held that a telegraph company is an agent of the sendee of a message as well as of the sender: *New York etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298; 78 Am. Dec. 338; but the prevailing view is that the occupation of such a company is one of a public nature: *Alexander v. Western Union Tel. Co.*, 66 Miss. 161; 14 Am. St. Rep. 556. It undertakes to serve the public, and must perform its duties and comply with its contracts in good faith, and its failure to discharge its functions with reasonable care renders it liable in damages for losses and injuries that may be traced directly or with reasonable certainty to its negligence: *Alexander v. Western Union Tel. Co.*, 66 Miss. 161; 14 Am. St. Rep. 556; note to *Western Union Tel. Co. v. Blanchard*, 45 Am. Rep. 487. There is no motive or opportunity for a telegraph company to make errors or mistakes. It must follow copy, and send the very message it is directed to send: *New York etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298; 78 Am. Dec. 338. If it negligently makes a mistake or error, and sends an altered message, it is liable to both sender and sendee for the damages occasioned: See monographic note to *Birney v. New York etc. Tel. Co.*, 81 Am. Dec. 615, on telegraph companies; *Western Union Tel. Co. v. Rountree*, 92 Ga. 611; 44 Am. St. Rep. 93; *Baldwin v. Western Union Tel. Co.*, 93 Ga. 692; 44 Am. St. Rep. 194; *New York etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298; 78 Am. Dec. 338; *Western Union Tel. Co. v. Edsall*, 74 Tex. 329; 15 Am. St. Rep. 835; *Young v. Western Union Tel. Co.*, 107 N. C. 370; 22 Am. St. Rep. 883; *Western Union Tel. Co. v. Hyer*, 22 Fla. 637; 1 Am. St. Rep. 222; *Kemp v. Western Union Tel. Co.*, 28 Neb. 661; 26 Am. St. Rep. 363.

If, however, no contract relation exists between the sendee and the company, his remedy is an action in tort, in which he may recover damages for the careless or negligent transmission of a dispatch: *Western Union Tel. Co. v. Dubois*, 128 Ill. 248; 15 Am. St. Rep. 109. As between the sender and an innocent sendee, all losses caused by errors or mistakes in transmission must be borne by the sender, but he may recover his loss from the company: *Ayer v. Western Union Tel. Co.*, 79 Me. 493; 1 Am. St. Rep. 353. The company has no authority or agency either from the sender or sendee to make, modify, or alter any agreement or proposition to buy or sell contained in the message, or to bind a person sending or receiving it: *Pegram v. Western Union Tel. Co.*, 100 N. C. 28; 6 Am. St. Rep. 557. Hence, the mere fact of employing the company to send a message does not make it the agent of the sender so as to bind him upon a telegram negligently altered in the transmission. The sender is bound by the contents of the telegram as received, only so far as it is a faithful reproduction of what is sent: *Pepper v. Telegraph Co.*, 87 Tenn. 554; 10 Am. St. Rep. 699. The negligence of the company in delivering a changed telegram cannot be attributed to the sendee, who acts upon its direction, when there is nothing in the message, as received, to suggest a doubt as to its accuracy: *Western Union Tel. Co. v. Edsall*, 74 Tex. 329; 15 Am. St. Rep. 885.

MONEY VOLUNTARILY PAID, with full knowledge of all the facts, although no obligation to make such payment existed, cannot be recovered back: *Baltimore etc. R. R. Co. v. Faunce*, 6 Gill, 68; 46 Am. Dec. 655; *City of Camden v. Green*, 54 N. J. L. 591; 33 Am. St. Rep. 686, and note.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

MULLALLY v. GREENWOOD.

[127 MISSOURI, 183.]

EVIDENCE—TRUTH OF FOR JURY.—If the defendant testifies that certain statements have been made by plaintiff, the jury may determine their truth, although they are not denied by plaintiff, his attention not having been called to them while testifying.

LANDLORD AND TENANT—SATISFACTORY LEASE.—Under a contract to pay a commission to an agent for obtaining a "satisfactory lease," the landlord cannot arbitrarily refuse to accept the lease negotiated.

Campbell & Ryan, for the appellants.

C. H. Krum and C. M. Napton, for the respondent.

¹⁴⁰ **BURGESS, J.** On the 20th of October, 1892, defendants, Moses M. and Moses Greenwood, Jr., were partners, doing a real estate business in the city of St. Louis ¹⁴¹ under the name of Greenwood & Co., and on that day they made a proposition, in writing, to plaintiff, that if he would negotiate a satisfactory lease for ninety-nine years on the southwest corner of Sixth and Chestnut streets, when the same was duly executed they would pay him for such services the sum of five thousand dollars.

On the day following, plaintiff, having procured a purchaser for the leasehold, went to the office of defendants, so informed them, and asked them to reduce their proposition to writing, as the party with whom he had contracted for the lease desired it. Defendants then wrote out and signed the following:

"October 19, 1892.

"Joseph J. Mullally, Esq., City.

"DEAR SIR: We are prepared to lease to you the southwest corner of Sixth and Chestnut streets, one hundred and twenty-seven and one-half feet on Chestnut street by forty-eight feet on Sixth street, bounded on the west by a private alley fifteen feet wide, on the following conditions, namely: Annual rental of seven thousand dollars, payable quarterly in advance, lessee to pay the taxes; term of lease, ninety-nine years; building to cost at least seventy-five thousand dollars, to be built within four years, and until such building is erected, lessee to give satisfactory bond for the rental until the building is erected; lease to contain the usual covenants in such leases. This proposition subject to withdrawal at any time, without notice.

"Yours truly,

GREENWOOD & Co."

Plaintiff then closed the contract for the lease according to defendants' proposition, received a payment of five hundred dollars on it, and so informed defendants, but they refused to close the contract or to perfect the lease. Plaintiff having complied with the contract, as he alleged, brought this suit for the five thousand dollars which he claims is due him on the contract.

¹⁴² Defendants in their answer admitted the partnership, but denied all other allegations in the petition. The answer then alleged that, at the time the memorandum sued upon was signed and delivered, plaintiff was informed and well understood that defendants were acting with respect thereto for other persons interested in said property, viz., one Otto L. Mersman, and that before any lease of said property negotiated by plaintiff would be satisfactory, it was necessary first to submit the same to said Mersman for his approval, and unless it was satisfactory to him it would be unsatisfactory to defendants, and must be rejected. That plaintiff never negotiated any lease for said property satisfactory to either of defendants, or to said Mersman, and that they are not indebted to him in any amount. Plaintiff replied denying all new matter contained in the answer.

There was a verdict and judgment in favor of plaintiff for five thousand one hundred and one dollars and sixty-six and two-thirds cents, and defendants appealed. The evidence on the part of plaintiff showed that, when he reported to defendants that he had made a contract for the lease, as proposed

by them, to S. F. Scott and others, and had received in part payment therefor Scott's check for the sum of five hundred dollars, which he then indorsed to them, defendant Moses Greenwood, Jr., told him to write out whatever kind of receipt he wanted, and he then wrote the following:

"ST. LOUIS, October 21, 1892.

"Received of S. F. Scott and others the sum of five hundred dollars (\$500) on account of first quarter's payment on ninety-nine year lease of parcel of ground on the southwest corner of Sixth street by one hundred and twenty-seven feet six inches on Chestnut street to a private alley, said lease to date from January 1, 1893, and balance of money to be paid as soon as satisfactory lease and bond is made by both parties, as per Greenwood ¹⁴² & Co.'s letter to Joseph J. Mullally of October 19, 1892."

Which Greenwood looked over and said, "I guess that it is all right." But defendants did not sign the receipt, and refused to receive the check, which was good for the amount for which it called. As to what occurred at the time of this conversation between plaintiff and Moses Greenwood, Jr., he, Greenwood, testified that he refused to accept the check of Scott, and told plaintiff that he could not do so until he saw Mersman, who was interested in the property; that he never agreed that the lease should begin from the 1st of January, 1893, but stated to plaintiff that he had no authority to make that change, and that Scott's name would not be satisfactory to either Mersman or himself.

Aside from what has been stated with reference to the conversation between plaintiff and Moses Greenwood, Jr., the proof tended to show that plaintiff had substantially complied with the terms of the agreement between himself and defendant with respect to the lease of the property.

At the close of the evidence defendants asked, and the court refused, to instruct the jury that, under the pleadings and evidence, plaintiff could not recover; but the court did instruct as follows:

"If you find from the evidence that the plaintiff did negotiate a lease of the real estate named, the question then arises, Was it a satisfactory lease within the meaning of that term in the written agreement? That term does not mean that the defendant had the right arbitrarily to pronounce the lease unsatisfactory, and therefore refuse to execute it and be re-

leased from the agreement to pay the plaintiff for his services; but it means a compliance with the terms of the proposed lease as understood between the plaintiff and the defendants at the time the written agreement of 144 October 20th was made. And if the terms proposed by the plaintiff, at the time he tendered the five hundred dollar check that has been mentioned in the evidence, were different from the terms understood between the parties at the time the aforesaid agreement was made, you cannot consider that such terms were satisfactory within the meaning of the agreement, unless you are satisfied from the evidence that the defendants agreed to those terms as satisfactory when so proposed. What were the terms of the proposed lease as understood between the parties at the time the aforesaid agreement was made, and whether or not the terms proposed by plaintiff at the time the check was offered, as aforesaid, were agreed to as satisfactory by the defendants, are questions for you to decide under the evidence in the case.

"If, at the time the written agreement in question was executed, the plaintiff knew or was informed that Mr. Mersman was one of the owners of the property, and that his consent to the lease had to be obtained before it could be executed, and if the failure to execute the lease was because of his failure to approve the terms, or of his declining to join in the execution, then it could not be said that the failure to execute the lease was because of the defendant's refusal to do so within the meaning of these instructions, and, in that event, the defendants are not liable. But, unless at the time the written agreement in question was executed the plaintiff knew or was informed that Mr. Mersman was one of the owners of the property, and that his consent to the lease had to be obtained before it could be executed, it is immaterial, so far as the rights of the parties to this suit are concerned, whether Mersman was willing to execute the lease on the terms offered by the plaintiff or not.

"Therefore, bearing in mind the foregoing instructions and explanations of the terms used, if you find 145 from the evidence that the plaintiff, Mullally, negotiated a lease of the premises at the southwest corner of Sixth and Chestnut streets for ninety-nine years upon terms satisfactory to defendants, Greenwood & Co., and if you also find from the evidence that the party with whom the plaintiff made the negotiation was ready, willing, and able to comply with

the terms and execute the lease on his part, and if you also find from the evidence that the lease was not executed because of the refusal of the defendants to execute it, then your verdict should be for the plaintiff, but, unless you are satisfied from the evidence of all these facts, your verdict should be for the defendants."

Defendants' first insistence is that the court should have sustained their demurrer to the evidence, and, in failing to do so, committed reversible error. This contention is in most part predicated on the statements of Greenwood, Jr., to the effect that, at the time the receipt, of date October 21, 1892, was presented to him by plaintiff, he informed plaintiff that Messman was the principal owner of the property, and the one to be satisfied with its lease, which it is claimed was not denied by plaintiff, and the further facts that under the proposition of October 19, 1892, the lease term was to commence as soon as made, and that as the proposition made by plaintiff for the lease to commence January 1, 1893, was not an acceptance of the offer of defendants, there was never an agreement, the minds of the parties never having met.

As to what occurred at the time of the conversation between plaintiff and Moses Greenwood, Jr., while there was no specific denial by plaintiff as to some of the statements which Greenwood, Jr., testified were made by himself at that time, plaintiff undertook to testify to the whole conversation between them, and because of his failure to deny some statements made by ¹⁴⁶ defendant, to which his attention may not have been called, we are not inclined to hold for that reason they must be taken as being absolutely true. Such matters, as well as all others included in this contention, were for the consideration of the jury.

In the second instruction the court defined "satisfactory lease," within the meaning of the terms of the written agreement, as being a compliance with the terms of the proposed lease as understood between plaintiff and defendant at the time the written agreement of October 20th was made, and to this exception is taken.

Under the facts as disclosed by the record, the words "satisfactory lease" were correctly defined, for the court would not have been justified, from the facts and circumstances as disclosed, in holding that the plaintiff intended to submit the result of his labors to the caprice of defendants or any one of them, to be approved or rejected at will, regardless of

any just cause or excuse therefor. We are not disposed to construe those words so as to produce a result so disastrous to plaintiff and inconsistent with the ordinary experience of mankind.

Most of the cases in which it has been held that the purchaser is to be satisfied and is the sole judge of the article to be furnished are cases involving articles of fancy, taste; then such article may be arbitrarily rejected as unsatisfactory. Thus, where the plaintiff contracted to make the defendant a satisfactory suit of clothes, and defendant returned the suit because unsatisfactory, it was held that an action for the price could not be maintained: *Brown v. Foster*, 113 Mass. 136; 18 Am. Rep. 463; *Zaleski v. Clark*, 44 Conn. 218; 26 Am. Rep. 446; *Gibson v. Cranage*, 39 Mich. 49; 33 Am. Rep. 351.

In such case, whether the employer or purchaser, as the case may be, acted upon reasonable grounds or ¹⁴⁷ not, cannot be inquired into. And it has been held that it is even doubtful whether the good faith of the employer's decision can be inquired into: *Glenny v. Lacy*, 1 N. Y. Supp. 513; *Campbell etc. Co. v. Thorp*, 36 Fed. Rep. 414.

So it has been said that, although the purchaser's objections may have been ill-founded or unreasonable in the opinion of others, yet, if they were made in good faith, he had the right to reject the article: *Seeley v. Welles*, 120 Pa. St. 69; *Singerly v. Thayer*, 108 Pa. St. 291; 56 Am. Rep. 207.

There are other cases which do not pertain to articles of taste or fancy which hold that it is a matter of contract, and that if the parties by contract agree that the article sold, or the services rendered, are warranted "or agreed" to give satisfaction, the purchaser or master is vested with full power to determine whether the article or the work is satisfactory; and the reasonableness of the grounds of dissatisfaction cannot be inquired into by the court in an action by the vendor for the purchase money, or in an action by the servant for damages for his discharge: *McCarren v. McNulty*, 7 Gray, 139; *Allen v. Mutual etc. Co.*, 101 Ala. 574; *Wood etc. Machine Co. v. Smith*, 50 Mich. 570; 45 Am. Rep. 57; *Buckport etc. R. R. Co. v. Brewer*, 67 Me. 295; *Cline v. Libby*, 46 Wis. 123; 32 Am. Rep. 700; *Tyler v. Ames*, 6 Lans. 280; *Osborne v. Francis*, 38 W. Va. 312; 45 Am. St. Rep. 859.

Again, it has been held that, if the task to be performed does not involve matter of taste, fancy, or judgment, but of

common experience, such as an ordinary job of mechanical work, or the quality of material, a different rule applies, and in such cases the law will say that what in reason ought to satisfy a contracting party does satisfy him: *Duplex Boiler Co. v. Garden*, 101 N. Y. 387; 54 Am. Rep. 709; *Brooklyn v. Brooklyn etc. R. R. Co.*, 47 N. Y. 475; 7 Am. Rep. 469; *Miesell v. Globe Ins. Co.*, 76 N. Y. 117; and that "the promisor¹⁴⁸ is supposed to undertake that he will act reasonably and fairly, and found his determination on grounds which are just and sensible; and from thence springs a necessary implication that his decision in point of correctness and the adequacy of the grounds of it are open considerations, and subject to the judgment of judicial triers": *Wood etc. Machine Co. v. Smith*, 50 Mich. 570; 45 Am. Rep. 57; *Daggett v. Johnson*, 49 Vt. 345; *Hartford etc. Mfg. Co. v. Brush*, 43 Vt. 528; *Pope Iron etc. Co. v. Best*, 14 Mo. App. 502.

We do not think that the defendants had the right to say, arbitrarily and without cause, that the lease contracted for by plaintiff for them was not satisfactory to them. It was their duty to act fairly and honestly, and in accordance with the reasonable expectations of the plaintiff, as implied from the contract, its subject matter, and the facts and circumstances surrounding its execution, its nature, object, and purpose.

The instructions seem to be in accord with these views, but, as they undertook to cover the whole case, should have embodied the substance of the second instruction asked by defendant, or have given it as asked. It is as follows:

"If the jury find from the evidence that, plaintiff, previous to October 20, 1892, had been negotiating with defendants for a lease of the premises on the southeast corner of sixth and Chestnut streets, for a ninety-nine year lease at an annual rental of seven thousand dollars for said term, and that on the said twentieth day of October, 1892, plaintiff requested defendants to make an agreement to pay him a commission for negotiating a satisfactory lease for ninety-nine years at said annual rental, and that plaintiff wrote out a statement of the terms and name of the lessee he proposed on the paper read in evidence dated October 21, 1892, and showed same to the defendants, and that defendants informed him that¹⁴⁹ they were also acting for others, among them one Otto L. Mersman, and that, before any lease would be accepted by defendants as satisfactory, it would have to be submitted to

said Mersman for his approval, and that at the time the defendants objected to the proposed lease, stated in said paper, dated October 21, 1892, because the proposed lease was to commence at a future day, January 1, 1893, and if the jury find that the plaintiff assented to this submission to said Mersman, and that it should be satisfactory to defendants and said Mersman, and that after that the said defendants executed and delivered to plaintiff the memorandum of October 20, 1892, read in evidence, then the court instructs the jury that these facts and this memorandum constituted the agreement between plaintiff and defendants, and that if you find from the evidence that the only lease proposed by plaintiff to defendants and said Mersman was for a lease to said premises to one S. F. Scott, for ninety-nine years, to commence on January 1, 1893, and that said date of the commencement for said lease of January 1, 1893, was not accepted as satisfactory by defendants and said Mersman, then the court instructs you that the said proposed lease was not a satisfactory lease within the meaning of the contract aforesaid, and plaintiff cannot recover, and you must find a verdict for defendants."

It is true that the instructions given seem to present the questions raised by the instruction last quoted, but not so clearly and pointedly, embracing, as it does, matters which we think defendants were entitled to have sharply presented to the jury.

From what has been said, the judgment must be reversed and the cause remanded.

It is so ordered.

All of this division concur.

EVIDENCE—TRUTH OF FOR JURY.—The truth of evidence substantially uncontradicted is for the jury: *Dibble v. Northern Assur. Co.*, 70 Mich. 1; 14 Am. St. Rep. 470, and note; *Turner v. Child*, 1 Dev. 25, 133, 331; 17 Am. Dec. 555.

BROKERS—WHEN ENTITLED TO COMMISSIONS.—If the contract provides in terms that the commission is to be paid only on the consummation of the sale, the agent cannot recover any commission where the principal refuses to complete the sale on reasonable grounds: Extended note to *Kalley v. Baker*, 28 Am. St. Rep. 517. A real estate broker is entitled to his commissions when a purchaser is introduced who is ready, willing, and able to buy upon the terms authorized by the principal, and no binding contract of sale is required if the principal is in a situation to execute it himself: *Gelatt v. Ridge*, 117 Mo. 553; 39 Am. St. Rep. 683, and note. To the same effect see *Mattingly v. Pennie*, 105 Cal. 514; 45 Am. St. Rep. 87; and see, also, the extended note to *Walker v. Osgood*, 93 Am. Dec. 175.

BANK OF VERSAILLES v. GUTHREY.

[127 MISSOURI, 189.]

FRAUDULENT CONVEYANCES—HOMESTEAD.—The rule that a person cannot convey his property in consideration of an obligation for support for life, without retaining sufficient to satisfy his creditors, has no application to homesteads.

HOMESTEADS.—CREDITORS HAVE NO INTEREST IN THE HOMESTEAD of their debtor; they cannot sell it under execution subject to the homestead right, nor subject it to the payment of their debts by a proceeding in equity.

HOMESTEAD—HEAD OF FAMILY.—A man, living on land with his children, who make it their home, and work for him until their marriage, and consider him the head of the family, may hold the land as his homestead.

A. L. Ross, for the appellant.

J. A. Blevins, for the respondent.

¹⁹¹ **BURGESS, J.** This is an equitable proceeding to set aside a deed, made by the defendant Guthrey on the twenty-ninth day of December, 1891, to his daughter ¹⁹² and codefendant Waller, to one hundred and eight acres of land in Morgan county.

Defendant Guthrey bought the land in May, 1885. Prior to its purchase he lived in Saline county, Missouri. His wife died in 1874. He bought the land for a homestead, and moved on to it, with his son, James B., then about twenty-nine years of age, and his daughter Callie, somewhat older, they being the only members of his family. He continued to live on the land and farm it until his son and daughter both married and left home, and, being then eighty years old, feeble and almost helpless, he conveyed the land to his daughter Waller, upon the express condition and in consideration that she would maintain and support him during his natural life, and then moved to her house, where he has since remained, being taken care of and provided for by her. The land was all of the property that James S. Guthrey had at the time he deeded it to his daughter. It was worth from twelve hundred dollars to fifteen hundred dollars.

The evidence was conflicting as to who was the head of the family while defendant and his son lived on the land—whether it was defendant or his son.

In August, 1892, plaintiff obtained judgment in the circuit court of Morgan county, Missouri, against the defendant James S., and his son J. B., Guthrey, for the sum of one

hundred and fifty-five dollars and fifty cents, and being unable to make the judgment or any part of it, plaintiff instituted this suit to set aside the deed from defendant Guthrey to his daughter on the ground that it was fraudulent as to his creditors, and to subject the land therein described to the payment of its debt. The court rendered judgment for defendant and plaintiff appealed.

Plaintiff's first contention is that, as the land in controversy was all the property that defendant Guthrey owned at the time of the execution of the deed therefor to his daughter, Mrs. Waller, the only consideration ¹⁹³ agreed upon being the grantor's support during his lifetime, the deed was absolutely void as to his creditors, as the law will not allow one to transfer his property in consideration of an obligation for support for life, unless he retains a sufficient amount to pay his debts.

With respect to property which may be subjected to the payment of the debts of a debtor, we fully agree to the rule announced in *Wait on Fraudulent Conveyances and Creditors' Bills*, 2d ed., sec. 211; *Crane v. Stickles*, 15 Vt. 252; *Stanley v. Robbins*, 36 Vt. 432; *Woodward v. Wyman*, 53 Vt. 647—that is, that he cannot convey his property which is subject to the payment of his debts in consideration of an obligation for support for life, or any considerable length of time, unless he retain whatever is necessary to satisfy his creditors, as the law will not allow any person having means to make provision for himself and family during life at the expense of his creditors. To do so would be to encourage fraud, by permitting a debtor, possessed of an unlimited amount of property, to place it beyond the reach of his creditors by conveying it for and in consideration of the support of himself and wife, or any member of his family, for and during life of any one or all of them.

But the law as thus announced has no application to property which is exempt from seizure and sale under attachment and execution, such as a homestead. Creditors have no interest in such property, as it cannot be subjected to the payment of their debts by proceeding in equity, any more than it can be seized under attachment or execution: *Kendall v. Powers*, 96 Mo. 142; 9 Am. St. Rep. 326; *Holland v. Kreider*, 86 Mo. 59. In *Davis v. Land*, 88 Mo. 436, it is said: "No fraud upon creditors can be perpetrated by any disposition the debtor may see ¹⁹⁴ proper to make of his homestead. It

is beyond their reach, both at law and in equity, and there can be no fraudulent disposal of such property within the meaning of the attachment law."

Section 5435 of the Revised Statutes of 1889 provides that the homestead of every housekeeper or head of a family which is or shall be used by such housekeeper, or head of a family as such homestead shall be exempt from attachment and execution as therein provided. It will be observed that no restriction is placed upon the right of the housekeeper or head of a family, having the title in fee, to dispose of the homestead as he or she may think proper, but it is expressly provided by said section that nothing contained therein shall be so construed as to prevent the husband from mortgaging, alienating, or in any other manner disposing of such homestead, or any part thereof.

By section 5436 of the Revised Statutes of 1889 it is provided that whenever an execution is levied upon the real estate of a housekeeper or head of a family of which such homestead may be a part, or upon any part of such homestead as may be in excess of the limitation of the value thereof, such housekeeper or head of a family may have the right to designate and choose the part thereof to which the exemption shall apply, not exceeding the limited value.

By section 5441 of the Revised Statutes of 1889 it is provided that the homestead shall be subject to attachment and execution upon all causes of action existing at the time of acquiring such homestead, and, in case of existing estates, such homestead shall not be subjected to attachment or levy of execution upon any liability thereafter created. The following section provides for the acquiring of a new homestead, with the consideration derived from the sale or other disposition of such prior homestead, and exempts such homestead thus ¹⁹⁵ acquired from the payment of the same debts as was the former homestead.

By section 5439 of the same article it is provided that in case the housekeeper or head of a family shall die leaving a widow or any minor children, the homestead right is extended to them until the youngest child attains its legal majority, and until the death of such widow; then the homestead right ceases, and the fee therein descends to the legal heirs of the original housekeeper or head of the family in whomsoever the legal title may have been at the time of his or her de-

cease, subject to the laws relating to devise, descent, dower, partition, and sale for the payment of the debts against the estate of the deceased.

The homestead is exempt from seizure and sale under attachment and execution by express statutory provision, by which it is also provided that it may be mortgaged, sold, alienated, or disposed of in any other manner that the owner thereof may think proper, or exchanged for another homestead, or sold and the proceeds arising from such sale applied for that purpose, and the homestead thus acquired is exempt from attachment and execution the same as the former homestead.

It would seem clear, from the provisions of the statute quoted, that it was never the intention of the lawmakers that any part of, or interest in, the homestead of a housekeeper or head of a family should be, in any manner, subjected to the payment of debts contracted after its acquisition. It is only after the expiration of the homestead right, it not having been disposed of by the owner of the fee during his or her lifetime, that it, like any other real property that he may then own, becomes subject to the payment of debts.

There is no such thing under our laws as subjecting the fee in the land, subject to the homestead right or interest, to seizure and sale under attachment, execution, ¹⁹⁶ or by proceeding in equity, upon the ground that it had been fraudulently or otherwise disposed of. If it is not subject to sale under attachment and execution before such disposition, it is difficult to see how it becomes so by reason of such transfer. No creditor has any interest therein; it cannot be subjected to the payment of his debt until after the homestead right expires by law, and certainly he has no right to complain of a transaction in which he has no interest. To hold that the fee in the homestead may be subjected to the payment of the debts of its owner, subject to the homestead right, is to deprive him of the right which is expressly conferred by statute, to sell, mortgage, or exchange it for another homestead, a contention to which we are unwilling to give our assent. The homestead includes the fee; they are not two separable and divisible interests.

What was said in *Schaffer v. Beldsmeier*, 107 Mo. 314, which would seem to hold to a contrary view, was not necessary to a decision of that case, and may be regarded as merely

obiter. The same may be said with respect of *Miller v. Leeper*, 120 Mo. 466. But in so far as they conflict with the views herein expressed, they should be overruled.

But it is insisted by plaintiff that the land in question was not the homestead of defendant Guthrey, and that no homestead right ever attached.

The evidence showed that the legal title was in the defendant Guthrey; that his son and daughter lived with him for a number of years on the land, which was farmed by the father and son, the daughter looking after the household affairs; that this continued until both daughter and son were married, and their father left alone. During the time defendant and his son and daughter lived on the land, he was looked up to and regarded as the head of the family. Both son and ¹⁹⁷ daughter worked without wages and as members of the family. The court found that the father was the head of a family, and, as such, entitled to claim and hold the land as a homestead. We have no disposition to interfere with the conclusion reached in this regard, which seems to be amply sustained by the evidence.

From what has been said it necessarily follows that the judgment should be affirmed.

It is so ordered.

All of this division concur.

HOMESTEAD—FRAUDULENT CONVEYANCES.—The transfer of a homestead cannot be fraudulent as against creditors of the grantor, because they have no right to resort to it for the payment of their demands: *Pipkin v. Williams*, 57 Ark. 242; 38 Am. St. Rep. 241, and note. Simple money judgment creditors, and those claiming under them, have no right to complain of the conveyance of his homestead by their debtor: *Rodges v. Winston*, 95 Ala. 514; 36 Am. St. Rep. 241, and note; note to *Pike v. Miles*, 99 Am. Dec. 152.

HOMESTEAD—HEAD OF FAMILY—WHO ENTITLED TO EXEMPTION AS.—The cases discussing this subject will be found collected in the note to *Boesquett v. Hall*, 29 Am. St. Rep. 405, and the extended note to *Wade v. Jones*, 61 Am. Dec. 586.

WYETH HARDWARE AND MANUFACTURING COMPANY v. LANG.

[127 MISSOURI, 242.]

ATTACHMENT—NONRESIDENTS.—Wherever a creditor may maintain suit to recover his debt, it may be there attached as his property.

GARNISHMENT—NONRESIDENTS.—Debts due a resident of one state by a resident of another may be garnished in the latter state.

GARNISHMENT—NONRESIDENTS.—**INJUNCTION** does not lie to restrain a resident creditor from maintaining garnishment in another state of debts due there to a resident debtor.

Johnson & Wilson and G. N. Elliott, for the appellant.

H. Wollman and A. New, for the respondent.

244 **BURGESS, J.** This is an injunctive proceeding, instituted by plaintiff to enjoin and restrain defendants ²⁴⁵ from prosecuting suit against it in the state of Kansas by attachment, and the garnishment of debts due it by various of their customers and debtors in that state, the plaintiff and defendants being residents of this state. From a judgment for defendants on demurrer to plaintiff's petition, plaintiff took the case to the Kansas City court of appeals by writ of error, where the judgment of the circuit court was affirmed in an opinion by Smith, P. J. The case was then certified to this court because of a conflict of the opinion with the decisions of the St. Louis court of appeals in *Keeting v. American Refrigerator Co.*, 32 Mo. App. 293; *Green's Bank v. Wickham*, 23 Mo. App. 663; *Fielder v. Jessup*, 24 Mo. App. 91. The opinion in this case is reported in *Wyeth etc. Mfg. Co. v. Lang*, 54 Mo. App. 147.

The statement of facts and that part of the opinion necessary to a disposition of the case by this court are as follows: "The petition in this case, which is for an injunction, alleged that both plaintiff and defendant were business corporations, organized and existing under the statutes of this state.

"It was further alleged that the defendant had sued the plaintiff by attachment in one of the courts of the state of Kansas, and had procured the process of garnishment in said suit to be served upon certain debtors of the plaintiff, who were its customers, and had become indebted to it for merchandise sold by it to them in this state, where such indebtedness, by the terms of the sale of such merchandise, for which it was incurred, was made payable; that the plaintiff here, who was the defendant in the attachment suit, was notified

thereof by publication, and that judgment had been severally pronounced against the defendant and the garnishees therein. The petition fails to disclose the nature of the claim upon which the attachment proceedings were grounded. It appears that the plaintiff is a solvent ²⁴⁶ corporation, and that the defendants are about to take steps to compel by execution the garnishees to satisfy the amount of the judgments against them; that the garnishees, who are plaintiff's customers, are in great danger of having to pay their indebtedness to plaintiff twice, which would frustrate the trade relations between the former and the latter, to the great injury of the latter, etc. The prayer was that defendants be enjoined and restrained from enforcing and collecting the judgments against plaintiff and the garnishees, etc.

"The defendant interposed a demurrer to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and the plaintiff, electing to abide by its petition, judgment was given accordingly. . . .

"The plaintiff's insistence is, that the proceedings of the Kansas court are void for want of jurisdiction, for the reason that the debts garnished had no situs in that state, and that, consequently, they were not liable to be attached there. Contracts respecting personal property and debts are now universally treated as having no situs or locality; and they follow the owner in point of right. They are deemed to be in the place, and are disposed of by the law of the domicile of the owner, wherever in point of fact they may be situate, in accordance with the maxim, *Mobilia non habent situm*: Story on Conflict of Laws, secs. 362, 399; *State Tax on Foreign Bonds*, 15 Wall. 320; *Renier v. Hurlbut*, 81 Wis. 24; 29 Am. St. Rep. 350; *Wallace v. McConnell*, 13 Pet. 136; *Rio Grande R. R. Co. v. Gomila*, 132 U. S. 485; *American Bank v. Rollen*, 99 Mass. 313; *Trowbridge v. Means*, 5 Ark. 135; 39 Am. Dec. 368. It has been ruled in effect that a debt without reference to where payable is deemed attached to the person of the owner, so as to have its situs at his domicile, yet this fiction always yields to laws for attaching the property of a nonresident, because such laws necessarily assume that ²⁴⁷ the property has a situs distinct from the owner's domicile. Wherever the creditor might maintain a suit to recover the debt, there it may be attached as his property, provided the laws of such place authorize it: *Harvey v. Great Northern Ry.*

Co., 50 Minn. 405; *Nichols v. Hooper*, 61 Vt. 295; *Hannibal etc. R. R. Co. v. Crane*, 102 Ill. 258; 40 Am. Rep. 581; *Berry v. Davis*, 77 Tex. 191; 19 Am. St. Rep. 748; *Wabash R. R. Co. v. Dougan*, 142 Ill. 248; 34 Am. St. Rep. 74; *Boyd v. Insurance Co.*, 90 Tenn. 212; 25 Am. St. Rep. 676; *Burlington etc. Ry. Co. v. Thompson*, 31 Kan. 180; 47 Am. Rep. 497, and cases there cited; *Plimpton v. Bigelow*, 93 N. Y. 592.

"According to the rulings in the cases just cited, it would seem quite obvious that the Kansas court had the requisite jurisdiction to impound the plaintiff's credits there by the attachment proceedings. And this doctrine seems just and reasonable, for, if the defendant cannot reach the plaintiff's credit by the attachment process in Kansas because they have a situs in this state, he cannot reach them in this state, because there can be no service of notice had on the garnishees in this state, so that it results that plaintiff's credits cannot be attached at all.

"But we are confronted with contrary rulings of the St. Louis court of appeals to the effect that the situs of the debt is the place where the debtor resides, *unless the debt, by the terms of the contract, is made payable elsewhere, and in the latter event such situs is at the place where the debt is payable*: *Keeling v. American Refrigerator Co.*, 32 Mo. App. 293; *Green's Bank v. Wickham*, 23 Mo. App. 663; *Fielder v. Jessup*, 24 Mo. App. 91. And to the exception to the rule, as indicated by the italicized words thereof, we cannot agree for the reason already stated. We think the rule declared in *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405, and the other cases cited, which are in accord with it, will better subserve interstate trade and business relations than that embraced in the foregoing exception."

218 That part of the opinion of the Kansas City court of appeals herein quoted is adopted as the opinion of this court, being, as we think, supported by reason and the weight of authority.

All of this division concur.

GARNISHMENT IN ANOTHER STATE.—Garnishment proceedings must be instituted in the state where the debt is payable, or the property is to be delivered, and a garnishment in one state of a debt due and payable in another is void: *American etc. Ins. Co. v. Hutter*, 37 Neb. 849; 40 Am. St. Rep. 522, and note. A resident indebted to a nonresident may be garnished in the courts of the state of the former's residence, and judgment there legally rendered against him that will bind the fund in his hands at

though his nonresident creditor was cited to appear by publication: *Berry v. Davis*, 77 Tex. 191; 19 Am. St. Rep. 748, and note. See, also, the extended note to *Missouri Pac. Ry. Co. v. Sharitt*, 19 Am. St. Rep. 145, and the note to *Bowen v. Pope*, 8 Am. St. Rep. 332.

MACFARLAND v. HEIM.

[127 MISSOURI, 327.]

CONTRACTS—CONSIDERATION.—A subsequent agreement not forming any part of an original contract, nor supported by the original consideration thereof, nor by any new consideration, is void.

GUARANTY—CONSIDERATION—VALIDITY—RECOGNITION BY GUARANTOR.—A guaranty of payment of rent, made subsequent to the execution and delivery of a lease, not based on the consideration thereof, nor upon a new consideration, is void, although the guarantor recognizes himself as bound thereby.

ASSIGNMENT OF LEASE, if made voluntarily and without the knowledge or acceptance of the assignee, does not bind him.

RATIFICATION.—VOID ACTS are incapable of ratification.

MARRIED WOMEN'S CONTRACTS.—A married woman is incapable of contracting, unless power is expressly given her by statute.

MARRIED WOMEN—AGENTS FOR.—A married woman is incapable of appointing an agent for property, except such as is held by her as her equitable separate estate.

APPEAL—INSTRUCTIONS—HARMLESS ERROR.—Error in giving instructions, if harmless, is not ground for reversal.

R. O. Boggess, for the appellant.

B. T. Hardin, for the respondent.

323 **SHERWOOD, J.** Action on a written lease bearing date August 1, 1888, to recover rent from April, 1889, to December of that year, both months inclusive. Lau was the lessee, Heim the guarantor, and Ellen J. Macfarland and husband the lessors—the land belonging to Mrs. Macfarland, who held it, so it is stated, “as her general estate.”

Among the defenses set up by defendant in his answer was a plea of failure of consideration, arising out of the fact that the alleged guaranty was signed by defendant long after the execution and delivery of the lease. The answer also denies an allegation of the petition that the lease had been assigned to him by Lau.

The evidence very clearly establishes that after the execution and delivery of the lease, Harding, the janitor of the building, was sent out by the husband in order to have Lau give security in the form of a guaranty from Heim. After some ten or twelve days from the time of the execution and

delivery of the lease, Heim was found, and gave the guaranty indorsed on the lease. There was no original understanding between Lau and Heim and the Macfarlands, at or before the execution of the lease, that Heim was to indorse the lease. Nor was the assignment indorsed on the lease by Lau, which purported to transfer the lease to Heim, on the lease, at the time the latter indorsed the lease as guarantor. Nor was that indorsement under seal. This is Heim's testimony, and there is no contradiction of it, nor does the evidence show that Heim accepted the assignment or even saw it after it was made. It was made without his knowledge or acceptance, so he states, and of this, also, there is no contradiction.

In these circumstances, the trial court very properly gave the following instructions: ³³³ "If the jury find that the assignment of the lease by Lau to Heim was voluntary on the part of Lau, or made under an arrangement between plaintiffs and Lau, and that Heim had no knowledge of said assignment and never accepted it, then it imposes no obligation or duty upon Heim, and he is not bound by it. The court instructs the jury that, if they find from the evidence that plaintiffs, on the first day of August, 1888, executed and delivered to Jacob Lau a written lease of the property in question, and that afterward, without any new consideration passing from the plaintiffs to Lau, or to defendant, or from Lau to defendant, Heim executed a writing binding himself for the rent, such agreement was without consideration, and defendant is not bound by it."

Nothing is better settled in this state than that a subsequent agreement which does not form any part of an original contract, nor is supported by the original consideration thereof, nor by any new consideration, is a mere nude pact, of no force or validity. Such is the situation here: *Williams v. Williams*, 67 Mo. 662; *McMahan v. Geiger*, 73 Mo. 145; 39 Am. Rep. 489; *Montgomery Co. v. Auchley*, 92 Mo. 126.

And the trial court rightly held that, unless Heim accepted the assignment made by Lau to him of the lease, that no contractual relations in respect to that assignment were created between Lau and Heim in consequence thereof, nor any obligations cast on Heim as the result of such assignment. Nor could Heim, by recognizing himself to be bound by his invalid guaranty, by promising to pay the rent, etc., confer any retrospective validity on the considerationless contract.

But the trial court erred in holding and instructing that Mrs. Macfarland not being seised of an equitable, separate estate, could have any agent either in Harding or in her husband to bind her by any act of theirs, or ³²⁴ that she could ratify their void acts. A void act is incapable of ratification. It is impossible to understand what is meant by the words "general estate," of which it is said Mrs. Macfarland was seised. It suffices for the present purpose that it is stated in the record that it was not her "equitable, separate estate."

It is among the fundamentals of the common law that a married woman is incapable of contracting, and her supposed contracts are void. This is still the law, except where statutory modifications have occurred. If thus incapable of contracting, then incapable also, of authorizing another to contract for her; for this would be to make the stream rise higher than its fountain head.

Story says: "Every person, therefore, of full age, and not otherwise disabled, has a complete capacity for this purpose. But infants, married women, idiots, lunatics, and other persons not sui juris are either wholly or partially incapable of appointing an agent. Idiots, lunatics, and other persons not sui juris are wholly incapable; and infants and married women are incapable, except under special circumstances. . . . So in regard to married women, ordinarily, they are incapable of appointing an agent or attorney. . . . With regard to her separate property, she may, perhaps, be entitled to dispose of it, or to encumber it, through an agent or attorney; because in relation to such separate property she is generally treated as a feme sole. I say, 'perhaps,' for it may admit of question; and there do not seem to be any satisfactory authorities directly on the point": Story on Agency, 9th ed., sec. 6. A similar doubt has been elsewhere intimated: *Weisbrod v. Chicago etc. Ry. Co.*, 18 Wis. 40; 86 Am. Dec. 743, and cases cited.

In this state, however, it has long been steadily maintained that a feme covert, as to her separate estate ³²⁵ in equity, is a feme sole: *Turner v. Shaw*, 96 Mo. 28; 9 Am. St. Rep. 319, and cases cited; and, therefore, may charge her separate estate, make an agent in regard thereto to all intents and purposes as if she had never passed *sub jugum matrimonii*. But where she is not thus seised, we have held, over and over again, that not being sui juris, of course she could not appoint an agent: *Wilcox v. Todd*, 64 Mo. 388; *Hull v. Calla-*

han, 66 Mo. 316; *Silvey v. Summer*, 61 Mo. 253; *Henry v. Sneed*, 99 Mo. 407; 17 Am. St. Rep. 580; *Flesh v. Lindsay*, 115 Mo. 1; 37 Am. St. Rep. 374; *Mueller v. Kaessmann*, 84 Mo. 318.

Counsel for defendant, however, make citation of *Mead v. Spalding*, 94 Mo. 48, as asserting a contrary doctrine, and so it does, for it is there broadly asserted that "There can be no doubt but the husband may be the agent of the wife."

The two cases cited from our own reports do not sustain that position, because the first one was one where the land of the wife, the proceeds of which she brought suit for, was "her sole and separate property": *Eyatra v. Capelle*, 61 Mo. 578. The second one cited is *Rodgers v. Pike County Bank*, 69 Mo. 560, where the subject of the suit was the wife's money, acquired by her under the married woman's act of 1875, section 3296. But that section authorizes the wife to appoint her husband as her agent for the disposition of her personal property, provided the authority be in writing, and we have expressly held that, in regard to that section, a married woman, respecting her personal property, held under its provisions, is a feme sole: *Blair v. Chicago etc. R. R. Co.*, 89 Mo. 391. We, therefore, decline to follow the ruling in *Mead v. Spalding*, 94 Mo. 48.

On account of the reasons expressed in a prior part of this opinion, the error mentioned is a harmless one, and, when this is the case, such error in giving erroneous instructions constitutes no ground for reversal: *Fitzgerald* ²³⁶ v. *Barker*, 96 Mo. 661, 666; 9 Am. St. Rep. 375; *Brobst v. Brock*, 10 Wall. 519.

Therefore the judgment is affirmed.

All concur.

GUARANTY—CONSIDERATION.—A promise to answer for the debt of another is void, unless made upon some new consideration of benefit accruing or moving directly to the promisor: *Bray v. Parcher*, 80 Wis. 16; 27 Am. St. Rep. 17, and note.

LEASE—ASSIGNMENT.—LIABILITY OF ASSIGNEE: See the extended note to *Washington etc. Gas Co. v. Johnson*, 10 Am. St. Rep. 563.

RATIFICATION OF VOID ACTS—EFFECT OF.—An illegal contract is not susceptible of ratification: *Insurance Co. v. Hull*, 51 Ohio St. 270; 46 Am. St. Rep. 571; *Handy v. St. Paul etc. Pub. Co.*, 41 Minn. 188; 16 Am. St. Rep. 695. The ratification of the signing of a bond by an obligor whose signature was forced does not render him liable thereon, there being no new consideration: *McHugh v. County of Schuylkill*, 67 Pa. St. 391; 5 Am. Rep. 445, and note.

MARRIED WOMEN.—AT COMMON LAW A MARRIED WOMAN'S CONTRACT was void: Extended note to *Ferguson v. Harris*, 30 Am. St. Rep. 743; *Snell v. Snell*, 123 Ill. 403; 5 Am. St. Rep. 526. The common-law disability of a feme covert to make a contract exists in North Carolina, except in cases provided for by statute: *Armstrong v. Best*, 112 N. C. 59; 34 Am. St. Rep. 473. The power of married women to contract under the American statutes is the subject of the extensive note to *Kontreis v. Prather*, 90 Am. Dec. 599.

APPEAL—HARMLESS ERROR—INSTRUCTIONS.—An instruction which is not prejudicial is not ground for reversal: *Ingerman v. Moore*, 90 Cal. 410; 25 Am. St. Rep. 139; *Brandon v. Carter*, 119 Mo. 572; 41 Am. St. Rep. 673; *Gray v. Merriam*, 143 Ill. 179; 39 Am. St. Rep. 172.

SETTLE v. ST. LOUIS AND SAN FRANCISCO R. R. Co.

[127 MISSOURI, 336.]

RAILROADS—NEGLECT—HANDHOLDS.—It is negligence on the part of a railroad company toward its brakeman to send out box-cars with handholds so bent as to render them dangerous and unfit for use by him in discharging his duties.

NEGLECT—PROXIMATE CAUSE—EVIDENCE.—To recover damages on account of negligence, the plaintiff must prove not only the negligence but also that it was the proximate cause of the accident. No direct proof of such fact is, however, required, and it is sufficient if the facts proved are of such nature, and so connected and related to each other, that the conclusion that the negligence was the cause of the damage may be fairly inferred.

MASTER AND SERVANT—ASSUMPTION OF RISKS.—A person, when he enters the service of another, assumes only such risks and dangers as are usually incident thereto.

MASTER AND SERVANT—NEGLECT—ASSUMPTION OF RISK.—An employer is charged with the continuing duty of not subjecting his servants to risks by his own negligence in not keeping instrumentalities used by them in a sound and secure condition, and the servants do not assume the risk arising from such neglect.

MASTER AND SERVANT—DEFECTIVE APPLIANCES—ASSUMPTION OF RISKS.—Although a servant is advised of defects in the appliances used by him, and of the neglect of the master to repair them, he does not, by electing to remain in the service and to use the defective appliances, thereby assume the risks of injury therefrom, unless the defect is so glaring and the danger so obvious, that a man of common prudence would refuse to use such instrumentalities.

RAILROAD COMPANIES—NEGLECT—DEFECTIVE APPLIANCES.—A railroad company is guilty of negligence in failing to keep appliances used by its servants in repair, and such servants knowing of defects in such appliances do not assume the risk of injury arising from their use, unless the danger is glaring and obvious.

MASTER AND SERVANT—DEFECTIVE APPLIANCES—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE.—Although a servant cannot wholly ignore a known defect in an appliance provided for him, and is required to

exercise care and caution in its use, he is not guilty of contributory negligence in thereafter using it, unless the defect is so manifestly and glaringly hazardous that a person of ordinary prudence would not use it.

RAILROADS—DEFECTIVE APPLIANCES—CONTRIBUTORY NEGLIGENCE.—If a defective handhold on a box-car under ordinary circumstances, and by the exercise of reasonable care, can be used for the purposes for which it is designed, and is not so dangerous as to threaten immediate injury by its use, a brakeman is not guilty of contributory negligence in using it, though he has a knowledge of its defects, and the railroad company is liable for an injury sustained by him arising from its use.

E. D. Kenna, L. F. Parker, and H. S. Abbott, for the appellant.

Cloud & Davies and T. D. Steele, for the respondent.

338 MACFARLANE, J. Plaintiff sues under the provisions of the laws of the state of Kansas, for the death of her husband, William F. Settle, which occurred in said state in January, 1892, while in the employment of defendant as a brakeman.

The petition contains three counts, which do not differ materially in their averments of negligence. The charge of negligence is that the handhold on the end of one of defendant's cars, which was provided for the use of plaintiff and other brakemen, was permitted "to get out of repair and in dangerous condition, having been mashed in so it could not be readily grasped with the hand, and that by reason thereof, while deceased was performing his duties, he lost his hold and fell from the car, and was run over, receiving injuries from which he died." The answer was a general denial.

At the close of the evidence offered by plaintiff, the court directed a verdict for defendant. This verdict the court afterward set aside, on motion of plaintiff, and granted a new trial, and from this order defendant appealed. The only question to determine, therefore, is whether there was evidence of negligence and the resulting death therefrom, which should have been submitted to the jury; if there was, then the new trial was properly granted; if not, then judgment should be entered upon the verdict for defendant.

Plaintiff's husband was rear brakeman on one of defendant's trains, and at the time had charge of switching some cars, the conductor being temporarily 339 absent. The work immediately in hand was to take a car from one track and place it upon another. This deceased undertook to do by making what is known as a running switch. To do this it was necessary to couple the car to the engine, and pull it toward

the switch to uncouple it from the engine, and, after the engine had passed, to turn the switch and let the car go in on the side-track. This operation required the car to be uncoupled from the engine while they were in rapid motion.

This was a box-car, and had, on the end and near the corner, a foothold for brakemen to stand upon. This was fixed near the bottom of the car. About three feet ten inches above this was a handhold. These were similarly constructed, and consisted of an iron rod about one inch in diameter, bent at the ends and fastened to the car with bolts. The holds were about eighteen inches long, and, when in proper condition, stood out from the car two or three inches. These holds were used in uncoupling cars while in motion. On the sides of the car near the end were similar holds, one above the other, making a ladder by means of which trainmen could go up and down the car. The handhold on the end of this car was bent or mashed in at the center to within an inch or less of the car, leaving, however, a sufficient hold of five or six inches at each end.

Plaintiff's husband undertook to handle the cars in making this running switch. The car was coupled to the engine, and was run toward the switch. Deceased, being at the time on top of the car, went down the ladder, reached round the corner, took hold of the end handhold, and swung round the corner of the car, placing his feet upon the footrest at the bottom. When the proper momentum had been obtained, and the proper distance from the switch had been reached, ²⁴⁰ he held with his left hand, standing with his feet on the hold at the bottom of the car, and reached down and drew the coupling-pin, thereby uncoupling the car from the engine; the engine was then run forward, leaving the car to follow to the switch. Deceased was seen to assume these positions and make these movements. As soon as the engine pulled away from the car, deceased was seen, in an erect position, hanging to the handhold, his feet having slipped off the hold upon which he was standing. After hanging in that position for a moment his hand gave away, and he fell upon the track, and the car ran over him, causing his death.

The engineer testified: "I had started ahead, and increased the speed of the engine, and got something like thirty feet from the car when I saw him drop down. He sort of dropped a little ways, and then retained himself for an instant, and then went down."

Worthington, telegraph operator, testified: "As they made the flying switch I saw the engine leave the car. I saw him hanging by his hands before his handhold loosened. His feet had slipped from the foothold. He was holding by his hands, and held himself there for a moment. . . . I think he held with both hands. . . . He was upright, holding by his hands. His feet were not on the rest at all then."

This was the substance of the evidence as to the manner in which the accident occurred. Defendant insists that the court properly directed a verdict for defendant, and that the court erred in granting the new trial.

1. The first proposition urged by defendant is that there was no evidence of negligence on the part of defendant, and, for that reason, the court properly instructed the jury.

²⁴¹ This proposition cannot be maintained. The handhold was a necessary appliance for performing the service required of deceased under his employment. The duty of defendant required the exercise of reasonable care to furnish a handhold suitable for the purpose, and to keep it in repair. The suitability and efficiency of this handhold was shown to have been greatly impaired, and its condition was obvious to one making the most casual inspection. The handhold was necessary for the safe and prompt performance of one of the most perilous duties a brakeman is called upon to discharge, and it was a disregard of duty, amounting to negligence on the part of defendant, to send the car out in that defective condition.

2. It is next insisted that the evidence failed to show any causal connection between the bent condition of the handhold and the injury which resulted in the death of plaintiff's husband.

It is undoubtedly true, as insisted by defendant's counsel, that in actions for damages on account of negligence, plaintiff is bound to prove, not only the negligence, but that it was the cause of the damage. This causal connection must be proved by evidence, as a fact, and not be left to mere speculation and conjecture. The rule does not require, however, that there must be direct proof of the fact itself. This would often be impossible. It will be sufficient if the facts proved are of such a nature, and are so connected and related to each other, that the conclusion therefrom may be fairly inferred.

The facts proved are that the handhold was bent in the

center to such an extent as to prevent the hand from grasping it securely for a space of some six inches, while at each end there was a sufficient hold for one hand. Deceased held up most of his weight with one hand while he leaned over and with the other drew the ²⁴² pin. He then raised himself to an upright position and immediately his feet slipped from the end of the rod upon which he was standing. He was seen to swing by his hands a moment, and, not being able to sustain himself, fell upon the track. With a firm hold on the rod with both his hands, being a young and active man, we may reasonably infer that he could have regained his footing, or held himself up until the car stopped. Now, from these established facts, it seems to us that the inference might fairly be drawn by a jury that deceased fell, because, in the emergency, he was unable to secure a firm hold on the rod by reason of its defective condition. This inference, it is true, is not a necessary one. On the contrary, it might as readily and fairly be inferred from these facts that the slipping of the feet was the sole cause of the fall; that the hold, taken by the hands at the time, was only such as was necessary to sustain a balance while standing, or attempting to get round the car to the side ladder, and not to support the entire weight of the body, and a firmer hold could not have been taken after the support from the feet had given away. But the question we have to deal with here is whether there was evidence from which the jury could reasonably conclude that the bent condition of the handhold was the cause of the injury. This question being ruled affirmatively, the jury should have been left to draw the correct inference from all the facts in evidence.

3. It is said also that the condition of the handhold being obvious, deceased assumed the risk of injury therefrom. The rule is too well settled in this state to require the citation of the cases, that a person, when he enters the service of another, assumes all the risks and dangers usually incident to the employment in which he ²⁴³ engages. But the rule is equally well settled that the employer is charged with the duty of not subjecting his servants to risks by his own negligence. Under this rule he is required to use ordinary care, not only in providing sound and secure instrumentalities which they are required to employ in their work, but of keeping them in such condition. This is a continuing duty of the master, and a neglect of it is negligence. On entering

the employment the servant does not assume the risk of dangers arising from its neglect.

These general propositions we do not understand defendant to deny, but it is claimed that though the duty to repair defects is neglected by the master, if the servant is advised of it, and thereafter elects to continue in the service, and to use the defective means, he thereby assumes the risk of injury therefrom: The rule thus invoked would relieve the master of his duty as soon as the servant became aware of its violation. Such is not the law in this state. The duty to repair is a continuing one, and a failure to discharge it is negligence, though the servant may continue in the service after knowledge thereof. An express contract will not relieve him: *Blanton v. Dold*, 109 Mo. 75.

The question has often been raised, discussed, and decided, whether a servant can recover for injuries incurred in the use of machinery or appliances known by him to be defective. The nonliability of the master in such cases, however, is properly placed upon the ground of contributory negligence, rather than that of assumption of risk: *Gibson v. Pacific R. R. Co.*, 46 Mo. 163; 2 Am. Rep. 497; *Huhn v. Missouri Pac. Ry. Co.*, 92 Mo. 447, and cases cited; *Soeder v. St. Louis etc. Ry. Co.*, 100 Mo. 681; 18 Am. St. Rep. 724; *Blanton v. Dold*, 109 Mo. 75.

"Where the instrumentality with which the servant is required to perform service is so glaringly defective that a man of common prudence would not ³⁴⁴ use it, the master could not be held responsible for it": *Huhn v. Missouri Pac. Ry. Co.*, 92 Mo. 447.

"If the instrumentality by which he is required to perform his service is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage. In such case the law adjudges the servant guilty of concurrent negligence": *Patterson v. Pittsburg etc. R. R. Co.*, 76 Pa. St. 389; 18 Am. Rep. 412.

"There may be cases where a servant would be wanting in due care by incurring the risk of injury in the use of defective or imperfect machinery or apparatus, after he knew it might cause him bodily harm": *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; 85 Am. Dec. 720.

The question is one of contributory negligence, which should be submitted to the jury unless the defect is so manifestly

and glaringly hazardous that the court could declare, as a matter of law, that a person of ordinary prudence would not use it. A servant could not wholly ignore a known defect in the instrumentality provided for him, but would be required to exercise care and caution in its use. The degree of care would depend upon the nature of the defect, and the character of the use made of the instrumentality.

Under ordinary circumstances, the handhold, in its defective condition, by exercising care, could have been used for the purposes for which it was designed. It was not so dangerous as to threaten immediate injury by its use, and deceased was not guilty of contributory negligence in using it, though he had knowledge of its defects: *Soeder v. St. Louis etc. Ry. Co.*, 100 Mo. 681; 18 Am. St. Rep. 624.

Neither do we think deceased guilty of negligence in law in the manner in which he used the handhold on this occasion. The slipping of his feet created a sudden and unexpected emergency, for which he was not prepared, and we cannot say, in the circumstances, ³⁴⁵ that a failure to grasp the hold at the proper place was negligence. It was a question for the jury.

The order granting a new trial is affirmed.

All concur.

RAILROADS—DUTY TO FURNISH SAFE APPLIANCES TO EMPLOYEES.—An employee, upon entering the service of a railroad company, has the right to assume that the railroad and its appliances are so constructed as to render him safe in the performance of his duties: *Boss v. Northern Pac. R. R. Co.*, 2 N. Dak. 128; 33 Am. St. Rep. 756. It is a duty that a railway owes its employees, and which it is required to perform, to furnish suitable appliances by which the service is to be performed, and to keep them in repair and order: *Daves v. Southern Pac. Co.*, 98 Cal. 19; 35 Am. St. Rep. 133; *Mason v. Richmond etc. R. R. Co.*, 111 N. C. 482; 32 Am. St. Rep. 814, and note with the cases collected.

NEGLIGENCE—PROXIMATE CAUSE—PROOF OF.—Negligence must not only be alleged and proven, but it must also be shown that it caused the injury complained of: *Robinson v. Flint etc. R. R. Co.*, 79 Mich. 323; 19 Am. St. Rep. 174. See, further, the extended notes to *Campbell v. Stillwater*, 50 Am. Rep. 569, and *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807.

MASTER AND SERVANT—ASSUMPTION OF RISK—GENERAL RULE.—An employee, when he enters into service, agrees to assume all risks ordinarily incident to his employment: *St. Louis etc. Ry. Co. v. Davis*, 54 Ark. 389; 26 Am. St. Rep. 48, and note; *Victor Coal Co. v. Muir*, 20 Col. 320; 46 Am. St. Rep. 299; *Michael v. Roanoke Machine Works*, 90 Va. 492; 44 Am. St. Rep. 927, and note.

MASTER AND SERVANT—ASSUMPTION OF RISKS—DEFECTIVE APPLIANCES. Every servant has a right to suppose that his master has provided such

means of protection from injury in the use of machinery, tools, and appliances, as are reasonably necessary for his safety, and he cannot be held to have assumed risks attendant on their absence, unless such absence is apparent, or his attention has been called to it: *Kehler v. Schwenk*, 151 Pa. St. 505; 31 Am. St. Rep. 777, and note; *Bess v. Northern Pac. R. R. Co.*, 2 N. Dak. 128; 33 Am. St. Rep. 756, and note. But if injury is suffered by an employee through defects in the machinery or appliances furnished by his master and used in the business, the servant cannot recover if he knew or had a means of knowledge equal to that of the master concerning such defects, and yet continued in the service, provided no inducement, such as a promise to cure the defect, leads him to so continue: *Victor Coal Co. v. Muir*, 20 Col. 320; 45 Am. St. Rep. 299, and note; but compare *Meador v. Lake Shore etc. Ry. Co.*, 138 Ind. 290; 46 Am. St. Rep. 384, and note; and see the note to *St. Louis etc. Ry. Co. v. Davis*, 25 Am. St. Rep. 52, where the cases are collected.

ROBERTS v. BARNES.

[127 MISSOURI, 405.]

SUNDAY LAWS.—A DEED OF TRUST executed and acknowledged on Sunday is not void under a statute simply prohibiting the performance of work and labor on that day.

SUNDAY LAWS.—CONTRACTS made on Sunday in matters of business, other than such as are prohibited by statute, are valid.

FRAUDULENT CONVEYANCES.—A deed of trust given to an administrator to secure a debt to the estate, and made upon a secret trust that part of the proceeds of the sale of the property on foreclosure shall be turned over to the grantor by such administrator, is fraudulent and void as against other creditors of the grantor.

FRAUDULENT CONVEYANCES.—A conveyance to secure a bona fide indebtedness, which creates a secret trust in favor of the grantor for the purpose of concealing from his other creditors a portion of his property, and ultimately depriving them of any benefits to be derived therefrom, is fraudulent and void as to them.

Turner, Hinton & Turner, for the appellant.

W. Gordon, for the respondent.

405 **BRACE, P. J.** This is an action in equity by the plaintiff, assignee of a judgment against the defendant Thomas J. Barnes, to set aside a deed of trust executed by the said Barnes and wife, dated the seventeenth day of January, 1891, and certified to have been acknowledged by them on that day by Josiah Hall, J. P., whereby the said Barnes and wife conveyed, subject to a prior deed of trust for four thousand five hundred dollars, to defendant W. A. Gooding, a tract of land containing three hundred and twenty acres in Boone county, in trust to secure the payment of four promissory notes, amounting, principal and interest, to about the sum of three

thousand five hundred dollars, payable to William Bratton, late of that county, deceased, and of whose estate the defendant James W. Bratton was then administrator, on the ground that the deed was executed and acknowledged on Sunday—was made for the purpose of defrauding the creditors of the said Barnes, and in secret trust for his benefit. The court, upon the hearing, found for the defendants and dismissed the bill, and the plaintiff appeals.

At the time of the execution of the deed of trust in question, the said Barnes was insolvent, and being pressed by his creditors. The notes secured thereby were found among the assets of William Bratton, deceased, by his son and administrator, James W. Bratton.

Barnes' first wife was a daughter of William Bratton, deceased, and his children by her were distributees of that estate. Tillman Kemper married another daughter of the said William Bratton, and he was thus interested in the estate. Kemper, who was introduced as a witness in behalf of the defendant, testified, in substance, as follows:

"I had a conversation with Thomas J. Barnes about the execution of this deed of trust the Saturday ⁴⁰⁰ night before the instrument was drawn. I had been trying for some time to get him to do something about this deed of trust. He claimed that he had paid a portion of the amount due on these notes which he owed the estate, but had no evidence of the fact. I told him he ought to secure the notes, and we talked the matter all over that Saturday night at his house. And the next morning he came to me and said: 'I believe I will give a deed of trust covering the whole thing.' I told him that was what he ought to do; that he would pay his individual debts, and that his children would get a benefit of it. And I told him if he paid these other debts, it would go where neither his people nor his children would get any good of it. James Bratton came to Barnes' house the next morning. I think he was sent for. I told him in the house, in the presence of Barnes, that Barnes had agreed to give the deed of trust covering all the notes. Then Barnes had his son Alfred there, and they went out into the yard and had another conversation, but I do not know what was said between them."

Thomas J. Barnes, who was introduced as a witness by the plaintiff, testified: That on Sunday morning, January 18,

1891, Tillman Kemper and James W. Bratton were at his house urging him to give a deed of trust on his farm to secure some notes (the same described in the deed of trust) which they claimed witness owed the estate of William Bratton, deceased; but that witness claimed that he had paid all but one note, and refused to give any deed of trust whatever at first, but that he finally agreed to do so on certain conditions; that these conditions were that, when the deed of trust was closed out by sale of the land, Bratton should collect and refund to witness all the proceeds of sale over and above the amount necessary to pay the note which he admitted to be due, which at that time, with interest, ⁴¹⁰ amounted to about eleven hundred dollars. It was also agreed that Bratton should have Judge Hall to draw up a paper showing that he would carry out the conditions; that witness' son, A. M. Barnes, came out to witness' house about the time the agreement was made between witness, Bratton, and Kemper, and heard the conditions stated; that, pursuant to the arrangements thus made, the parties then went to Hallsville and saw Judge Hall about drawing up the deed of trust; that it was then arranged that witness should return home, and bring his wife to A. M. Barnes' house in Hallsville that same Sunday afternoon to execute the deed of trust; that, in accordance with this arrangement, witness and his wife met Bratton and Hall at A. M. Barnes' about 4 o'clock Sunday afternoon, and that, on this occasion, the whole agreement about the deed of trust and the conditions upon which it was to be given were stated to Judge Hall, who objected to drawing the deed and taking the acknowledgment on Sunday, on the ground that it would not be legal; but that finally, upon being urged by witness and Bratton, Hall consented to write the deed and take the acknowledgment that afternoon, and to date the certificate and deed back to Saturday, the 17th, so that no one would ever know anything about it; that it was agreed on all hands to keep the matter a secret. Tillman Kemper was not present when the deed was drawn up and executed. While the deed was being drawn up, or just afterward, it was arranged for witness and Bratton to call at Hall's office in a day or so and get him to draw up a paper showing that Bratton was to collect the full amount of the deed of trust, and then pay back to witness all over and above the eleven hundred dollar note; that this paper was never drawn up, however, because wit-

ness and Bratton thought it best not to do so; that they did not want to make the matter public.

⁴¹¹ A. M. Barnes, son of Thomas J. by his first wife, being introduced as a witness, by the plaintiff, testified: That on Sunday morning, January 18th, he rode out to his father's house and there found his father, Tillman Kemper, and James W. Bratton; that his father desired him to witness an agreement between himself and Bratton about giving a deed of trust on his farm; that Thomas J. Barnes then stated that he would repeat the agreement between them, which was that Barnes should give a deed of trust on his farm to Bratton covering the notes held by Bratton as administrator of William Bratton, deceased, against Barnes; and that when the land was sold under the deed of trust, Bratton should pay back to Barnes all the proceeds of sale over and above one note, which would give Barnes about two thousand dollars to start on again, as Kemper and Bratton said. Bratton agreed to these conditions, and said he would give Barnes an instrument in writing binding him to carry them out; that on that same Sunday afternoon witness again met Thomas J. Barnes and wife, and James W. Bratton, and also Judge Hall at witness' residence in Hallsville; that on that occasion Judge Hall drew up the deed of trust in question; Thomas J. Barnes and wife executed it, and Judge Hall took their acknowledgment; that this was all done on Sunday afternoon, January 18, 1891; that when the deed of trust was finished it was left with Judge Hall for him to fill out a blank about a former deed of trust to Gatewood.

Josiah Hall, the justice, was introduced as a witness by the plaintiff, who testified: That he had on Sunday, the eighteenth day of January, 1891, at the residence of A. M. Barnes, in Hallsville, at the instance of T. J. Barnes and J. W. Bratton, drawn up the deed; and that Barnes and wife signed and acknowledged the same before him as justice of the peace on that ⁴¹² day; and that he had written out his certificate of acknowledgment at the same time and place; that when the deed of trust was drawn up, executed, and acknowledged, James W. Bratton and Thomas J. Barnes were present, and A. M. Barnes, who was the son of Thomas J. Barnes, was present, part of the time; that these were all who were present, except that Mrs. Ellen Barnes, Thomas Barnes' wife, was called in to sign and acknowledge the deed. The notes embraced in the deed were handed witness by J.

W. Bratton, and each was fully described in the body of the deed. Barnes claimed that he only owed one of the notes—one of the larger ones, which at the time, amounted to about eleven hundred dollars; he claimed to have paid off the other notes in William Bratton's lifetime. It was understood between the parties then present that Barnes should give Bratton a deed of trust on his land embracing all the notes, and, that when the land was sold under the deed of trust, Bratton should pay back to Barnes all the land should sell for over and above enough to pay the eleven hundred dollar note, which he admitted that he still owed. The witness further states that Tillman Kemper had, earlier in the day of Sunday, the 18th, called at his house and requested him to go to A. M. Barnes' house that afternoon and draw up this deed; that he objected to doing this justice work on Sunday, and insisted that it would not be legal if done; but that both Barnes and Kemper, and afterward Bratton, insisted that witness should proceed that afternoon to draw up and take the acknowledgment to the deed; that he could date the deed and his certificate back to the 17th (Saturday), and nobody would ever know the difference; and that it was insisted by Barnes and Bratton that all should keep it secret.

Witness did, as urged by the parties, date the ⁴¹³ deed and certificate back to Saturday, the seventeenth day of January, 1891. When signed and acknowledged the deed of trust was left with witness with the understanding that he should on the following day, Monday, January 19, 1891, take it to Columbia, and, after inserting in a blank left for that purpose the description of the deed of trust theretofore given, he was to file it for record in the recorder's office, all of which witness did. Witness further stated that while drawing up the deed, or just afterward, at A. M. Barnes' house, T. J. Barnes and J. W. Bratton had some conversation about getting witness to draw up a paper between them showing the conditions upon which Barnes had agreed to give the deed of trust. As a matter of fact, however, they never came to witness to have this paper written; why, the witness did not know.

Defendant James W. Bratton testified in his own behalf, in substance, as follows: "The first interview I ever had with T. J. Barnes in regard to giving me this deed of trust was in his house on Sunday morning, January 18, 1891. Mr. Tillman Kemper was present at this talk we had in his house.

I don't know whether Kemper was present when we finally talked the matter over, near his well in his yard, or not. A. M. Barnes was present at this conversation. Thomas J. Barnes was suspicious of me, for some reason, and had his son present to hear what was said between us, and he repeated over the conversation we had in the house. Thomas J. Barnes told me in this conversation that he would give me the deed of trust to secure the notes, if I would give him as much as he claimed he had paid on them. I told him I did not know whether he had paid those other notes or not, or anything about that. He then said he would give me the deed of trust if I would give him my proportional part of the notes he claimed to ⁴¹⁴ have paid that I might get out of the estate. I was an heir, and had a fifth interest in the estate. I told him whatever amount I received from the estate on account of the notes he claimed to have paid from the sale of his land, under the deed of trust, I would give him my part of it if he would give me the deed of trust, and he said he would do it. . . . The only proposition I made Barnes was, that I would give him my part of this debt, that might be paid by me out of these notes he claimed to have paid. . . . I went to A. M. Barnes' house that evening where Hall drew up the deed of trust. I do not know who brought Hall there. He was at Barnes' house when I arrived there, and Hall and Thomas J. Barnes came to the house a little while after I had been there. I had no conversation with either of them about the conditions upon which the deed of trust was to be executed. Not a word was said about it at A. M. Barnes' house. Hall was but a little while drawing up the deed of trust. I gave him the notes, and he went on to draw up the deed of trust. I don't know who told Hall about the notes I wanted to secure, but I presume Barnes told him. I laid the notes on the table. I had talked the matter over with Barnes that morning and had no further talk with him in regard to the matter."

The foregoing extracts from the evidence present the salient features of the case.

1. That the deed of trust was executed on Sunday is beyond question. Is it void for that reason? Plaintiff contends that it is, because by statute it is provided that: "Every person who shall either labor himself, or compel or permit his apprentice or servant, or any person under his charge or control, to labor or perform any work, other than the house-

hold offices of daily necessity, or other works of necessity or charity, . . . on the first day of the week, commonly called Sunday, ⁴¹⁵ shall be deemed guilty of a misdemeanor": Rev. Stats. 1889, sec. 3852. And in support of this contention we are cited to 1 Jones on Mortgages, section 623, and several cases from other states, maintaining the proposition that "statutes forbidding the transaction of business on Sunday have the effect to render void all contracts executed upon that day."

But these authorities are not in point under our statute, which contains no such comprehensive provision, and the inhibitions of which are limited to work and labor, hunting game and shooting, in the section cited; to horseracing, cock-fighting, and playing at cards or any games, in section 3854; and to exposing for sale any goods, wares, or merchandise; keeping open any ale or porter house, grocery or tippling shop, and retailing any fermented or distilled liquor on Sunday, in section 3855. While contracts growing out of a violation of these provisions of the statute are void, and will not be enforced by the courts (*Bernard v. Luppig*, 32 Mo. 341,) other business contracts are left by our statute as they were at common law, and as the common law makes no distinction between Sunday and any other day, as to the making of contracts, and all other acts, not of a judicial nature, it is not seen upon what principle a note or deed, executed on Sunday, could for that reason alone be held void; and so it has been ruled in this state that a promissory note executed on Sunday is not, for that reason, void: *Kaufman v. Hamm*, 30 Mo. 387; *More v. Clymer*, 12 Mo. App. 11; *Glover v. Cheat-ham*, 19 Mo. App. 656.

And elsewhere, under statutes similar to ours, it has been held that contracts made on Sunday in matters of business, other than such as is prohibited by statute, are valid: *Bloom v. Richards*, 2 Ohio St. 387; *Boynton v. Page*, 13 Wend. 425; *Johnson v. Brown*, 13 Kan. 529; *Horacek v. Keebler*, 5 Neb. 355; *Hellams* ⁴¹⁶ *v. Abercrombie*, 15 S. C. 110; 40 Am. Rep. 684; *Moore v. Murdock*, 26 Cal. 514.

The cases in which contrary rulings have been made will be found in the main to be under statutes which prohibit generally the transaction of any secular business on Sunday, except works of necessity or charity; but such is not the scope of our statute, nor of the statutes of many of the states. It was not necessary to pass upon this question in *Gwinn v.*

Simes, 61 Mo. 335, and the fact that the judgment of the court upon the subject was reserved in that case ought not to impair the force of the authorities cited.

The fact that the acknowledgment was taken on Sunday neither impairs nor strengthens the integrity of the instrument. Acknowledgment is for the purpose of registration, and registration, to impart notice. No question of notice or priority of lien is involved in this issue. It follows from what has been said that the deed of trust cannot be held to be void because executed and acknowledged on Sunday.

2. This brings us to the main question, which is one of fact to be determined by the testimony, and for that purpose it does not seem necessary that the weight of the evidence should be ascertained, for the reason that from all the evidence it is manifest that either one or the other of two propositions must be true; that in this deed of trust, given to secure a debt which in whole or in part was due and owing from Thomas J. Barnes to the estate, there was concealed a trust for his benefit, either in the amount of all the proceeds that might be realized from a sale of the land over and above the note, amounting in principal and interest to about the sum of eleven hundred dollars, as testified to by Thomas J. and Alfred M. Barnes, and Squire Hall, or in so much of that amount as might be the share of James W. Bratton, as distributee of the estate, as testified to by ⁴¹⁷ him—and, whichever story be credited, it is equally manifest that this secret trust was willfully and knowingly created by the grantor and beneficiary, for the purpose of concealing from the creditors of the grantor a portion of the debtor's property, and ultimately depriving them of any benefits to be derived therefrom, under cover of a conveyance to secure a bona fide indebtedness. Such a contrivance was a fraud upon the creditors of Thomas J. Barnes, whether he was thereby to secure two thousand dollars or three thousand dollars, according to the one agreement testified to, or only five hundred dollars or six hundred dollars, according to the other agreement testified to, and it was the common fraud of both parties to the deed, for which the deed of trust should have been set aside.

The judgment is reversed and the cause remanded.

All concur.

SUNDAY LAWS—WHAT CONTRACTS NOT INVALID.—At common law, acts performed on Sunday were valid, unless expressly prohibited; consequently,

contracts made, work and labor done, and even business of one's ordinary calling, were not considered illegal because performed on that day: *Amis v. Kyle*, 2 Yerg. 31; 24 Am. Dec. 463, and note; to the same effect see *Kepner v. Krefer*, 6 Watts, 231; 31 Am. Dec. 460, and note; *Adams v. Hamell*, 2 Doug. 73; 43 Am. Dec. 455, and note. A contract is not void because made on Sunday, within a statute prohibiting "labor" that "disturbs the peace and good order of society": *Richmond v. Moore*, 107 Ill. 429; 47 Am. Rep. 445, and note. So, a mortgage executed on Sunday is not void either at common law or under a statutory prohibition of the exercise on that day of acts in the "ordinary calling" of citizens: *Hellams v. Abercrombie*, 15 S. C. 110; 40 Am. Rep. 684, and note. This question will be found further discussed in the notes to the following cases: *Costello v. Ten Eyck*, 24 Am. St. Rep. 134; *Handy v. St. Paul etc. Pub. Co.*, 16 Am. St. Rep. 699; *Allen v. Duffie*, 38 Am. Rep. 165; *Myers v. Meinrath*, 3 Am. Rep. 371; *State v. Lorry*, 32 Am. Rep. 557; *Hazard v. Day*, 92 Am. Dec. 794, and *Robeson v. French*, 45 Am. Dec. 237.

FRAUDULENT CONVEYANCES—WHAT ARE.—A bond and mortgage given partly to secure a real debt, but partly to protect the obligor's property against certain persons holding his indorsements, is fraudulent and void: *Barrett v. Nealon*, 119 Pa. St. 171; 4 Am. St. Rep. 628, and note. A mortgage designed and made by the mortgagor to enable him to continue in business by placing his property beyond the reach of legal process is void, though intended in good faith for the ultimate benefit of all the creditors: *Sabin v. Columbia Fuel Co.*, 25 Or. 15; 42 Am. St. Rep. 756, and note. Where a conveyance purporting to be absolute is in fact accompanied by a secret trust that the creditors shall hold the property merely as security, and shall hold any balance realized after the discharge of the debt subject to the order of the debtor the transaction will be held fraudulent and void as to other creditors: *McCulloch v. Hutchinson*, 7 Watts, 434; 32 Am. Dec. 776.

FOX v. WINDES.

[127 MISSOURI, 502.]

DEEDS, CORRECTORY—ADVERSE POSSESSION.—After the acceptance by grantees of a deed of correction from their grantor in lieu of a prior deed from him, misdescribing the land intended to be conveyed, the grantor's possession of the land first conveyed to such grantees is adverse to them.

DEEDS—PRESUMPTION.—One who has sold land is presumed to have made a deed to the purchaser.

DEEDS, CORRECTORY—ESTOPPEL.—The acceptance by grantees of a deed of correction from their grantor in lieu of a prior deed executed by him, misdescribing the land intended to be conveyed, and the sale by such grantees of the land conveyed to them by the subsequent deed, estop them from claiming title to the land conveyed by the first deed.

DEEDS, CORRECTORY—ELECTION.—The acceptance by grantees of a deed of correction from their grantor in lieu of a prior deed executed by him, misdescribing the land intended to be conveyed, constitutes an election by the grantees to take the land conveyed by the deed of correction and a relinquishment of title to the land conveyed by the prior deed.

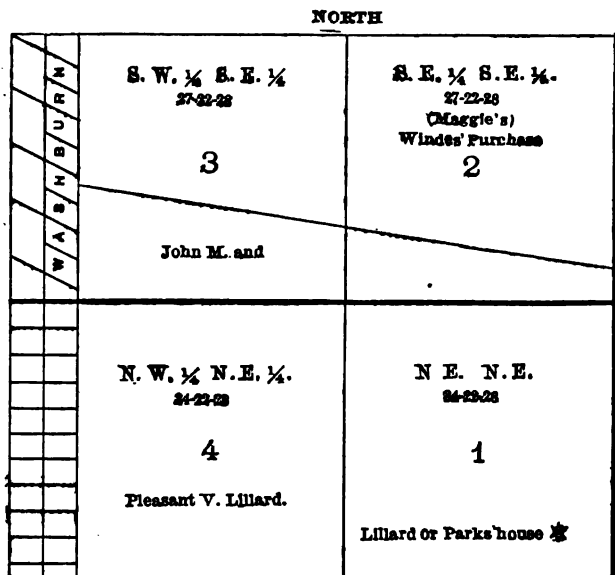
ELECTION.—ONE WHO ACCEPTS BENEFITS under an instrument must adopt the whole of it, conforming with all its provisions and renouncing all rights inconsistent therewith.

EVIDENCE.—DECLARATION OR OPINION OF HUSBAND while living on his wife's land, as to the nature of her title, is inadmissible in evidence to bind her or the land.

DEEDS OF CORRECTION — ELECTION — ADVERSE POSSESSION.—If grantees accept a deed of correction from their grantor, conveying different land from that conveyed to them by a prior deed, misdescribing the land intended to be conveyed, and sell the land conveyed to them by the deed of correction, the fact that the original grantor does not remit to them all of the purchase money received by him from their grantee does not affect their election to take the land conveyed to them by the deed of correction, nor does it affect the original grantor's adverse possession of the land described in the prior deed containing the misdescription.

APPEAL—HARMLESS ERRORS.—If the result reached by the trial is correct, errors in giving or denying declarations of law, or in giving or denying instructions, must be treated as harmless on appeal.

EJECTMENT for the southeast quarter of the southeast quarter of section 27, township 22, range 28. Plaintiffs are the children and heirs at law of John M. Lillard. The tract of land in dispute is part of one represented by the following plat:



James M. Lillard is the common source of title to the whole of the land. He had three children, John M., Pleasant V., and Sarah M., commonly called "Maggie." On

March 6, 1867, James M. Lillard conveyed to his sons, J. M. and P. V., land in the southeast quarter of the southeast quarter, and the southwest quarter of the southeast quarter of section 27, township 22, range 28. On March 4, 1867, he conveyed to his daughter "Maggie" the northwest quarter of the northeast quarter of section 34, township 22, range 28. On March 10, 1869, the same grantor conveyed to his sons, J. M. and P. V., the southwest quarter of the southeast quarter of section 27, township 22, range 28, and the northwest quarter of the northeast quarter of section 34, township 22, range 28. This deed recited: "That this deed is made in lieu of a certain deed made and executed by us before Ezekiel H. Cave, justice of the peace, on the sixth day of March, 1867, and recorded in book 'H,' pages 125 and 126, in the recorder's office in Barry county, Missouri, by G. L. Carlin, recorder, in which said deed the numbers of the land are incorrectly given, making us convey the northwest quarter of the northeast quarter of section, township, and range aforesaid to Sarah M. Lillard." On March 10, 1869, the same grantor conveyed to his daughter, Sarah M., the southeast quarter of the southeast quarter of section 27, township 22, range 28. This deed recited: "And we by these presents further state, this deed is made in lieu of a certain deed made and executed by us before Ezekiel H. Cave, justice of the peace, on the fourth day of March, 1867, and recorded in book 'H.'" In April, 1869, John M. and P. V. Lillard conveyed and sold the southwest quarter of the southeast quarter of section 27, and the northwest quarter of the northeast quarter of section 34, township 22, range 28, to one Booth, who conveyed it to Dr. Long, who conveyed it to Windes, the present defendant. Judgment for defendant. Plaintiffs appealed.

Frost & Wear and H. C. Pepper, for the appellants.

N. Gibbs and T. M. Allen, for the respondent.

510 SHERWOOD, J. Upon the foregoing facts detailed in evidence, we have no doubt that defendant was entitled to judgment. There was no warrant in the evidence on which to base the conclusion that the possession ⁵¹¹ of James M. Lillard was in any sense "permissive" after he had made the two reciprocal deeds of correction of April 10, 1869, and especially after the acceptance of one of them by John M. Lillard, whom we shall presume after such a lapse of time

was acting for his brother, Pleasant V. And it will be presumed, also, that John M. and his brother, having sold the land to Booth, they executed a deed in conformity thereto, for this was in the usual course of business: *Fitzgerald v. Barker*, 85 Mo. 13.

The deed of correction made at the time indicated, followed by an acceptance and sale of the land by John M. for himself and brother, assisted by his father and Dr. Long, as well as the presumption last aforesaid, constitute evidence, of the most cogent nature, of a ratification of the correction made in the two deeds. In such circumstances the possession of the father, James M., was no more "permissive," as to the rest of the land, than if he had never, in the first instance, made a deed to his sons. His possession was, therefore, as much adverse toward them as toward anyone else, and the usual consequences would of course attend such adverse possession.

But another view may be taken of this matter which will result as unfavorably to plaintiffs as the former one, to wit: John M. Lillard, by accepting for himself and brother the deed of correction, made the acceptance at the time, and the sale thereafter, in a manner, that precluded either of them from subsequently asserting anything to the contrary of what might be reasonably inferred from those acts; in a word, that acceptance and that sale constituted an election and a tacit relinquishment to the property in suit.

On this topic a learned author says: "The doctrine of election is founded upon the principle that there is an implied condition, that he who accepts a benefit ⁵¹² under an instrument must adopt the whole of it, conforming with all its provisions, and renouncing every right inconsistent with them. The principle is recognized and established in this country almost precisely the same as in England, and rests upon the equitable ground that no man can be permitted to claim inconsistent rights with regard to the same subject, and that anyone who claims an interest under an instrument is bound to give full effect to that instrument as far as he can. A person cannot accept and reject the same instrument, or, having availed himself of it as to part, defeat its provisions in any other part; and this applies to deeds, wills, and all other instruments whatsoever": 2 Herman on Estoppel and Res Judicata, sec. 1023, p. 1156. See, also, 2 Story's Equity Jurisprudence, 13th ed., sec. 1080.

This doctrine of election, which prevents the assertion of repugnant rights, is but an extension of the law of equitable estoppel: 1 Herman on Estoppel and Res Judicata, 11. And the estoppel was properly pleaded in the answer.

It is proper to say here that it is immaterial whether the alteration in the deeds was the result of original mistake, or of a subsequent desire to make a change in the land conveyed, and would not affect the result already announced as to the application of the doctrine of election.

There was no error in refusing to let Parks give his opinion as to the interest of John M. Lillard in the litigated premises. His wife held under the married woman's act of 1865, and no declarations of her husband could bind her or the land, even while he was living on the premises with her. His sole deed could not affect her interests in the land, and certainly his "word of mouth" could not do more than his deed: *Mueller v. Kaessmann*, 84 Mo. 318, and cases cited. If the declarations or opinion of Parks were inadmissible ⁵¹³ while living on his wife's land, as to the nature of her title, then a fortiori were they incompetent after her possession had ceased and they were attempted to be used against his wife's grantee.

The court, at the conclusion of the case, made this finding: "The court finds from the evidence in this case that John M. Lillard assented to and approved of the making the two deeds, dated April 10, 1869, read in evidence in this case, by his father, James M. Lillard, and acquiesced in the change intended to be made by James M. Lillard by the said deeds of April 10, 1869, and that plaintiffs are not entitled to recover in this action."

This finding was not as comprehensive as it should have been, inasmuch as it did not embrace within its scope the acquiescence or election of Pleasant V. Lillard, of which there was sufficient evidence as already stated. His death, it appears, occurred in October, 1869, and it is now claimed that, as he died a single man, John M. Lillard inherited a portion of his brother's interest, and, as his father died in 1882, and his mother in 1886, he inherited a portion of their interests in the disputed premises. Respecting this claim, it may be said that this cause was not tried on that theory in the lower court. Moreover, the considerations heretofore adverted to, of election, and of the statute of limitations, effectually cut off any right which those claiming under Pleasant V. Lillard

had. Under this view, the point that the finding of the court lacked in comprehensiveness becomes immaterial.

Nor does it affect either the question of election, or of the statute of limitations, that all the money paid by Booth to James M. Lillard, for the land the latter had deeded to his sons on the tenth day of April, 1869, was not transmitted by him to his sons in Texas; the question of the disposition of the proceeds of such sale was ⁵¹⁴ one between the father and his sons, just as it would have been between any other agent and his principals: *Long v. Joplin Min. etc. Co.*, 68 Mo. 433.

It is unnecessary to discuss the declarations of law given or refused. Under the evidence, the finding could not have been otherwise, and, when this is the case, it is our custom to treat errors in giving or denying declarations of law, or in giving or denying instructions, as harmless: *Fitzgerald v. Barker*, 96 Mo. 661; 9 Am. St. Rep. 375; *Greer v. Lafayette County Bank* (Mo., March 8, 1895), 30 S. W. Rep. 319, and cases cited.

Holding these views, we affirm the judgment.

All concur.

WITNESSES—HUSBAND AND WIFE—COMPETENCY.—A husband cannot testify where the wife has an interest involved in the litigation: *Johnson v. Boice*, 40 La. Ann. 273; 8 Am. St. Rep. 528; or in which she is a party: *Cramer v. Reford*, 17 N. J. Eq. 367; 90 Am. Dec. 594. A statute removing the disability of witnesses on the ground of interest does not render the husband and wife competent witnesses, the one for or against the other: *Gee v. Scott*, 48 Tex. 510; 26 Am. Rep. 331. A wife is a competent witness for her husband on the trial of civil actions, under the Connecticut statute: *Merriam v. Hartford etc. R. R. Co.*, 20 Conn. 354; 52 Am. Dec. 344. See, also, the notes to *Chamberlain v. People*, 80 Am. Dec. 258, and *Stuts v. Boyd*, 27 Am. Dec. 377.

SALENO v. CITY OF NEOSHO.

[127 MISSOURI, 627.]

MUNICIPAL CORPORATIONS—ORDINANCES—PASSAGE.—The fact that an ordinance is not signed by the mayor of a city after its passage does not render it invalid, if the statute requiring it to be so signed also provides that, if the mayor shall "neglect or refuse to sign any ordinance, or return the same with his objections in writing at the next meeting of the board of aldermen, the same shall become a law without his signature."

MUNICIPAL CORPORATIONS—ORDINANCES—APPROVAL.—The approval of an ordinance by the acting president of a board of city aldermen, made during the absence of the president of the board, is valid.

MUNICIPAL CORPORATIONS—CONTRACTS.—Failure to make a contract in duplicate, and to file it with the proper city officer as required by statute, does not make a contract entered into with the city void, if the statute does not make such filing of the contract a condition precedent to its validity.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—CONSTITUTIONAL LIMIT.—A contract by a city to pay a fixed price annually for a supply of water for twenty years, payment to be contingent on the water being supplied, does not create a debt on the part of the city for the aggregate amount which may ultimately become payable, within the meaning of a constitutional provision limiting the yearly indebtedness which may be incurred by the city.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—CONSTITUTIONAL LIMIT.—Contracts for the annual supply of municipalities with such necessities as light and water, and contracts for the payment therefor, do not create a debt for the aggregate amount which may become due upon a compliance with the terms of the contract, within the meaning of a constitutional provision limiting the yearly indebtedness which may be incurred by a city.

Thurman & Wray and J. H. Pratt, for the appellant.

O. L. Cravens and G. Hubbert, for the respondent.

§33 **BURGESS, J.** This is an action upon a contract alleged to have been entered into between plaintiff and defendant, under which plaintiff erected for defendant, a city of the fourth class, a system of waterworks, and §33 defendant granted to plaintiff a waterworks franchise for a term of twenty years, and agreed to pay plaintiff, for the use of water for city and other purposes, two thousand dollars a year for the use of fifty water hydrants for a term of twenty years, and thirty dollars per year for each additional hydrant which the city, by its board of aldermen, might order for the use and benefit of the city. The action is for hydrant rental due. As to the amount there is no controversy.

The validity of the contract is denied by defendant, the only evidence thereof and details being included in an ordinance of said defendant, No. 113. Section 15 of said ordinance reads as follows: "This ordinance shall become binding as a contract on the said city of Neosho, in the event that said S. V. Saleno or his assigns shall, within ten days from the passage and publication thereof, file with the city clerk of said city his written acceptance of the terms, obligations, and conditions of this ordinance; and, upon such acceptance, this ordinance shall constitute the contract, and shall be the measure of the rights and liabilities of the said city and of the said S. V. Saleno."

On the fifteenth day of October, 1890, this ordinance was submitted to a vote of the people for ratification after its passage by the board of aldermen, under authority of an ordinance, No. 114, in which was set forth the object and purpose of the election to be held for the ratification or rejection of the contract as set forth in said ordinance first named, which last-named ordinance provided for all the details for holding the election, including notice thereof, polling places, the kind of ballots to be used, manner of ascertaining and declaring the result of the election, and certifying the same.

An election was held in pursuance of the provisions ⁶³⁴ of this ordinance, which resulted in an almost unanimous vote in favor of ratifying the contract as set forth by ordinance No. 113. On the day next after the election, being October 16, 1890, the city clerk, by order of the board of aldermen, notified plaintiff that the contract had been ratified by a vote of the people of Neosho, voting at an election held in said city on the day previous, at which there were more than two-thirds of the legal votes polled at said election in favor of ratifying said ordinance No. 113, there being two hundred and ninety-three votes polled for its ratification, and thirty-two votes against it.

On the seventeenth day of October, 1890, plaintiff filed with said board his written acceptance of the contract. Plaintiff then gave bond, entered upon the construction of the waterworks, which were completed, and subsequently, to wit, November 23, 1891, accepted by the board of aldermen. By the terms of the contract the hydrant rental is made payable semi-annually, on the first days of January and July of each year. This suit was brought for the hydrant rental which became due July 1, 1892. The trial resulted in a judgment for defendant, and from the judgment plaintiff appealed.

The court declared the law to be: 1. That the contract set forth in ordinance No. 113, ratified by the people, and accepted by the plaintiff, as shown by the records of the city, was not sufficient to constitute a valid contract between plaintiff and defendant, and refused to declare the law to be that it was not necessary, in order to the validity of the contract, that it should be upon one paper, signed by both plaintiff and defendant, and that, if the terms of the contract in said ordinance were ratified by the voters of defendant city, at an election lawfully held for that purpose, and plaintiff

§ 2 thereafter in writing accepted such terms, that the same constituted a valid contract. 2. That if the hydrant rental could not be paid out of the levy of fifty cents on the one hundred dollars, after paying all current expenses of the city, it constituted a debt for the amount that might ultimately become due, and refused to declare the law to be that a contract to pay the two thousand dollars a year for hydrant rental for a term of twenty years did not constitute a debt, within the meaning of section 12, article 10, of the state constitution, without reference to performance.

Plaintiff's first contention is that ordinance No. 113 was signed by the acting mayor, attested by the clerk, ratified by a vote of the voters of the city of Neosho, and accepted in writing by the plaintiff, and constituted a valid contract for furnishing said city with water, according to the terms and conditions as set forth in said ordinance.

Defendant is a city of the fourth class. By section 1599 of the Revised Statutes of 1889, which pertains to such cities, it is provided that: "No bill shall become an ordinance until the same is signed by the president of the board of aldermen and the mayor." By section 1616, the mayor, when present, is ex officio president of the board of aldermen.

The record shows that, although the mayor was present and presiding at the meeting of the board when ordinance No. 113 was put upon its final passage, he did not authenticate its passage by his signature as such president of the board, and, because of his failure to do so, it is insisted by defendant that the ordinance never became effective. It is difficult to see the force of this argument, when it is provided by section 1618 of the Revised Statutes of 1889, that if the mayor should neglect or refuse to sign any ordinance, or return the same with his objections in writing at the next meeting of § 3 the board of aldermen, the same shall become a law without his signature.

By the very terms of the section last quoted on the neglect or refusal of the mayor to sign the ordinance, or to return the same to the next meeting of the board of aldermen with his objections in writing thereto, it becomes a law, and his failure to so return it must be regarded as equivalent to signing it.

The notice of holding the election with respect to the ratification of the ordinance by the voters, and everything pertaining thereto, as well also as the publication of the result

of the election which was spread upon the records of defendant, seem to have been a fair and substantial compliance with the charter and ordinances of the city.

Another contention on the part of defendant is that the ordinance authorizing and calling the special election is void, for the reason that it is provided by section 9 of that ordinance that it was to take effect and be in force from and after its passage by the board of aldermen and its approval by the mayor: At the time of its passage the mayor of the city was absent, and in consequence thereof it was approved by the then acting president of the board of aldermen.

By section 1616 of the Revised Statutes of 1889, it is provided that, in the absence of the mayor, the board shall elect one of their own members to occupy his place temporarily, who shall be styled "acting president of the board of aldermen," while the following section provides that in case of temporary absence of the mayor, and until his return, the acting president of the board of aldermen, for the time being, shall perform the duties of mayor, with all his rights, powers, and jurisdiction.

This ordinance was signed "John Meyers, Acting Pres. Board of Aldermen," and its approval seems to ⁶³⁷ have been in strict compliance with the provisions of defendant's charter, under the then existing circumstances. We are, therefore, of the opinion that section 9, in so far as its validity depended upon its approval by the mayor, was and is valid, and that its approval by the acting president of the board of aldermen was all that the law required.

The objections raised by defendant as to the publication of the notice of the election, and the canvass of the returns thereof, seem to be extremely technical and without merit.

It is argued by counsel for defendant that, as the contract sued upon was not made in duplicate and subscribed by both parties thereto, nor deposited in such office or with such officer of defendant as may have been charged with the keeping of its contracts, it is void, under sections 3157 and 3158 of the Revised Statutes of 1889.

A similar question was passed on by this court May 28, 1894, in *Lamar Water etc. Co. v. City of Lamar*, 26 S. W. Rep. 1025, in which Black, C. J., speaking for the court, said: "The ordinance could not take effect as a contract until ratified by the requisite vote, but it was competent, and per-

fectly proper, to pass the ordinance to take effect when ratified. Indeed, an ordinance setting forth the terms of the contract, and then approved by the necessary vote, and accepted in writing by the persons proposing to build the works, was all that was necessary to make a perfect and complete contract."

In the case in hand the ordinance setting forth the terms of the contract was approved by the necessary vote, and accepted in writing by plaintiff, who was proposing to build the works, and clearly brings this case within the rule announced in *Lamar Water etc. Co. v. City of Lamar*, 26 S. W. Rep. 1025.

The validity of the contract in no way depends upon the provisions of said section 3158, as contended ^{ess} by defendant. By that section, in every case of contract entered into by any county, city, town, village, school district, or other municipal corporations, or by any officer or agent on their behalf, duplicate copies of the same are required to be executed, one of which shall be filed in such office or with such officer of the municipal corporation as may be charged with the keeping of the contracts thereof, and shall not be taken thence, except for the purpose of evidence in some legal matter or cause; but the law nowhere requires as a condition precedent to its becoming a contract that the instruments embodying its terms shall be signed in duplicate. If such was the law, why say "in every case of contract entered into," etc? The object and purpose of the statute in requiring duplicate copies to be executed and filed with the proper custodian was evidently for the purpose of preserving them as evidence to be used in any legal matter or cause, and not to make the duplicate copies constituent elements of the contract. Indeed, the statute provides that, in case of variance between such copies, the one on file shall control in the construction of the contract, which is very persuasive evidence at least, that the object in requiring duplicate copies to be taken was to preserve them as evidence. In executing the contract the requirements of the statute seem to have been observed, and it is not, we think, invalid because not properly executed.

Defendant contends that, under the ordinance, the city incurred, if anything, an indebtedness beyond its income and revenue for the year, and exceeding five per centum on its taxable property, while, upon the part of plaintiff, the contention is that the contract by the defendant city to pay a fixed

price annually for a supply of water, for a term of twenty years, does not constitute a debt for the aggregate amount which may ⁶³⁹ ultimately become payable, within the meaning of section 12, article 10, of the state constitution.

The only allegation in the answer that can possibly be construed as having any reference to the power of defendant to enter into the contract is that wherein it is alleged that "defendant says that the alleged contract between the plaintiff and defendant was not within the scope of the powers of defendant, nor expressly authorized by law." It does not allege that, under the contract, the city incurred an indebtedness beyond its income and revenues for the year and exceeding five per cent upon its taxable property. So that the only question that we have to deal with is as to whether the contract created an indebtedness upon the part of defendant, as contemplated by the constitution, and upon that question the authorities are not entirely in harmony.

In construing words used in that instrument, in the absence of some restriction placed upon their meaning, they must be given such meaning as is generally accorded to them. A debt is understood to be an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, depending upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed. Here the hydrant rental depended upon the water supply to be furnished to defendant, and if not furnished no payment could be required of it.

That the contract did not create an indebtedness within the meaning of the section of the constitution before mentioned finds support in the fact that said section provides that any city incurring any indebtedness requiring the assent of the voters shall, before or at the time of doing so, "provide for the collection of an annual tax sufficient to pay the interest on such indebtedness ⁶⁴⁰ as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same." The contract in suit provides for no interest; by its terms there is none to fall due, nor was the constituting a sinking fund, as required by the constitution for the payment of interest, intended to apply to simple contracts that might never be performed.

A number of cases has been cited by defendant, in which

it has been held, under constitutions containing similar provisions to those in the constitution of this state, that a contract to pay upon a contingency, as upon the happening of some event, such as the rendering service or furnishing supplies, is, in a sense, a debt: *Beard v. City of Hopkinsville*, 95 Ky. 239; 44 Am. St. Rep. 222; *Spilman v. Parkersburg*, 35 W. Va. 605; *East St. Louis v. East St. Louis etc. Co.*, 98 Ill. 541; 38 Am. Rep. 97; *Springfield v. Edwards*, 84 Ill. 626; *Law v. People*, 87 Ill. 385; *Prince v. Quincy*, 105 Ill. 138; 44 Am. Rep. 785; *Appeal of City of Erie*, 91 Pa. St. 398; *Read v. Atlantic City*, 49 N. J. L. 558; *Atlantic City Waterworks Co. v. Read*, 50 N. J. L. 666; *Niles Waterworks v. Niles*, 59 Mich. 311; *Putnam v. Grand Rapids*, 58 Mich. 416; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Coulson v. Portland*, Deady, 481.

It is worthy of remark that, in each one of the cases cited, the constitutional limit of indebtedness had been reached before the contract had been made, except *Niles Waterworks v. Niles*, 59 Mich. 311, and in that case one of the members of the court, Sherwood, J., dissented. No such claim is made as to the city of Neosho.

Among the authorities which hold to a contrary rule, and that the word "indebted," as used in state constitutions, as in section 12, article 10, of the constitution of Missouri, does not include contracts for the annual supply of municipalities with such necessities as light and water and of a similar character, and contracts ^{§41} for the payment therefor do not create a debt for the aggregate amount which may become due upon a compliance with the terms of the contract, may be cited the following: *Dively v. Cedar Falls*, 27 Iowa, 227; *Grant v. Davenport*, 36 Iowa, 401; *Budd v. Budd*, 59 Fed. Rep. 735; *Walla Walla Water Co. v. Walla Walla*, 60 Fed. Rep. 957; *State v. McCauley*, 15 Cal. 429; *Koppikus v. State Capitol Commrs.*, 16 Cal. 248; *People v. Pacheco*, 27 Cal. 207; *Carlyle Water etc. Co. v. Carlyle*, 31 Ill. App. 339; *City of Carlyle v. Carlyle Water etc. Co.*, 140 Ill. 445; *Crowder v. Sullivan*, 128 Ind. 486; *Valparaiso v. Gardner*, 97 Ind. 1; 49 Am. Rep. 416; *Weston v. Syracuse*, 17 N. Y. 110; *Utica Waterworks Co. v. Utica*, 31 Hun, 430; *Smith v. Dedham*, 144 Mass. 179. See, also, 1 Dillon on Municipal Corporations, 4th ed., sec. 135.

Our conclusion is that the weight of authority is adverse to the contention of defendant, and is in accord with the

spirit and meaning of our constitution as we understand it, and as we think also comports with better reason.

Under section 1589 of the Revised Statutes of 1889, defendant was given the power to prevent and extinguish fires, and for that purpose to provide the necessary means, including water, without first taking a vote of its citizens to authorize it to do so, but no power was given it to erect a system of waterworks for the purpose of supplying the city and the inhabitants thereof with water, or to contract with any person, company, or association, giving and granting to such person, company, or association the exclusive right to furnish by any system of waterworks for the use of the city for any length of time not to exceed twenty years, without being authorized by a vote by ballot of two-thirds of its qualified voters voting at an election held for that purpose provided by ordinance. As we have seen, the ~~642~~ ordinance providing for such an election was duly passed, and the election held, which resulted in a two-thirds vote in favor of its adoption.

There are numerous other questions raised by counsel in their briefs to which we have not adverted, as, from what has already been said, the judgment must necessarily be reversed, and the cause remanded.

It is so ordered.

All concur.

MUNICIPAL CORPORATIONS—PASSAGE OF ORDINANCES—APPROVAL.—It is prima facie evidence of the authority of an acting mayor to approve an ordinance, when it is shown that the mayor of the city has stated to the council that he will be absent from the city for several weeks, and the council, acting according to charter, has elected one of their members as acting mayor during the mayor's absence, and that the person so chosen has served as acting mayor from the time of his election down to the passage and approval of the ordinance: *Seattle v. Doran*, 5 Wash. 482, cited in the note to *Babbidge v. Astoria*, 42 Am. St. Rep. 799.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—CONSTITUTIONAL LIMIT.—This question is fully discussed in the monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 239, 240.

CASES
IN THE
SUPREME COURT
OF
MONTANA.

NORTHWESTERN GUARANTY LOAN CO. v. SMITH.

[15 MONTANA, 101.]

A GUARDIAN MAY MORTGAGE THE ESTATE OF HIS WARD under an order of court directing him to do so, when the purpose of the mortgage is to raise moneys to discharge a pre-existing mortgage and prevent the foreclosure thereof, and the statute of the state authorizes the guardian to safely keep the property of his ward to maintain the same, and deliver it to his ward at the close of the guardianship in as good condition as he received it.

C. S. Marshall, John M. Evans, R. L. McCulloch, and A. K. Barbour, for the appellant.

George W. Reeves, for the respondents.

103 DE WITT, J. The question upon this appeal is whether the mortgage given by the guardian upon his ward's estate, under the authority of the judgment of the court, is void; that is to say, had the court no power or jurisdiction to render such a judgment? Mr. Pomeroy lays it down that, "It seems to be a doctrine sustained by a preponderance of authority that a court of equity has no power, as a part of its jurisdiction over infants, to order a sale of the infant's real estate for purposes of maintenance, education, or investment": 8 Pomeroy's Equity Jurisprudence, sec. 1309, p. 332. But in his note to this remark the author refers to cases which have held a contrary doctrine: See, also, *Allman v. Taylor*, 101 Ill. 185; *Dodge v. Cole*, 97 Ill. 338; 37 Am. Rep. 111; *Smith v. Sackett*, 5 Gilm. 534; *Goodman v. Winter*, 64 Ala. 410; 38 Am. Rep. 13. But the same author says, in the same section above quoted: "The powers and duties of guard-

ians in their management of the property of infant wards, and the powers of courts to direct a sale of their lands, are so much regulated by statutes in the various states that these general rules of the purely equitable jurisdiction can have little practical application throughout the United States." We have in this state a statute which provides for the sale of the ward's estate under certain circumstances: Probate Practice Act, sec. 369. But we have no statute which directly authorizes a guardian, under order of the court or otherwise, to mortgage the real estate of his ward.

The majority of the decisions seem to be to the effect, as ¹⁰⁴ Mr. Pomeroy remarks, that the court has not jurisdiction, in the absence of a statute, to authorize a guardian to sell or mortgage the real estate of his ward. This doctrine seems to be a relic of the English doctrine of primogeniture, and was born of the desire to preserve for the infant the integrity of the corpus of the real estate. While there is no direct authority in our statute to mortgage the ward's real estate, still we have the declaration of the statute that the guardian must safely keep the property of his ward; that he must maintain the same, with its buildings and appurtenances, and deliver it to the ward, at the close of his guardianship, in as good condition as he received it: Probate Practice Act, sec. 422. Whether we should ever be prepared to hold that a court could empower a guardian to mortgage the real estate of his ward for the purpose of raising money for the ward, or for his support or maintenance, we think we need not now determine, for such exact question we do not think is here presented. In this case no money whatever came to the guardian or to the ward by virtue of this mortgage to plaintiff, and no encumbrance was placed upon the ward's property additional to that which was already there. In effect, the guardian, under the order of the court, simply exchanged creditors. He exchanged a pressing and unfortunate creditor for one who was willing to let the loan stand for three years more. It appears by the judgment of the court, in authorizing the loan and mortgage, that the ward's estate was about to be sacrificed by foreclosure and wholly lost, and that it could probably be saved to the ward by negotiating with a new proposed creditor. Of course, it appears, in the light of subsequent events, that the estate has not been finally saved to the ward, but the case may be looked at from the point of view which the court occupied when it made the

order allowing this present loan and mortgage. As far as appeared to the court this transaction was certainly not to the disadvantage of the ward, but was for her probable advantage. None of the reasons adduced against the policy of allowing the ward's estate to be mortgaged apply to the transaction before us. There was no encumbering the ward's estate, for it was already encumbered in the identical amount. It is said that it is not good policy to allow a mortgage upon ¹⁰⁵ the estate of a ward, lest it may finally eat up the estate, and the ward, at majority, receive nothing. But the encumbrance was already there, and the estate was to be eaten up at once by the foreclosure of the Missoula Loan & Building Association mortgage. The new mortgage simply postponed this devourment—which, under the old mortgage, would have been at once—to a period three years later, with the probability, as appeared, of finally saving the estate, or a portion of it, and the certainty of saving the rents and profits for three years. Therefore, not an argument or reason against the policy of allowing a mortgage upon the ward's estate applies to the facts before us. The guardian must safely keep the property of his ward, and deliver it to the ward, at the close of his guardianship, in as good condition as he received it: Probate Practice Act, sec. 422. If the guardian, and the court as his superior, had allowed the mortgage of the Missoula Loan & Building Association to be foreclosed, the guardian could not have kept the estate at all, and he never could have delivered it to the ward in any condition. He adopted a course, under the order of the court, which seemed to offer a prospect of his keeping the estate for his ward, without adding one dollar's worth of burden to the estate more than it was already carrying. As a matter of fact he lightened the burden, for he obtained the new loan at the rate of six per cent interest, whereas the old loan was accumulating against the estate of the ward at the rate of nine per cent interest.

It was said in *Smith v. Sackett*, 5 Gilm. 545, as follows: "The jurisdiction of the court of chancery to order the sale of the whole or a portion of the estate of an infant, or to order it to be encumbered by a mortgage, whenever the interest of the infant demands it, will not be denied, whether that interest be of a legal or an equitable nature. Such is one of the objects of this suit, and it certainly seems that the case made by the bill shows a strong necessity for the exercise of

that power. As I have already shown, the infant has an equitable interest in this land, of considerable value, for the property is averred to be worth some three thousand dollars. The interest of the infant manifestly requires that the lien or encumbrance upon the estate should be discharged." So the interest of this ¹⁰⁰ infant in this case manifestly required that the mortgage debt to the Missoula Loan & Building Association should be discharged, or, if this could not be done, carried to a later, and perhaps more prosperous, period; otherwise the infant would have, at that time, lost her estate. It was held in *Allman v. Taylor*, 101 Ill. 185, that the court might order the sale of an infant's unproductive real estate in order to raise money to pay an encumbrance upon productive property, and save the latter to the infant.

We are of opinion that under the facts of this case the doctrine announced in many decisions, against mortgaging a ward's estate, is not here applicable. The court, as superior guardian of the infant, here had reason to believe that it saw an opportunity to save the infant's estate, not by creating a debt, or by borrowing money, but by simply transferring an already existing debt from one creditor to another. The court had reason to believe that this would be of advantage to the infant, and indeed it was some advantage, although the final result is that the infant loses her estate now, instead of three years before.

The judgment in this case is reversed, and the cause is remanded, with directions to overrule the demurrer.

PEMBERTON, C. J., and HARWOOD, J., concurred.

GUARDIAN AND WARD—POWER OF GUARDIAN TO MORTGAGE WARD'S PROPERTY.—An infant's guardian cannot bind the ward for a loan, nor make him liable jointly with anyone else who is to have part of the money borrowed: *Wood v. Truax*, 39 Mich. 628. A mortgage in fee, executed by a guardian upon the ward's land, being wholly unauthorized by the statute, is void so far as the interests of the ward are concerned: *Merritt v. Simpson*, 41 Ill. 391. A statute authorizing a court to order the renting, sale, or other disposal of the real and personal property of minors, does not empower such court to authorize a guardian to mortgage his ward's real estate: *Truick v. Bunnell*, 11 Or. 58; 50 Am. Rep. 456.

STATE v. HENDRICKS.

[15 MONTANA, 194.]

CRIMINAL LAW—INFORMATION—BILL OF PARTICULARS.—A defendant charged in an information with having kept a certain house of ill-fame, commonly called a bawdy house, open to the public night and day, for common bawdry, then and there situate on Sixth street, in a city, county, and state named, is not entitled to a bill of particulars. The information is sufficiently specific in its facts.

INFORMATION—IMMATERIAL VARIANCE.—If an information charges the keeping of a house of ill-fame on Sixth street, and the evidence tends to prove that it was kept on North Sixth street, the variance is immaterial.

EVIDENCE.—GENERAL REPUTATION FOR LEWDNESS OF WOMEN who live in a house is admissible in a prosecution for keeping a house of ill-fame.

EVIDENCE.—THE REPUTATION FOR LEWDNESS OF A DEFENDANT charged with keeping a house of ill-fame is admissible in evidence on the trial of such charge.

EVIDENCE.—THE GENERAL REPUTATION OF A HOUSE, AS BEING A HOUSE OF ILL-FAME, is admissible in evidence in a prosecution of a person charged with keeping such house. Such reputation is not alone sufficient to sustain a conviction. There must be some evidence of the actual use of the house as a house of ill-fame.

CRIMINAL LAW.—THE KEEPING OF A HOUSE OF ILL-FAME MAY BE ESTABLISHED BY EVIDENCE of its general reputation, and of the gathering there of men and women for illicit intercourse, and of their lewd conduct, and profane and obscene language, and from other facts and circumstances which may induce the conclusion that the house was in fact used for purposes of prostitution.

JURY TRIAL—INSTRUCTIONS—IMMATERIAL ERROR.—An incomplete and wholly inapplicable statement of the law, on the trial of a prosecution for keeping a house of ill-fame, does not entitle the accused to a reversal of a judgment of conviction, when the essential elements of the offense were properly stated in other instructions.

PROSECUTION under an information charging the defendant with having kept and maintained "a certain house of ill-fame, commonly called a 'bawdy house,' and open to the public night and day for common bawdry, then and on said other days and times there situate on Sixth street, in the city of Miles City, county of Custer, and state of Montana, and then and said other days and times, by her, the said Fannie French, kept and used as a house of ill-fame, and then and on said other days and times there resorted to for the purpose of prostitution and lewdness; and the said Fannie French, in said house, and, for her own lucre and gain, certain evil-disposed persons, whose names to said informant aforesaid as yet are not known, as well as men and women of evil name and fame and of dishonest conversation, do fre-

quent and come together, did then and on said other days and times there unlawfully and wickedly cause, permit, and procure, and said men and women in said house, as well in the day as in the night, then and on said other days and times, there did suffer and permit to be and remain whoring, to the common nuisance of all good citizens, then and on said other days and times there resided, passing, and being, and an evil example to all others in like case offending, and against the peace and dignity of the state of Montana." The defendant, being convicted, made a motion for a new trial, which being overruled, she appealed.

Middleton & Light, for appellant.

H. J. Haskell, attorney general, *Ella L. Knowles*, and *C. H. Loud*, for the state.

197 HUNT, J. The errors relied on will be noticed as presented by the briefs. Defendant moved the court to require the county attorney to give her a bill of particulars—that is, "a more specific statement of facts or evidence upon which the plaintiff will rely on the trial of said cause." We think the court correctly overruled this motion. The information was sufficiently specific in its facts, and the charge was so plainly stated that the particular evidence which the state intended to produce was properly withheld from defendant until trial.

As will be observed by the information, the house is alleged to be situate on Sixth street, in the city of Miles City. On the trial the state's witnesses swore that the street was Sixth, and was known as Sixth, but the defendant introduced a plat of Miles City, showing that the house was on North Sixth street. Granting that this was a variance, it was an immaterial one, and could not prejudice the rights of defendant.

Upon the trial witnesses were asked as to the general reputation of the women who lived in the house—whether they were virtuous or not. The same question was asked in relation to defendant herself. These questions were all objected to as incompetent. We are of opinion that the better reasoning sustains the ruling of the court in permitting proof of the general reputation for prostitution and lewdness of the persons, inmates of the house. It tends to prove the character of persons who resort to the place, and the intent of the keeper, and the general character of the house itself. The

illicit acts which establish a woman's character as a prostitute are very difficult to prove; and, of necessity, in order to place sufficient facts before a jury from which they may draw common-sense and legitimate inferences, there are a few classes of cases, of which this is one, where, to develop truth, character may be affirmatively proved by the prosecution, and by hearsay evidence of general reputation: *Commonwealth v. Gannett*, 1 Allen, 7; 79 Am. Dec. 693; *Commonwealth* ¹⁹⁸ *v. Kimball*, 7 Gray, 329; 2 Bishop's Criminal Law, sec. 112; *State v. Hull*, 18 R. I.; 26 Atl. Rep. 191; Wharton's Criminal Evidence, sec. 281; *State v. Brunell*, 29 Wis. 435; *State v. McDowell*, 1 Dud. (S. C.) 346; *Territory v. Stone*, 2 Dak. 155; *Drake v. State*, 14 Neb. 535.

This view being supported by the weight of authority, it is difficult to see why the reputation of any particular inmate of the bawdy house should not be inquired into because such inquiry may involve the defendant herself. The principle of law that the character of a defendant may not be attacked by the state unless she puts her character in issue by her defense cannot be said to be violated because the evidence of her reputation is not admitted to prove that, inasmuch as the defendant is a prostitute, she is, therefore, a bad woman, and thus would be more likely to commit the crime charged against her, but as bearing upon a material issue in the information—that is, the character of the inmates of the house, of which she may happen to be one, and the character of the house, and the intent of the keeper. For these purposes we hold that, in cases like the one at bar, such evidence is competent and proper, particularly when limited by an instruction to the jury as to its applicability. A woman may live, as the sole inmate and keeper of a bawdy house; yet, if several of the cases cited by appellant correctly state the law, although the reputation of the inmates of a bawdy house is a proper subject of investigation, still there could be no testimony offered to prove the fact that she was by reputation a prostitute, simply because she was the person charged with the offense. We think such a distinction is not well founded, and prefer to lay down the rules fixed in those cases which put the defendant keeper, if an inmate, on a plane with the others, whose characters become matters of common repute: See *Sparks v. State*, 59 Ala. 82; *State v. Brunell*, 29 Wis. 435.

The court charged the jury, by instruction No. 11, as follows: "It is competent for the state to prove by reputation

the character of the house, and of the inmates, and of those who frequented the house, for the purpose of proving the character of the house kept; but whether or not the defendant was the actual keeper of said house cannot be proven by reputation. ¹⁰⁰ You must be satisfied by other proofs, beyond a reasonable doubt, that she was the keeper, before you can find her guilty." The use of the house being material, the appellant argues that this statement of the law by the court was error. She contends that even if the court holds that the reputation of the inmates of a bawdy house may be legally proved to be bad, for purposes herein discussed, nevertheless the character of the house itself may not be so proved, but that positive evidence must be adduced for that purpose. There are a few cases which decide that, where the house has the reputation of being bawdy, the jury may find as a fact, from such evidence alone, that it is a bawdy house, and is used as such; but we are of opinion that, the use of the house for evil purposes being a material fact, there should be proof of such actual use, and that reputation alone, without such proof, is insufficient. Such was evidently the theory of the county attorney in the conduct of this case, because he carefully avoided the introduction of any testimony pertaining to the reputation of the house, and relied entirely upon proof of facts of a most positive nature. We do not hold that the state must prove the reputation of the house, as do some cases (*Cadwell v. State*, 17 Conn. 467), but that, while evidence of its general reputation is competent as bearing upon its character, yet there must be some testimony of its actual use as a house of ill-fame: *State v. Smith*, 29 Minn. 193; *State v. Boardman*, 64 Me. 523; *Toney v. State*, 60 Ala. 97; *State v. Lee*, 80 Iowa, 75; 20 Am. St. Rep. 401. This proof may be made by showing, as was done in this case, the gathering at the place of men and women for illicit commerce of the sexes, by the lewd conduct of such persons, by their obscene language and profanity, or by other facts and circumstances from which may be deduced the conclusion that the house was in fact used for purposes of prostitution and lewdness.

By the instruction above quoted the jury were told that the character of the house could be proved by reputation. This is the law, provided there are other facts or circumstances in connection with such evidence of the reputation which satisfy the jury, beyond a reasonable doubt, that the house is not only one of ill-fame, but is used for purposes of

prostitution and ²⁰⁰ lewdness. But that portion of instruction No. 11 just examined was inapplicable to the case at bar, for the reason, as stated before, that there was no testimony at all introduced by the state to prove the reputation of the house in question. The charge was not pertinent, and, although by itself incomplete, yet defendant cannot complain, provided the jury could not have been misled, and provided, further, the law was fully and correctly stated elsewhere in the charge.

We have made a most careful examination of the entire instruction given to the jury in this case, and our conclusion is that the law was correctly stated. By instruction No. 4, the court, after telling the jury that a person might be convicted of the crime charged if she knowingly permitted any of the inmates of her house to use any portion thereof for the purposes of prostitution and lewdness, expressly charged them, among other things, that such a use was necessary to justify conviction. The language given was as follows: "And you further find from the evidence, beyond a reasonable doubt, that said house was so used and occupied, . . . then the defendant would be guilty of the crime charged in the information." The sentence quoted was a correct statement of the law predicated upon the evidence. It told the jury what must be proved, and, upon the point under consideration, was a fair statement of the whole law applicable to the testimony adduced on the trial. But, again, the jury was told, in instruction No. 18, that, to constitute a nuisance, the house must be kept as a place of public prostitution. This was also proper, and, when considered with instruction No. 4, required the jury to be satisfied by the evidence, beyond a reasonable doubt, that the house was both used and kept for bawdy purposes. In the light of these instructions, and the overwhelming weight of testimony to support the verdict, the jury could not have been misled in their deliberations. Moreover, the court did not assume in instruction No. 11 to state all the facts necessary to sustain a conviction; and, inasmuch as the essential elements of the offense were properly charged in other instructions based on the testimony, the defendant could not have been injured by an incomplete, but wholly ²⁰¹ inapplicable, statement of law: *Bird v. State*, 107 Ind. 154; *Thompson on Trials*, 2407. The judgment heretofore modified by this court is sustained.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

DISORDERLY HOUSES—EVIDENCE OF GENERAL REPUTATION OF INMATE.—Evidence of general bad character for chastity of females who frequent a house is competent to show that the house is of bad repute, on an indictment for keeping a house of ill-fame: *Commonwealth v. Gannett*, 1 Allen, 7; 79 Am. Dec. 693. Under an indictment for keeping a disorderly house and permitting lewd persons to frequent it, it is competent to prove by witnesses the reputation for lewdness of the women who frequent the house: *Beard v. State*, 71 Md. 275; 17 Am. St. Rep. 536, and note.

DISORDERLY HOUSE—EVIDENCE OF REPUTATION OF DEFENDANT.—Evidence of common reputation, as to character of a person, is not sufficient to justify his conviction on an indictment for keeping a house of ill-fame; he must be shown to be the keeper in order to sustain a conviction: *State v. Hand*, 7 Iowa, 411; 71 Am. Dec. 453, and note. This subject is especially discussed in the extended note to *Henson v. State*, 50 Am. Rep. 209-211.

DISORDERLY HOUSES—EVIDENCE OF GENERAL REPUTATION.—A house may be proven to be disorderly by evidence of its general reputation, or of the general reputation of its inmates: *Harkey v. State*, 33 Tex. Cr. Rep. 100; 47 Am. St. Rep. 19, and note.

BLAKE v. DICK.

[15 MONTANA, 236.]

LANDLORD AND TENANT.—THERE IS NO IMPLIED WARRANTY that a dwelling-house is in a tenantable condition, or that it will be kept in such a condition.

LANDLORD AND TENANT.—A TENANT ASSUMES THE RISKS OF THE CONDITION of premises if he inspects them before accepting a lease and the landlord is not guilty of any concealment.

LANDLORD AND TENANT—DEFECTIVE CONDITION OF PREMISES.—The fact that the premises were so situate that rain was liable to flow into the basement and render it unfit for use, and that this defect at the time of leasing was not apparent, because the weather was warm and dry, does not entitle the tenant, after accepting a lease, to surrender and abandon the premises, when he had an opportunity for inspecting them and no fraud or concealment was practiced upon him.

LANDLORD AND TENANT.—AN AGREEMENT OR PROMISE, AFTER A LEASE OF PREMISES HAD BEEN ACCEPTED, to repair defects in them, or to put them in a better condition, is without consideration and void.

LANDLORD AND TENANT.—WHERE A LANDLORD CANNOT BE HELD LIABLE for the creation of a nuisance, he cannot be held responsible for any act not negligent or wrongful in trying to abandon it at the request of the tenant.

LANDLORD AND TENANT—WAIVER.—IF A TENANT LEAVES THE DEMISED PREMISES, BUT AFTERWARD RETURNS AND REMAINS THEREIN for some months, he waives any right he may have had to set up fraud, deceit, or eviction.

LANDLORD AND TENANT.—AUTHORITY TO ACCEPT A SURRENDER of leased premises, which the tenant leaves without lawful justification, is not implied from authority to collect the rents thereof.

LANDLORD AND TENANT.—CONSENT TO THE SURRENDER OR ABANDONMENT OF LEASED PREMISES is not implied from the failure of the landlord to return a key which the tenant had left with a clerk authorized to collect rents.

ACTION to recover rent of certain premises for the months of October, November, and December, 1891, under a lease made in April of the same year. The leased premises consisted of a dwelling-house in the city of Helena. The term of the lease was one year, and the rental forty dollars per month, payable monthly in advance. The lease did not contain any covenants upon the part of the landlord that the premises were or should be kept tenantable or in repair. The defendant, in his answer, alleged that, after he had entered into the occupancy of the premises, they became untenable by means of water flowing into the basement room and washing therein large quantities of mud and filth from the back yard, rendering the premises unfit for use, and dangerous to the health; that the plaintiff agreed to render the place fit for use and tenantable, and did partially remedy the same, but neglected to remedy the primary cause of the deposit of water and filth, and that at the occasional rains of the season the basement became flooded with water carrying mud and filth from the back yard; that the plaintiff, though notified at various times of the condition of the premises, and requested to remedy the same, and though informed that defendant would abandon the lease, had but partially removed the mud and filth, and in so removing it spread the same over the yard, rendering the place unfit for habitation, and more dangerous to the health of the occupants, and that because of the unhealthy and untenable condition of the premises, the defendant abandoned them on September 13, 1891, notifying plaintiff thereof, and that plaintiff accepted the premises, and had been in possession thereof, and offered them for rent. Verdict and judgment in favor of the plaintiff for the amount claimed. Defendant moved for a new trial, which being denied, he appealed.

J. W. Kinsley, for the appellant.

M. Bullard, for the respondent.

340 **HUNT, J.** The lease between Blake and Dick was the ordinary contract between landlord and tenant; there was therefore no implied warranty on the part of Blake that the dwelling-house leased was in tenantable condition, or would

be kept in such condition; nor, at the time of the original contract between the parties, was there any obligation on Blake's part to make any repairs of the cellar or ground. These rules of law are too well settled to require a citation of authorities to support them: *Bowe v. Hunking*, 135 Mass. 383; 46 Am. Rep. 471, and cases cited.

Defendant, in his answer, having admitted the execution of the lease and nonpayment of rent, assumed the burden of proof to escape liability under its terms. He was asked "if there was any change in the condition of the basement about that time [meaning July, 1891] from what he found it." This question was objected to and the objection sustained, whereupon defendant made the following offer of proof:

"I now offer to show that these premises were so situated that any rain or storm was liable to flood this basement and render it unfit for use; that, at the time this defendant leased this building, it was warm, dry weather, and that defect was not apparent to him at the time; that tenants who had occupied the building before this defendant had occupied it complained, and were obliged to leave on account of a similar defect; that by the rain of about July 4th, this cellar was filled with filth, manure, mud, and water, which ran into it from a stable-yard belonging to the plaintiff on the premises immediately adjoining; that the basement was filled with water to the depth of some six or eight feet, and also with the filth from the barnyard; that it remained so for some week or ten days; that the plaintiff or his agent came there and offered to remove it, admitted that they were liable to remove it, and undertook to remove it; that they took it from the basement and spread it around in the yard of the premises, and left it in manure piles and piles of rubbish and garbage, and that these piles of rubbish and garbage so distributed upon the premises rendered the whole premises unfit for occupation, and that by reason of this change in the premises, making it dangerous to ²⁴¹ the health and lives of the family of the defendant, he was obliged to and did surrender the premises to the plaintiff."

Plaintiff objected to the offer, upon the ground that such proof was irrelevant and immaterial, and, if established, would constitute no defense to the complaint. The court sustained this objection.

The defendant contends that because the facts in relation to the situation of the premises, and the construction of the

dwelling-house, and the liability of the water to run down into the cellar, were not apparent to him at the time he leased the property, it became the duty of the landlord to disclose all such "defects" to him, and that, not having done so, he was guilty of fraud in procuring the lease. But the tenant cannot complain. The landlord did not warrant the condition of the premises; the tenant, by the evidence, inspected them; he took the risk of their condition: *Taylor's Landlord and Tenant*, sec. 328. We find no plea of concealment by the landlord of any fact of which the tenant did not have full opportunity of informing himself, and, accepting, as we do, all the facts to be true as pleaded and offered, in relation to the occasional rains causing draining of water into the cellar from the stable-yard of the landlord, there can be no deduction that, by reason of such overflow or drainage, there was any suppression of the truth, or any concealment of facts, or other conduct positively or inferentially fraudulent on the part of the plaintiff before or at the time of the execution of the lease. *Milliken v. Thorndike*, 103 Mass. 385, relied on by appellant, was decided upon a wholly different state of facts from that in this case. There the lessees set up that before the execution of the lease they had a conversation with the lessor, and that by the false representations of the lessor of material facts which he knew to be false when he made them, or positively affirmed as of his own knowledge, they were induced to sign the lease, and that such conduct was fraudulent, and rendered the lease null and void. And the decision in that case was based entirely upon the ground that, by the deceit of the landlord and the abandonment of the premises immediately upon the discovery of the fraud, the defendant could obtain relief. The case has no application. Here, Blake, the landlord, was not obliged, by any relation ³⁴³ of the parties to the lease under consideration, to remove the mud and filth from the cellar. His act in so doing was, therefore, gratuitous, and any agreement on his part to remove it was without consideration, and void: *Purcell v. English*, 86 Ind. 34; 44 Am. Rep. 255; *Wood's Landlord and Tenant*, sec. 382.

The further argument, that the landlord incurred a liability when he undertook to remedy the defect, but failed, might be applicable, under proper averments, in tort, upon the principle, however, that where a person has assumed to make repairs, and has failed to exercise a proper degree of care in

making them, and injury results, redress is afforded the injured party, independent of any contract existing between the parties. But there is no such plea or contention before us.

The defendant next says that by the spreading of the filth upon the yard the premises became unfit for habitation, and more dangerous to the health and lives of the family of defendant, and thus a nuisance was created which constituted an eviction, and justified him in quitting the possession. The facts show, however, that the primary nuisance was the filth in the cellar, which made the premises unfit for use, and dangerous to health. For this condition and its causes the landlord was not liable, and where he cannot be held liable for the creation of the nuisance, we hold he cannot be held responsible for any act not negligently or wrongfully done involuntarily, by request of the tenant trying to abate it. Moreover, the conduct of the defendant Dick is inconsistent with the claim on his part that he was evicted. He swears that he left the premises in July, but after about ten days' absence returned, and remained in them until September. We are of opinion that by his return and stay he waived any rights he may have had to set up fraud, deceit, or eviction: *Wood's Landlord and Tenant*, sec. 481; *Gear on Landlord and Tenant*, sec. 160, and note.

Defendant finally pleads a surrender. He testified that, when the October bill for rent was rendered to him, he returned the key, writing at the foot of the bill rendered that he considered the house untenable, and refused to pay any more rent, and that he afterward saw a notice "For Rent" posted upon the premises. The key and note were delivered ²⁴³ to a Mr. Hopkins, who worked for Wallace & Thornburgh, from whom defendant hired the premises, and who appear to have offered the house for rent in September after defendant vacated. But no surrender is proved. The defendant did not establish any authority whatever in Hopkins to terminate the lease or to consent to the abandonment of the premises: *Thomas v. Nelson*, 69 N. Y. 118. Even granting that Hopkins, as a clerk of the agents of the landlord, had authority to collect the rent from the defendant, such authority was a recognition of the existence of the contract, and that it would continue in force; but an agency to collect the rent of premises does not, by implication, and without further proof of authority, carry with it the right to accept a surrender, where a tenant, without legal justification, has

quitted the premises before the term is completed: *Woodward v. Lindley*, 43 Ind. 333; *Baylis v. Prentice*, 75 N. Y. 604.

The appellant argues that the conduct of the landlord, however, in not returning the key, and in offering the house for rent, amounted to an acceptance and release. But it was not incumbent upon the landlord, if he got the key, to seek out the tenant and return it to him. And we hold that in the absence of any testimony of a surrender to the landlord himself, or of any acceptance of the premises by him, or by his authorized agents, proving an intent to consent to an abandonment by the tenant, the delivery of the key to Hopkins, and its retention, and a subsequent offer to rent, are not, without further evidence, sufficient to relieve the tenant of rent due under the lease for such time as the house was empty: *Nelson v. Thompson*, 23 Minn. 508; *Withers v. Larabee*, 48 Me. 570; *Ladd v. Smith*, 6 Or. 316; *Bowen v. Clark*, 22 Or. 566; 29 Am. St. Rep. 625.

In conclusion, upon a review of the authorities and facts, we are of opinion that there was no eviction and no surrender by agreement, or by operation of law, and that the direction to the jury to find for the plaintiff was correct.

The order denying a motion for new trial and the judgment are affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

LANDLORD AND TENANT—IMPLIED WARRANTIES.—In the lease of a building there is no implied warranty that it is safe, suitable for habitation, or properly adapted to the uses to which it was applied, nor that it shall continue fit for the purposes for which it is demised: *Davidson v. Fischer*, 11 Col. 583; 7 Am. St. Rep. 267, and note; extended note to *Minneapolis Co-operative Co. v. Williamson*, 38 Am. St. Rep. 477, 480, fully discussing the subject.

LANDLORD AND TENANT—ASSUMPTION OF RISKS OF CONDITION OF PREMISES.—A lessee of real property must run the risk of its condition, unless he has an express covenant on the part of the lessor on that subject: *Franklin v. Brown*, 118 N. Y. 110; 16 Am. St. Rep. 744, and note; extended note to *Minneapolis Co-operative Co. v. Williamson*, 38 Am. St. Rep. 478.

LANDLORD AND TENANT—REPAIR OF PREMISES.—A landlord is not bound to keep the leased premises in repair, unless he has covenanted to do so: *Ward v. Fugin*, 101 Mo. 669; 20 Am. St. Rep. 650, and note; *Gregor v. Cady*, 82 Me. 131; 17 Am. St. Rep. 466, and note; notes to *Sawyer v. McGillicuddy*, 10 Am. St. Rep. 264.

LANDLORD AND TENANT—AUTHORITY TO ACCEPT SURRENDER.—A general agent who executed the lease has an implied power to accept a surrender: *Amory v. Kannoffsky*, 117 Mass. 351; 19 Am. Rep. 416.

LANDLORD AND TENANT—SURRENDER OF PREMISES.—Where a tenant vacated the premises during the term, and gave the keys to the landlord, who took and retained them, but notified the lessee that he should hold him for the rent, and then let the premises to another after notifying the lessee of his intent to do so, it was held that the lessee was liable for the difference in the rent received: *Auer v. Penn*, 99 Pa. St. 370; 44 Am. Rep. 114.

BRADSHAW v. DEGENHART.

[15 MONTANA, 262.]

JURY TRIAL—MISCONDUCT OF JURORS.—THE ACCEPTANCE OF DRINK by a juror, furnished at the expense of the prevailing party or his attorney, will turn the scale against the verdict, unless it is shown that it was not intended to influence his action and had no influence on his mind. The burden of proving that the treating was not done with the desire to influence the juror, and did not have that effect, must be assumed by the party who paid for the refreshments.

JURY TRIAL—MISCONDUCT OF JURORS—WAIVER OF.—If some of the jurors accept drink at the expense of a party to the action, whose adversary is also included in and accepts the invitation to drink, he thereby contributes to the misconduct of the jurors, and cannot, after failing to object until a verdict against him, avail himself of the irregularity as a means of escape from the verdict. Especially is this true in a chancery case, where the verdict is advisory only, and has been adopted by the chancellor who made special findings in harmony therewith.

Forbis & Forbis, for the appellant.

F. W. Cole and H. R. Whitehill, for the respondent.

SEE HUNT, J. The appellant makes two points: 1. That the evidence was insufficient to sustain the verdict of the jury; and 2. Misconduct of the jury. Upon the first point, after reading the testimony of the many witnesses produced upon the trial, the truth of the admission of counsel for the appellant is confirmed, that there was a substantial conflict in the evidence upon the material issues in the case. The verdict is fully supported by the evidence. In such a case, by the well-established precedents of this court, the verdict of the jury, where it has been reviewed by the court below, in determining the credit to be given to the witnesses, will not be disturbed.

Upon the ground of misconduct of the jury, the affidavits show that by permission of the court, before the arguments of counsel, the jury were allowed to visit the irrigation ditch in question, and, for the purpose of viewing the ground, were gone the better part of two days. While the jury were on

their way to view the premises, in charge of the undersheriff, Thomas F. Ward, and while they were at the town of Drummond, several jurors were invited by the plaintiff, William C. Bradshaw, to drink or smoke with him. The facts and circumstances are set forth in the affidavit of the undersheriff, who had charge of the jury, and who swears as follows:

"That it was agreed between the parties to said suit that each should pay one-half of the costs and expenses of such visit to the said premises, and affiant was instructed by the attorneys of the respective parties that all the expenses of transportation, food, and entertainment would be so paid, and this affiant did collect such costs and expenses in equal proportions from the plaintiff and defendant; that while affiant, with the ²⁷⁰ said jury and others, was at the town of Drummond waiting for the train to convey them to Philipsburg, affiant was invited by W. C. Bradshaw, the plaintiff, to take a drink with him; that they went to the saloon of Samuel Ritchie, and all the persons in said saloon at that time were also asked by Bradshaw to drink; that among the number so invited were some of the said jurors, but the names of whom and the number thereof affiant does not now remember and does not know; that the defendant, L. C. Degenhart, and some of his witnesses were among the number; that, altogether, about twenty-five persons were present and were treated at the same time by the said Bradshaw; that there was a general invitation by Bradshaw to all persons present to drink, and no special invitation was given by said Bradshaw to the jury or any particular jurymen; that nothing was said or done by the said Bradshaw for the purpose of influencing the verdict of the jury at the time of said treat; that by agreement of the attorneys of the respective parties the said Degenhart and Bradshaw were, by an order of the court, permitted and authorized to accompany affiant and the jury to view the said premises, and, except when viewing said premises, the jury were, by agreement of the parties and the instruction of the court, permitted to separate, and were not kept together or under control of affiant."

The plaintiff, Bradshaw, also filed an affidavit in which he corroborates Ward, and says that, by permission of the court, he and the defendant accompanied the jury. That by agreement they were permitted to separate, and "that while the parties, the officer in charge of the jury, the jurors, and many of the persons who had been witnesses in the trial of said

cause, and other persons, were at the town of Drummond awaiting the departure of the train for Philipsburg, this affiant did invite the officer in charge of said jury to take a drink with him; that the said officer and some of the jury also joined them; that the defendant, L. C. Degenhart, and some of his witnesses, as well as other persons, were invited by affiant, and all, to the number of about twenty-five persons, were treated to liquor or cigars at affiant's expense; that all of said jurors did not participate in said treat, but affiant believes that two of ²⁷¹ them did join, to wit, Beacock and McMahon; that nothing was said or done by this affiant for the purpose of influencing said jurors in their verdict, and affiant believes, and so states, that no jurymen was influenced in his verdict by reason of said treat at affiant's expense; that affiant is informed and believes that jurors E. Girard, Joseph Richards, P. C. Patterson, F. W. Dunton, Thos. Blakeley, and Tobias Schurtz, James Beaton, Lars Beck, and Peter Johnson, and Ed Newman were not present, and did not participate in said treat."

Affidavits were filed by jurors Beaton, Dunton, Newman, and Beck, to the effect that they were not present, did not drink with, nor were they, or any of them, treated by the said Bradshaw at the time mentioned. The jurors Dunton and McMahon swore that the jurors Patterson, Schurtz, Johnson, Girard, Richards, and Blakeley were not present and did not drink with nor at the expense of plaintiff, Bradshaw. John McMahon, a juror, by affidavit admits that he took a cigar at the expense of plaintiff, Bradshaw.

Beacock was the one juror who evidently did take a drink.

The mere fact that the jurors took the refreshment is, by itself, not enough to vitiate their verdict: *Territory v. Hart*, 7 Mont. 489; *Territory v. Burgess*, 8 Mont. 57.

The inquiry in this case involves the further element, however, of whether the verdict must be set aside because the jurors respectively smoked and drank at the expense of the successful party.

The rule adopted by many courts seems to be, that "where a juror has been treated, fed, or entertained by the successful party, or at his expense, a new trial will in nearly all cases be granted," upon grounds of public policy and without regard to any investigation into whether the verdict was right or wrong: *Thompson and Merriam on Juries*, sec. 372, and cases cited.

Thompson on Trials, section 2566, qualifiedly approves the general rule, by stating that the circumstance that the drink was furnished at the expense of the prevailing party or his attorney "will turn the scale against the verdict, unless it is shown that it was not intended to influence his action in the cause, and had no such influence on his mind." To sustain the rule without the qualification stated, the author cites the ²⁷² learned opinion of Justice Garber of Nevada, in *Sacramento etc. Co. v. Showers*, 6 Nev. 291, where it was decided, in 1871, that because jurors drank liquor at the expense of the prevailing party during a trial, either by design or inadvertence, in the presence or out of the presence of the bailiff, a verdict must be set aside.

To uphold the rule as limited, the author relies upon the case of *Pittsburgh etc. Ry. Co. v. Porter*, 32 Ohio St. 328, decided in 1877, where the court, after reviewing the earlier decisions, holds that "the mere fact of treating jurors by a party during the progress of a trial, so far evinces a purpose to influence them that, unexplained, it is held to be a ground for vacating a verdict rendered in his favor."

Under the rule as limited, it appears, therefore, that the burden of explaining that the treating was not done with the design of influencing the jurors is upon the party who paid for the refreshment.

We approve of the limitation, and have no hesitation in establishing the practice that whenever a juror has been guilty of any such impropriety as to accept, during the progress of a case, liquor or tobacco, or any other such favors at the expense of a litigant to the suit on trial, or his attorneys, the burden of proof is upon the prevailing party to satisfy the court that "it can be safely assumed" the mind of the juror was not improperly influenced, and that the party's conduct in no way operated upon him to corrupt his verdict. Indeed, we are inclined to hold that the rule without the limitation is sound, and that if a juror accepts a treat from a party to a suit without the knowledge or acquiescence of the opposite party, and no opportunity is given the opponent to bring the matter to the court's or judge's notice until the judge has charged the jury, or until after verdict is rendered, such misconduct on the part of a juror, when made the ground for a new trial, is enough to require the court to set aside a verdict upon the ground of public policy, and the necessity of the honest and impartial administration of justice.

But the case before us is not quite like any cited by either counsel, and is not to be wholly governed by the applications of any of the decisions referred to.

²⁷³ Here the jury, bailiff, and the parties were waiting for a train at a small town. The plaintiff, after asking the bailiff to drink, extended his invitation to all others present, including two jurors, the defendant, witnesses who were there, and others who happened to be in the saloon. There is nothing tending to prove that the plaintiff sought the jurors or intended in any manner to influence any one who was present. The casual manner in which the treating was done negatives the idea of improper motive. Not a word was said about the case, and it does not even appear that the plaintiff had any conversation at all with the jurors.

Nevertheless, if the defendant had not been present and thus known of the conduct of the jurors, we should be inclined, as above stated, to follow the general rule that the mere fact that the jurors drank or smoked at plaintiff's expense would, in the fear of "possible improper motives," demand that the verdict be set aside. At least it would take a very strong showing to sustain the verdict of a jury in such a case.

But where a defendant himself so far forgets the proprieties of the relation which exists between a jury with a case on trial before them and a party to such trial, as to not only drink with them, but does so at the plaintiff's expense, we think he contributes to the misconduct of the jurors and of the plaintiff, and stands upon about the same footing, provided he makes no complaint before the court charges the jury, and in no manner seeks to have the error cured.

The learned counsel for appellant says that it was a very trying situation for the defendant, and that most men under like circumstances would have accepted plaintiff's hospitalities. We are not prepared to admit this contention, but assuming it is a correct observation of human nature, still, if, despite his better convictions, by moral weakness, or by intensity of his zeal to curry favor with the jurors, he was led into such conduct, his duty was plainly to lay the matter before his counsel to the end that the court might act in the premises. He was willing at the time to take the refreshment and speculate upon the chances of a verdict, and, now that he has lost, we are of the opinion he cannot plead the

embarrassments of the occasion as sufficient excuse to relieve himself of an unfavorable decision.

²⁷⁴ By his knowledge of and active part in the conduct of the jurors, and by his silence when the matter might have been excepted to and guarded against, he must be held to have waived the point: *Flesher v. Hale*, 22 W. Va. 44; *Davis v. Allen*, 11 Pick. 468; 22 Am. Dec. 386; Thompson on Trials, sec. 2725.

The trial judge, in the exercise of his judicial discretion and sitting as a chancellor, adopted the verdict which was only advisory, and made special findings in plaintiff's favor. We therefore decline to hold that the exercise of that discretion in sustaining the verdict was unwise; and, in the absence of a showing of misconduct of the jury, which did or could, under all the circumstances, have affected the rights of the defendant, public policy alone does not require that the case be remanded for a new trial.

The order denying the motion for a new trial is affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

NEW TRIAL.—MISCONDUCT OF JURORS IN RECEIVING FAVORS FROM A PARTY.—For any, even the least, intermeddling with a juror, the verdict will always be set aside. Consequently, the entertainment of a juror at the expense, or through the co-operation of the party in whose favor the verdict is given, will authorize a new trial, but not if there is no ground to believe that the juror was influenced thereby: *Extended note to Hilton v. Southwick*, 35 Am. Dec. 260.

STATE v. SECOND JUDICIAL DISTRICT OF SILVER BOW COUNTY.

[15 MONTANA, 324.]

CORPORATIONS.—A RECEIVER OF A CORPORATION PENDENTE LITE MAY BE APPOINTED BY A COURT OF EQUITY when the complaint alleges that certain shareholders have obtained control and management of the stock of the corporation and elected their own officers; that they are taking all the profits of the corporation for their own use instead of paying them out in dividends; have kept false books to deceive stockholders; have pretended to buy a worthless franchise, and mortgage the property of the corporation in payment therefor, for the purpose of having such mortgage foreclosed and the property interests of the stockholders thereunder destroyed. The appointment of a receiver in such a case is justified, because it is not to dissolve the corporation, but to preserve its assets from being wasted and misappropriated in pursuance of a fraudulent conspiracy.

CERTIORARI to review the action of a district court in appointing a receiver of the properties of the Independent District Telegraph Company and the Citizens' District Messenger and Burglar Alarm Telegraph Company. The action in which the receiver was appointed was brought by H. L. Haupt and E. A. Nichols against the two corporations above named and their directors. The complaint alleged that the two corporations were organized under the laws of the state; that the plaintiffs were the owners of certain shares of their capital stock; that the Independent company was the owner of a franchise from the city of Butte permitting it to carry on the messenger business and entitling it to use the streets and alleys of the city for the purposes of such business; that the Citizens' company owned a similar franchise; that the two companies entered into an agreement to put their stocks and franchises and property into a common business, to be carried on by officers and agents to be appointed by the two companies, the money earned to go into a general fund and to be in the hands of a general treasurer; that after paying the expenses, a reserve fund of five hundred dollars was to be accumulated, and thereafter the profits were to be paid by the general treasurer to the respective corporations, five-ninths to the Independent company and four-ninths to the Citizens' company; that in January, 1893, certain stockholders united and obtained a majority of the stock of the two corporations, and thereafter conspired to manage its business for their individual benefit and to exclude from participation in profits the plaintiffs; that the plaintiffs had since such combination been kept from any participation in such profits; that moneys which had accumulated and were applicable for the purpose of paying dividends had been withheld from that purpose; that the corporation had executed certain notes, secured by mortgage, upon their franchises and property, which notes purported to be given for the purchase price of a certain franchise granted by the city of Butte to one Puddington to erect and maintain a district and burglar alarm telegraph; that said franchise was granted upon certain conditions precedent which had not been fulfilled, and the franchise was therefore forfeited and void; that the notes and mortgages were executed for the purpose of bringing about a sale of the property and franchises of the corporation and depriving the plaintiffs of all interests therein, and that unless the negotiation of the notes be restrained and

they and the mortgage declared forfeited and void, the property of the Independent company would be sold and the plaintiffs deprived of their rights therein. The court, upon the pleadings and also upon certain affidavits, appointed a receiver pendente lite of the franchises, plants, business, books, accounts, and of all property of the two corporations.

Robinson & Stapleton and J. W. Cotter, for the relators.

George Haldorn and O. M. Hall, for the respondents.

321 DE WITT, J. The question in this case is simply whether under the facts, as recited in the statement above, the district court had jurisdiction to appoint a receiver: *State v. Judge etc. District Court*, 10 Mont. 401. See, also, *French Bank case*, 53 Cal. 550. There is here no question of the court's discretion under consideration.

The relators in this application rely very largely upon the decision in the French Bank case, but we think that the case at bar is distinguishable from that case in many respects, and, in order to make the distinction apparent, we quote as follows from the California case:

"Irrespective of the effect of the fifth subdivision of section 564 of the Code of Civil Procedure, which will be presently considered, there is no jurisdiction vested in courts of equity to appoint a receiver of the property of a corporation in a suit prosecuted by a private party. This is only to say that there is no jurisdiction vested in these courts in such a case to dissolve a corporation; for the power of a receiver, when put in motion, of necessity supersedes the corporate power. It necessarily displaces the corporate management and substitutes its own, and assumes, in the language of the order under review, 'to do all and everything necessary (in the judgment of the receiver, under the advice of the court) to protect the rights of the creditors and depositors of said corporation.' This precise question was brought directly under consideration here in the case of *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508, where, in a suit brought by a stockholder, a receiver had been appointed by the district court **322** to take possession of the property of the 'Gold Hill and Bear River Water Company,' a corporation existing under the laws of this state. The opinion in that case, rendered by Mr. Justice Cope, and concurred in by the whole court, after referring to the adjudicated cases in England and in this country, uses this language: 'This decree, if permitted

to stand, must necessarily result in the dissolution of the corporation; and, in that event, the court will have accomplished, in an indirect mode, that which, in this proceeding, it had no authority to do directly. It is well settled that a court of equity, as such, has no jurisdiction over corporate bodies for the purpose of restraining their operations, or winding up their concerns. We do not find that any such power has ever been exercised in the absence of a statute conferring the jurisdiction.' Of course, it is not to be doubted that the trustees of a corporation, the persons who constitute its direction, and from time to time exercise the corporate authority in the management of its affairs, are subject to the control of courts of equity, or, as observed by Chancellor Kent, 'that the persons who from time to time exercise the corporate powers may, in their character of trustees, be accountable to this court [the court of chancery] for a fraudulent breach of trust; and,' he adds, 'to this plain and ordinary head of equity the jurisdiction of this court over corporations ought to be confined': *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 388. And in exercise of these admitted equity powers of the court, referable to the well-known grounds upon which its jurisdiction ordinarily proceeds, embracing the cognizance of fraud, accident, trust, and the like, the rights of natural persons injured or put at hazard through corporate proceedings unauthorized by law will find ample protection and redress. But even in such a proceeding as that the trustees must, of course, be made parties defendant; and it will be observed, upon looking at the complaint of Gallagher in this view, that it is not substantially sufficient in its scope to put the equity powers of the court in motion for any purpose. The corporation itself being the sole party defendant, the trustees—those persons upon whom the management of its affairs is devolved—are not parties, nor is any relief sought against them personally. That there is no inherent power in ³³³ the district courts, as being courts of equity, to appoint a receiver in such a case as that presented by the complaint of Gallagher, is, therefore, apparent both upon principle and authority."

In the California case an important element in the decision, as it appears, was that the appointment of the receiver acted as a dissolution of the corporation. In the case at bar no such result is intended by the order appointing the receiver or is accomplished by that order. It is true that in the com-

plaint the case in the district court asks for a dissolution of the corporation, but whether such relief may be granted in that action is not now before us for review. The complaint also asks another relief, as set forth in the statement, namely, that the negotiation of the notes described be restrained, that the foreclosure of the mortgage be prohibited, and that the notes and mortgage be declared null and void. While the determination of these matters is pending in the action the receiver is to act. His appointment is *pendente lite* only, and he is authorized to do only those acts which are peculiarly *pendente lite*. Again, in the *French Bank case*, 53 Cal. 550, one ground of the decision was that the action was against the corporation only (see page 546 of the decision), and not against the malfeasing trustees, that is, the "persons upon whom the management of its affairs is devolved." (Page 551.) But in the case at bar the managing officers of the corporation are joined as defendants, and their unlawful acts are sought to be set aside, and their future wrongful conduct enjoined. The receiver is not to wind up the corporation under his appointment; he is simply to manage the affairs of the same, while charges of the most outrageous frauds by the managers and controllers of the corporation are being investigated in the trial of the action. We are fully aware of the reluctance of courts of equity to interfere by receivership in the management of corporations, or to take that management from trustees elected by the shareholders.

It is said in Morawetz on Private Corporations, section 281, as follows: "A court of equity will grant all relief to a shareholder which the nature of his case may require. But it has always been a settled principle that no interference with the ³²⁴ management of a corporation can be justified, unless such interference is absolutely necessary to the attainment of justice. The reason of this rule is obvious. The officers of a corporation are generally elected by a vote of the shareholders. Every shareholder has a voice in their appointment, and may insist that they shall represent the corporation when duly appointed. If an officer is guilty of a breach of duty, he may, in many cases, be removed by act of the corporation; but no minority of the shareholders has any authority to restrain his action, or remove him and appoint another officer in his place. Nor can a court of chancery interfere at the suit of a portion of the shareholders and remove an offending officer, or even enjoin him generally from acting for the cor-

poration, unless this be essential to the protection of the corporate rights; as, for example, where the directors have conspired to defraud the corporation, or have otherwise shown themselves to be totally unfit to be intrusted any longer with the management of the company's affairs. The court must ordinarily confine its remedy to the redress of the specific wrongs which have been charged."

But the case before us is not an ordinary one, and perhaps it may be doubted that many such histories of fraud will be found in the conduct of human affairs. It is difficult to imagine a case more thoroughly saturated with fraud than this which was presented to the district court on the application for the appointment of a receiver. Four shareholders of two small corporations, which were paying handsome dividends, obtained control of the majority of the stock, and elected their own officers. These four conspirators, instead of paying five hundred dollars a month dividends which the corporations were earning, proceeded to put that money into their own pockets. They kept false books to deceive the shareholders. They pretended to buy for the corporations an absolutely worthless franchise, when they already owned two good and valid franchises, which were more than ample for the same purpose. They gave the corporations' notes for this worthless franchise, and mortgaged all of the property of the corporations for the purpose of having the mortgage foreclosed and the property of the corporations wiped out. It is needless to enlarge upon these facts; they are all set forth in the statement preceding this ³²⁵ opinion. This is a story of wrecking and robbing that would make a pirate of the Spanish main exclaim, in the language of Lord Clive, "I am surprised at my own moderation." Is not interference here absolutely necessary, as Morawetz says, to the attainment of justice? Again Morawetz remarks, as quoted above, the court of chancery will not interfere at the suit of the shareholders unless this be essential to the protection of the corporate rights. We can scarcely conceive of a case where it would be more essential than it is here, for the protection of the corporate rights; for, if the interference is not had, the corporate property will be swept away from the corporations into the grasp of the conspirators. And, while the investigation into the acts of the Sommers-O'Rourke party is being made by the court, should the court allow this same band of marauders to remain in possession of the corporations and their prop-

erty, and continue to convert the assets to their own use, and exercise their own pleasure as to the trusts imposed upon them? To allow such a proceeding, it seems to us, would shock the conscience of the most indifferent court. Our statute provides that "a receiver may be appointed by the court in which an action is pending, or by the judge thereof . . .

6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity": Code Civ. Proc., sec. 229. We are of opinion that the decisions of the courts sustain the doctrine of the powers and the usages of courts of equity in such a case as that which was made in the showing before the district court.

We note the following language from a very recent decision (January, 1894) of the Kansas supreme court. While the Kansas statute is broader than ours, and the case of *In re Lewis*, 52 Kan. 660, is decided largely upon the statute of that state, still the following remarks of the Kansas court are valuable, as is also the collection of authorities appended to the decision. We extract from the opinion as follows:

"By the averments of the petition it would appear that all the officers of the corporation have conspired together to divert its business to another company, and to absorb its earnings and assets, and appropriate the same to their own uses. Under those circumstances it would be useless to apply to the officers to bring ³³⁶ an action against themselves, and in such cases the law permits the appointment of a receiver at the instance of a stockholder. In most cases of this character no other adequate remedy exists. The appointment of a receiver is not necessarily a proceeding to dissolve a corporation, nor will it necessarily result in its extinction. The property and assets of the corporation, which are being dissipated and fraudulently absorbed, will be preserved and rightfully applied under the supervision of the court, and may be restored to the officers of the corporation, when there has been a change of officers, or when it is deemed prudent and safe to restore the property and affairs of the corporation to its duly constituted officers: See *First Nat. Bank v. United States etc. Tile Co.*, 105 Ind. 227; *Wayne Pike Co. v. Hammons*, 129 Ind. 368; *Supreme Sitting Order of Iron Hall v. Baker*, 134 Ind. 293; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639; *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 43 Fed. Rep. 204; Morawetz on Private Corporations, sec. 281; Pomeroy's Equity Jurisprudence, sec. 1334; High on

Receivers, sec. 313; Spelman on Private Corporations, sec. 1001; 20 Am. & Eng. Ency. of Law, 272."

We also find it stated in High on Receivers, section 313, as follows: "It has already been shown that in most of the states of this country the general jurisdiction of courts of equity over corporations has been enlarged to the extent of authorizing the appointment of receivers in behalf of creditors and shareholders."

The supreme court of Michigan (October, 1892) in *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, after reviewing the history of a fraud, which perhaps is worthy to be ranked with that of the case at bar, says: "The present case furnishes an instance of gross abuse of trust. Must the cestui que trust be committed to the domination of a trustee who has for seven years continued to violate the trust? The law requires of the majority the utmost good faith in the control and management of the corporation as to the minority. It is of the essence of this trust that it shall be so managed as to produce for each stockholder the best possible return for his investment. The trustee has so far absorbed all returns. What is the outlook for the future? This court, in view of the past, can give no assurances. ²²⁷ It can make no order that can prevent some other method of bleeding this corporation, if it is allowed to continue. If Lorman be removed, who shall take his place? He has the absolute power to determine. Once deposed he may elect a dummy to fill his place? There are practically but three persons concerned, Miner, Lorman, and Lorriassa Carpenter, and she has for seven years, in fraud of complainant's rights, been paid a dividend to secure her acquiescence. Who has any right to complain if ample and complete justice is awarded to Miner? Who shall be permitted to stand between him and an adequate remedy? This corporation has utterly failed of its purpose, not because of matters beyond its control, but because of fraudulent mismanagement and misappropriation of its funds. Complainant has a right to insist that it shall not continue as a cloak for a fraud upon him, and shall not longer retain his capital to be used for the sole advantage of the owner of the majority of the stock, and a court of equity will not so far tolerate such a manifest violation of the rules of natural justice as to deny him the relief to which his situation entitles him. I think a court of equity, under the circumstances of this case, in the exercise of its general equity jurisdiction, has the power to

grant to this complainant ample relief, even to the dissolution of the trust relations. Complainant is therefore entitled to the relief prayed. A receiver will be appointed, and the affairs of this corporation wound up."

In the Michigan case the decision went to the winding up of the corporation; but in the case before us the receiver is only to hold until the charges of fraud are investigated. The Michigan decision is an able discussion of the powers of the court of equity in this respect, and a valuable review of decisions. It may be said here, as was said in the Michigan case, that the corporations have utterly failed of their purpose, not because of matters beyond their control, but because of the fraudulent mismanagement and misappropriation of their funds. An equal, if not greater, mismanagement and misappropriation has been done by the officers of the corporations who are here made defendants, and whose acts are sought to be restrained and set aside, and declared null and void. We also ^{see} find the same general subject mentioned in the following language in Waterman on the Law of Corporations, volume 2, section 356: "The power to appoint a receiver is necessarily inherent in a court which possesses equitable jurisdiction. It is exercised when an estate or fund is in existence, and there is no competent person entitled to hold it; or the person so entitled is in the nature of a trustee and is misusing or misapplying the trust; or the property is about to be removed beyond the reach of the court, and generally when it is necessary to secure rights and prevent a failure of justice. The property is thus placed in the hands of an officer of the law in order that it may be under the protecting care and control of the court, and be delivered unimpaired to the persons to whom it is legally ascertained to belong": See, also, *Ranger v. Champion etc. Co.*, 52 Fed. Rep. 611; Morawetz on Private Corporations, sec. 642.

Upon questions of equity and jurisdiction, aid is always found in the records of the courts of chancery of New Jersey, and from a decision rendered in May, 1894, by that learned court, we quote as follows: "The power of this court to appoint a receiver of a corporation, either because it has no properly constituted governing body, or because there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage to its stockholders, I think must be regarded as settled,

but I think it is equally well settled that this power is subject to certain limitations, namely, it must always be exercised with great caution, and only for such time, and to such an extent, as may be necessary to preserve the property of the corporation and protect the rights and interests of its stockholders. As soon as a lawfully constituted and competent governing body comes into existence, whether it is brought into existence by an adjustment of the dissensions or by the election of a new body, and such body is ready to take possession of the property of the corporation, and proceed in the proper discharge of its duties, the court must lift its hand and retire. This is the doctrine, as I understand it, which was laid down by Vice-Chancellor Malins in *Featherstone v. Cooke*, L. R. 16 Eq. 298, and *Auxiliary Co. v. Vickers*, L. R. 16 Eq. 303, and which was approved ³²⁹ by Chancellor Runyon in *Einstein v. Rosenfeld*, 38 N. J. Eq. 309, and by Chancellor McGill in *Archer v. American Water Works Co.*, 50 N. J. Eq. 33": *Edison v. Edison United Phonograph Co.*, 52 N. J. Eq. 620.

It is true, of course, that the power must be exercised with great caution, but we are of the opinion that the most scrupulous caution would not cause a court to hesitate in the matter which was before the district court. Furthermore, the district court did not go any further in the appointment than was necessary to preserve the property of the corporations and protect the rights and interests of its stockholders, as was stated in the New Jersey case.

It does not seem necessary to go further in this discussion. The facts of this case will not afford a precedent in the future, for any imprudent or unauthorized appointment of a receiver for corporations, or the unwise withdrawal of the business of a corporation from the management of its duly elected and lawfully acting trustees. The case is a precedent only as to its own facts. Here the object of its existence, and, indeed, the practical existence itself, of the corporations are being totally destroyed by the unlawful (not to use a stronger term) acts of its managers; and one object at least of the action in the district court is to set aside and prevent such unlawful acts of such managers; and the action itself is against such unlawfully acting persons. If they are allowed to go on in the course which they are pursuing, the corporations are to be totally wrecked, their funds are to be embezzled, and their property is to be taken from them by a fraudulent conspiracy

of the managers whose position is one of trust toward the plaintiffs in the action in the district court.

Under such a vigorous shewing of facts we believe that the decisions of the courts of equity uphold the powers and usages of those courts to interfere by a receivership. See the cases cited in this opinion, and the cases referred to in those citations.

We are therefore of the opinion that the writ of certiorari must be dismissed, and it is so ordered.

PEMBERTON, C. J., and HUNT, J., concur.

RECEIVERS OF CORPORATIONS—APPOINTMENT OF.—In the absence of statute, a court of equity may appoint a receiver where there is fraud shown in the defendant corporation, and its funds are in danger of being wasted, misapplied, or removed beyond the jurisdiction of the courts. Extended note to *Cortleyou v. Hathaway*, 64 Am. Dec. 485. In a suit by a stockholder of a corporation to obtain removal of its officers and an accounting and settlement of its affairs, a judgment rendered in accordance with the prayer is not deprived of its effect as a final judgment so as to render an appeal therefrom ineffective, because the court, in addition to the judgment prayed for, provided for the appointment of a receiver to take charge of the property of the corporation until further order, collect moneys, sell stock, and pay the proceeds in accordance with the judgment: *Neall v. Hill*, 16 Cal. 145; 76 Am. Dec. 508, and note.

NORTHERN PACIFIC AND MONTANA RAILWAY COMPANY v. FORBIS.

[15 MONTANA, 431.]

EMINENT DOMAIN—DAMAGES.—In determining the compensation to be made for property sought to be taken in the exercise of the right of eminent domain, the proper inquiry is, What is its value for the most advantageous use to which it may be applied?

EMINENT DOMAIN—DAMAGES—VALUE OF LAND FOR TWO OR MORE USES.

If land sought to be taken in the exercise of the right of eminent domain can be used for two or more purposes which do not interfere with each other, and is valuable for each purpose, its value for both may be proved, and the court cannot compel the owner to elect upon which of these purposes he will rely in seeking to show damages which should be awarded to him.

EMINENT DOMAIN—DAMAGES.—If land over which a railway corporation seeks to acquire a right of way is valuable for mining purposes, the court, in determining the damages to be awarded, should take into consideration the fact that the use of the surface for railway purposes would be no more injurious to the owner than would be a grant of the lands, reserving to himself the mines therein.

PROCEEDING to condemn land to be used for railway purposes. A part of the land sought to be condemned consisted of a tract known as the railroad mining claim. The defendant on the trial offered to prove the value of the ground both for townsite purposes and as a mining claim. The trial court determined that the owner could obtain the market value of the land based upon its availability for the most valuable purpose for which it could be used, but could not recover for two purposes, and required the landowner to elect which value he would prove; that is, whether he would prove as a town lot or as a mine. Thereupon the appellant involuntarily elected to prove the value as town lots only, and, not being satisfied with the amount awarded to him, appealed.

William Scallon, for the appellant.

Cullen & Tools, for the respondent.

434 DE WITT, J. The court below based its ruling in the matter complained of upon its view of the decision in the case of *Montana Ry. Co. v. Warren*, 6 Mont. 275. That was an action by the railway company to condemn the land of a mining claim for railroad purposes. In that case the value of the land, both as a mine and as town lots, was proven. But the court instructed the jury that the landowner could not recover the value of the land for both purposes. This is all that is said of the instruction in the report of the case in 6 Montana, page 284. Upon examination of the record in the case as filed in this court, we find that the instruction in this respect was, in full, as follows:

“12. If the jury believe from the evidence that the use of 435 the surface of the Nipper claim for town lot purposes would prevent its use for mining purposes to as great an extent as the construction of the railway prevents such use, and if they base their estimate of damages on the value of such surface for town lots, then they will not consider or allow any damages for any injury or inconvenience, or any diminution in value to or in the claim for mining purposes—that is to say, the jury cannot, if they find as above, allow the owners damages both for the value of the surface of town lots, and also for the value of such surface for mining purposes.”

The principle announced in the *Warren* case in this court, and upon which the district court considered that it was properly proceeding in the case at bar was not disturbed on

the appeal of that case to the United States supreme court: *Montana Ry. Co. v. Warren*, 137 U. S. 348.

We are of opinion that the instruction in the *Warren* case, which we have quoted above, is a correct statement of the law; and, furthermore, that if this instruction had been placed in the opinion in that case in full, that the reasoning of the case would have more symmetrically appeared, and that the district court, in the case at bar, in ruling upon the question of evidence above described, would have been guided to a conclusion different from that which the learned judge below adopted. We are of opinion that the decisions hold that the landowner may recover the market value of the land for its most valuable purpose.

The United States supreme court said, in the case of *Boom Co. v. Patterson*, 98 U. S. 408, as follows: "The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valuable because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or convenience of life. Its capability of being made thus available gives it a market value which can be readily estimated. So many and varied are the circumstances ⁴⁵⁶ to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisal in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. . . . The views we have expressed as to the justness of considering the peculiar fitness of the lands for particular purposes as an element in estimating their value find support in the several cases cited by counsel. Thus, in *In the Matter of Furman Street*, 17 Wend. 669, where a lot upon which the owner had his residence was injured by cutting down an embankment in opening a street in the city of Brooklyn, the supreme court of New York said that

neither the purpose to which the property was applied, nor the intention of the owner in relation to its future enjoyment, was a matter of much importance in determining the compensation to be made to him; but that the proper inquiry was, 'What is the value of the property for the most advantageous uses to which it may be applied?' In *Goodin v. Cincinnati etc. Canal Co.*, 18 Ohio St. 169, 98 Am. Dec. 95, where a railroad company sought to appropriate the bed of a canal for its track, the supreme court of Ohio held that the rule of valuation was what the interest of the canal company was worth, not for canal purposes, or for any other particular use, but generally for any and all uses for which it might be suitable. And in *Young v. Harrison*, 17 Ga. 30, where land necessary for an abutment of a bridge was appropriated, the supreme court of Georgia held that its value was not to be restricted to its agricultural or productive capacities, but that inquiry might be made as to all purposes to which it could be applied, having reference to existing and prospective wants of the community. Its value as a bridge site was, therefore, allowed in the estimate of compensation to be awarded to the owner."

It was said in the case of *Colorado M. Ry. Co. v. Brown*, 15 Col. 196, as follows: "In arriving at the value of the ⁴⁵⁷ property taken, and the damages, if any, to the residue, a wide range of evidence is admissible. It must be conceded that the matters admitted in evidence on the trial of this case, as above stated, have some bearing upon the compensation and damages to be awarded by the jury, though, without proper instructions from the court, the jury might be misled by such evidence. But as counsel do not urge in argument anything against the charge, and as, upon examination the instructions appear to be full and fair, we must presume that the jury did not draw improper inferences from the evidence."

In *Lewis on Eminent Domain*, section 479, the author, after reviewing the topic of value for particular uses, closes the section with this language: "The conclusion from the authorities and reason of the matter seems to be that witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. The condition of the property and all its surroundings may be shown, and its availability for any particular

use. If it has a peculiar adaptation for certain uses, this may be shown, and, if such peculiar adaptation adds to its value, the owner is entitled to the benefit of it. But, when all the facts and circumstances have been shown, the question at last is, What is it worth in the market?" See, also, *Maynard v. City of Northampton*, 157 Mass. 218; *Russell v. St. Paul etc. Ry. Co.*, 33 Minn. 210; *Harrison v. Young*, 9 Ga. 359; *Johnson v. Freeport etc. R. R. Co.*, 111 Ill. 413; *Amoskeag Mfg. Co. v. Worcester*, 60 N. H. 522; *Goodin v. Cincinnati etc. Co.*, 18 Ohio St. 169; 98 Am. Dec. 95; 6 Am. & Eng. Ency. of Law, 569, note 7, and cases; *Little Rock etc. R. R. Co. v. McGehee*, 41 Ark. 202.

Upon the trial of the Warren case, testimony as to value for town lot purposes and for mining purposes was offered and allowed by the court. With this condition of the testimony, we think that the court properly stated the law applicable to such testimony when it instructed the jury that the landowner could not recover the value of the ground for two uses or purposes, but we think that the court by this holding intended to say, and that it was so understood in the case, that this meant two incompatible uses; for if the uses are incompatible, if the landowner uses the land for one purpose, he ⁴⁵⁸ cannot use it for the other, nor could his grantee use the land for both such incompatible purposes, whether such grantee is a railroad company receiving by operation of law, or a town lot occupant receiving by the grantor's voluntary deed.

But, on the other hand, if the proposed or described uses of the land do not interfere with each other, it is apparent that the owner or grantee can use the land for both purposes, and, if such owner or his grantee can so use the land for two purposes, there is a value for each purpose, of which value the landowner is deprived, whether his land is taken from him by condemnation, or granted by him by voluntary deed. Such two compatible uses of the land would, therefore, go to constitute its market value, and it is conceded that the owner may recover the market value. We think that these views were those which obtained upon the trial of the Warren case.

In the instruction of the court to the jury in that case it was held, in effect, that a landowner could not recover a value for two uses of the land if the one use excluded the other. Thus the court instructed the jury. The court did

not instruct the jury simply and baldly that the landowner could recover only for the most valuable use, nor did the court instruct the jury baldly that the landowner could not recover for two uses, but the jury was instructed, in effect, that, if one use excluded the other, the landowner could recover for one only, and that he might recover for the most valuable use. By referring to the instruction in the Warren case, it is seen that it holds that, if the town lot use prevented a mining use to as great an extent as the railway use would prevent the mining use, then the landowner could recover the value of one use only. This seems to us logical, and perfectly in accord with the decisions that the landowner may recover the market value of the land.

But, in the case at bar, the court, by excluding evidence as to value of the land for a mining use, and by forbidding the landowner from proving more than one use, decided the question a priori of whether the town lot use would, in fact, interfere with the mining use to as great an extent as the railway use would prevent a mining use. We cannot but conclude that this was a question of fact which should have been determined by evidence. The evidence being introduced, the ⁴⁵⁹ court should, by appropriate instructions, as in the Warren case, have properly limited the consideration of this evidence by the jury. The jury could then, under these proper instructions, have determined whether the town lot use would destroy the owner's use of the surface of the ground for mining purposes to the same extent as would the railway use.

It must be remembered throughout this whole consideration, however, that the railway company condemns and takes only the easement of the use of the surface of the ground: Code Civ. Proc., sec. 599; and does not take the owner's estate in the minerals, or the right to work the ground for the minerals, if he can do so by not interfering with the railway's estate in the easement: *Perley v. Chandler*, 6 Mass. 453; 4 Am. Dec. 159; *West Covington v. Freking*, 8 Bush, 121; *Dubucque v. Benson*, 23 Iowa, 248; *Blake v. Rich*, 34 N. H. 282; *Tucker v. Eldred*, 6 R. I. 404; *Woodruff v. Neal*, 28 Conn. 165; *Jackson v. Hathaway*, 15 Johns. 447; 8 Am. Dec. 263.

Therefore, in considering the compatibility or noncompatibility, the consistency or inconsistency, of the uses of this surface easement for town lot purposes and mining purposes, or for railway purposes and mining purposes, there must be

constantly kept in mind the estate which the condemnation by the railway company takes, namely, the easement of the right of way, which would be the same estate, as far as the mines are concerned, as would be granted by the owner if he voluntarily deeded to a town lot occupant, reserving to himself the mines.

It is perhaps difficult to understand how the surface of the ground could be used for mining purposes if the easement of the right of way to the railway company had been granted, any better than such surface could be used for mining purposes if an easement for town lot uses had been granted, but we cannot hold otherwise than that this matter is a question of fact upon which evidence should have been allowed, and upon which the jury should have decided, under proper instructions, as we have above pointed out.

The judgment is therefore reversed and the case is remanded for new trial.

HUNT, J., concurs.

EMINENT DOMAIN—DAMAGES.—The rate of valuation is not what property taken in the exercise of the right of eminent domain is worth for some particular purpose. The owner is to be compensated for the deprivation of some existing value. It has been held in California, however, that in estimating the value of property taken for a public use, the purpose for which it is most valuable may be considered: *Note to Rumsey v. New York etc. Ry. Co.*, 28 Am. St. Rep. 608. These questions are fully discussed in the extended note to *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 113-121, and the notes to *Wabash etc. Ry. Co. v. McDougall*, 9 Am. St. Rep. 547, and *Owrie v. Waverly etc. R. R. Co.*, 19 Am. St. Rep. 459.

WILLMAN MERCANTILE COMPANY v. FUSSEY.

[15 MONTANA, 511.]

SALE OF PROPERTY TO BE SHIPPED—TITLE, WHEN PASSES.—If a vendor, when shipping, takes a bill of lading in his own name, this fact, if not rebutted by evidence to the contrary, is very strong proof of the intention of the vendor to reserve title in himself, and is almost decisive to prove his intention to retain the *jus disponendi* of the property, and to prevent a delivery of it to the vendee.

SALE—SUBSEQUENT LOSS OF PROPERTY—WHO MUST BEAR.—Where a car-load of apples is shipped by the vendor in good order, but frozen on the road, the vendor taking a bill of lading, with a sight draft attached, it will be presumed that he retained title and that the loss must be borne by him.

ACTION to recover moneys alleged to be due on a carload of apples sold by plaintiff to defendant. Defendant denied the sale and delivery, and alleged that the apples were delivered to him to be sold on a commission for the plaintiff. A judgment of nonsuit having been entered in favor of the defendant, the plaintiff appealed.

Duis & Crouch and T. H. Carter, for the appellant.

Bickford, Stiff & Hershey, for the respondent.

⁵¹² **HUNT, J.** The question to decide is whether or not, under the facts, the district court correctly held that the title to the apples, and the control over them, remained in the plaintiff, vendor, or passed to the defendant as vendee.

From the statement settled by the judge, and the evidence in the record, it appears that about October 31, 1891, at St. Joseph, Missouri, through one Brown, a broker, acting for defendant at Missoula, Montana, plaintiff received an order for a carload of apples of a designated kind. Brown offered a price which plaintiff accepted, "free on board cars at St. Joseph, Missouri, sight draft with bill of lading attached." The apples were shipped in good order, but froze en route. The plaintiff took a bill of lading for the consignment in its own name, which bill of lading, with sight draft attached, was sent through a bank at Missoula, and presented to Fussy, who refused to honor the draft or to receive the apples, because they were frozen.

There is no proof that defendant ever received the bill of lading taken by plaintiff at the time of the original shipment, or that the defendant ever received the apples as consignee, or that he ever exercised any control over them as owner thereof. On the contrary, the testimony showed that the carrier notified plaintiff that it would sell the apples for freight charges, if plaintiff did not turn them over to Fussy without the bill of lading, and that Fussy refused to receive the apples because they were frozen in transit, and were in transit too long.

The motion for a nonsuit was upon the ground that the evidence failed to sustain the allegations of the complaint of a sale and delivery of the apples by plaintiff to defendant.

By the established rules of commercial law, where goods are shipped at the risk of the purchaser and by his order, or if by other evidence the intention of the shipper is made apparent to part with his title, the carrier is held to be the

agent of the consignee, and not the agent of the consignor. But if the seller does not intend to part with his title to and control over the property when he makes the consignment, the authorities regard the carrier as the consignor's agent, and not the consignee's.

⁵¹⁴ To get at the intention of the parties to such commercial transactions the bills of lading are resorted to.

If the vendor, when shipping, takes the bill of lading in his own name, this fact, when not rebutted by evidence to the contrary, is very strong proof of the intention of the vendor to reserve title in himself, and is almost decisive to prove the vendor's intention to retain the *jus disponendi* of the property, and to prevent the delivery of same to the vendee: *Dowe v. National Exchange Bank*, 91 U. S. 618; *Emery v. Irving's Nat. Bank*, 25 Ohio St. 360; 18 Am. Rep. 299; *Seeligson v. Philbrick*, 30 Fed. Rep. 600; *Chandler v. Sprague*, 5 Met. 306; 88 Am. Dec. 404, and note; *McCormick v. Joseph*, 77 Ala. 236; *Forchheimer v. Stewart*, 65 Iowa, 594; 54 Am. Rep. 30; *Sohn v. Jervis*, 101 Ind. 578; *Jones v. Brewer*, 79 Ala. 545; *Moors v. Kidder*, 106 N. Y. 32; *First Nat. Bank v. McAndrews*, 5 Mont. 325; 51 Am. Rep. 51.

The plaintiff, the vendor in this case, dealt with the bill of lading with the manifest purpose of securing the payment for the apples. And the defendant, by his refusal to pay the draft, acquired no right to the bill of lading, or to the goods which it represented: *Benjamin on Sales*, sec. 567; *Farmers' etc. Nat. Bank v. Logan*, 74 N. Y. 568.

When the bill of lading was taken in the shipper's name the presumption arose that he intended to retain the title in himself. This presumption must stand as conclusive until it is rebutted by affirmative proof on the plaintiff's part. We find nothing in the testimony to overcome the presumption, and considerable to strengthen it.

The failure of plaintiff to notify defendant of any reason why the bill of lading was taken as it was, the failure of defendant to receive a bill of lading when the goods were shipped, coupled with the fact that it was sent with the draft for collection, leave no doubt in our minds that the vendor intended to hold the title to the property until the defendant paid for the same. The case, therefore, is in no way excepted from the application of the general principles which must govern.

The judgment is affirmed.

DE WITT, J., concurs.

SALES.—THE EFFECT OF A VENDOR TAKING BILL OF LADING IN HIS OWN NAME is to make him liable for the loss if the goods are injured or destroyed during transportation, as such act on his part shows an intention to retain title until payment of the purchase price: *Extended note to McNeal v. Brown*, 26 Am. St. Rep. 452, 453.

STATE v. EVANS.

[15 MONTANA, 533.]

FORGERY.—AN INFORMATION CHARGING A FORGERY BY THE UTTERING AND PASSING AS TRUE AND GENUINE OF CERTAIN PAPER known to be false, forged, and counterfeit, is sufficient under the statutes, because, by them, it is one of the methods by which that crime may be committed.

FORGERY.—WHEN A WRITING IS INVALID ON ITS FACE, it cannot be the subject of forgery, because it has no tendency to effect a fraud.

FORGERY—INSTRUMENT WHICH CANNOT BE THE SUBJECT OF.—An order to pay to W. L. Evans an amount specified, and charge him at my office, will not sustain a conviction of forgery, because it is invalid on its face, and, if used as genuine, it could not do any damage to the alleged signer.

FORGERY.—A FORGED INSTRUMENT MUST BE ONE WHICH, if genuine, would injure another, and it must appear from the indictment that such is its legal character, either from the recital or the description of the instrument itself, or, if that does not show it to be so, then by the averment aliunde which will show it to be of that character.

PROSECUTION for forgery. The information was as follows: "That the above-named W. L. Evans is guilty of the crime of forgery committed as follows, that is to say: That the said W. L. Evans, late of said county and state, on Tuesday, the twenty-fifth day of December, 1894, at the county of Gallatin and state of Montana, then and there a certain false, forged, and counterfeited writing on paper, of the tenor following:

"' BOZEMAN, December 25, '94.

"' *Schumacher, Esq.*: Please pay to the order of W. L. Evans the amt. of twenty dollars (\$20.00), and charge to him at my office.

JOHNSON & MCCARTHY.'

did falsely, feloniously, and designedly utter and pass as true and genuine, he, the said W. L. Evans, at the same time well knowing the said writing on paper to be false, forged, and counterfeit, with intent, then and there, one William Guy to prejudice and defraud." A motion in arrest of judgment having been made upon the ground that the information did not state facts sufficient to constitute the crime of

forgery, and that the court had no jurisdiction granted by the court, the state appealed.

Henri J. Haskell, attorney general, Ella L. Knowles, and W. L. Holloway, for the state, appellants.

⁵⁴⁰ DE WITT, J. This information is drawn under a statute similar to that which was in existence in California when the case of *People v. Ah Woo*, 28 Cal. 206, was decided: See, also, *State v. Malish*, 15 Mont. 506.

An information charging forgery by the uttering, etc., as does this one, is proper; for the uttering is, under our statute (Criminal Practice Act, sec. 96), one method by which forgery may be committed: See cases last cited. This question of criminal pleading was not considered in *State v. Hudson*, 13 Mont. 112, the case being decided on the question of jurisdiction only: See *State v. Malish*, 15 Mont. 506.

The ground upon which the motion in arrest of judgment was granted seems to be that the alleged forged instrument concluded with the words, "and charge to him at my office. Johnson & McCarthy." Counsel for the respondent argue that this writing is invalid on its face, in that if it were used as genuine, it could not do any damage to the alleged signers⁵⁴¹ of the same, namely, Johnson & McCarthy, for the reason that it requested Schumacher to charge the twenty dollars to Evans, instead of requesting him to charge it to Johnson & McCarthy. We are of opinion that the motion in arrest of judgment was properly granted.

Mr. Bishop says, in his work on Criminal Law, volume 2, section 506, as follows: "When the writing is invalid on its face it cannot be the subject of forgery, because it has no legal tendency to effect a fraud." Section 511 of the same work states as follows: "Therefore, the general doctrine is, that the invalidity of an instrument must appear on its face, if the defendant would avail himself of this defect on a charge of forgery. In still other words, the forged instrument, to be the foundation for an indictment, must appear on its face to be good and valid for the purpose for which it was created. It must be, in another aspect, such that, if it were genuine, it would be evidence of the fact it sets out."

We find it stated in *People v. Tomlinson*, 35 Cal. 506, as follows: "Without much conflict, if any, it has been held from the outset that the indictment must show that the instrument in question can be made available in law to work the intended

fraud or injury. If such appears to be the case on the face of the instrument it will be sufficient to set it out in the indictment; but, if not, the extrinsic facts, in view of which it is claimed that the instrument is available for the fraudulent purpose alleged in the indictment, must be averred. If the indictment merely sets out an instrument which is a nullity upon its face, without any averment showing how it can be made to act injuriously, or fraudulently, by reason of matter aliunde, no case is made. This rule is so well settled by the precedents that we do not feel called upon to discuss it upon principle: *Rex v. Knight*, 1 Salk. 375; 1 Ld. Rayn. 527; *Regina v. Marcus*, 2 Car. & K. 356; *People v. Shall*, 9 Cow. 778; *People v. Harrison*, 8 Barb. 560; *State v. Briggs*, 34 Vt. 501; *Commonwealth v. Ray*, 3 Gray, 441; *Barnum v. State*, 15 Ohio, 717; 45 Am. Dec. 601; *Clarke v. State*, 8 Ohio St. 630. These cases establish the doctrine that, to constitute forgery, the forged instrument must be one which, if genuine, may injure another, and that it must appear from the indictment that such is its legal character, ⁵⁴² either from the recital or description of the instrument itself, or, if that does not show it to be so, then by the averment of matter aliunde, which will show it to be of that character."

We take the following from the remarks of Judge Cowen, in *People v. Shall*, 9 Cow. 778: "In the principal case I have shown that the paper forged, if genuine, would be a mere nullity for any purpose; nor, to my mind, could it be made good by any possible averment. It could not be made the foundation of liability, like the letter of credit. It does not come within any of the cases sustaining indictments; but to me it appears to be directly within the cases cited holding that an instrument, purporting to be void on its face, and not shown to be operative by averment, if genuine, is not the subject of forgery. How is it possible, in the nature of things, that it should be otherwise? 'Void things are as no things.' Was it ever heard of that the forgery of a nudum pactum, a thing which could not be declared on or enforced in any way, is yet indictable? It is the forgery of a shadow."

The following remarks were made by the Indiana supreme court in *Reed v. State*, 28 Ind. 396: "The certificate, so far as it purports to be an instrument entitling Allen to the bounty claimed therein, was, at the time charged, utterly void. There was no law authorizing the giving of bounties by the county commissioners: *Oliver v. Keightly*, 24 Ind. 514; *King v. Course*,

25 Ind. 202. The legalizing act was not passed until March 3, 1865. Every one is presumed to know the law. Officers acting under an official oath are presumed to do their duty. The order of the county commissioners referred to in the certificate was void. 'Void things are no things.' The indictment must show the forgery of an instrument which appears on its face naturally calculated to have some effect, or, if it be not sufficient for that purpose, extrinsic matter must be averred, so that the court may judicially see its fraudulent tendency."

The supreme court of Illinois takes the same view when the court says, in the case of *Waterman v. People*, 67 Ill. 92: "The indictment framed upon this writing contains not a single averment of any extrinsic matter which could give the instrument forged any force or effect beyond what appears ⁵⁴² on its face. No connection is averred between the party to whom the writing is addressed and the Chicago, Rock Island & Pacific Railroad Company, nor is it averred that the prisoner attempted to pass the writing on that company. The writing, if genuine, has no legal validity, as it affects no legal rights. It is a mere attempt to receive courtesies on a promise, of no legal obligation, to reciprocate them. We are satisfied the writing in question is not a subject of forgery, and no indictment can be sustained on it, and no averments can aid it."

To the same effect see *Commonwealth v. Hinds*, 101 Mass. 211, where the court say: "If the fraudulent character of the forged instrument is not manifest on its face, this deficiency should be supplied by such averments, as to extrinsic matter, as would enable the court judicially to see that it has such a tendency. We find nothing of the kind in the present indictment, and therefore cannot say that the plea of guilty is a confession of any crime whatever": See, also, the learned note in 22 Am. Dec. 314. See, also, *Barnum v. State*, 15 Ohio, 717; 45 Am. Dec. 601; *Raymond v. People*, 2 Col. App. 329; *State v. Wheeler*, 19 Minn. 98; *Abbott v. Rose*, 62 Me. 194; 16 Am. Rep. 427; 2 Bishop's New Criminal Law, sec. 533.

We are of opinion that the alleged forged instrument set out in the information in this case is such a one as comes within the doctrine of the decisions quoted, and, as far as we know, generally held. The instrument in question, if genuine, and if acted upon as its terms suggest it might be, could do no possible damage. If the amount of twenty dol-

lars was advanced to Evans by Schumacher upon this order, and if that amount were charged to Evans himself, it would be nothing whatever but a transaction between Schumacher and Evans, which could be accomplished between those two persons with as much ease without the order as with it. The order, as it appeared on its face, would not accomplish the advancing of the money by Schumacher to Evans on the credit of Johnson & McCarthy. Schumacher would as readily have advanced it without the order as with it. There were no extrinsic facts alleged in the information to show that the instrument was ⁵⁴⁴ available for the fraudulent purpose alleged in the information.

The order of the district court in arrest of judgment is affirmed.

HUNT, J., concurs.

FORGERY.—WRITINGS INVALID ON THEIR FACE ARE NOT SUBJECTS OF FORGERY: *State v. Dunn*, 23 Or. 582; 37 Am. St. Rep. 704, and note; but see *People v. Munroe*, 100 Cal. 664; 33 Am. St. Rep. 323, and note. See, also, the extended notes to *Hendricks v. State*, 8 Am. St. Rep. 469, and *Arnold v. Oost*, 22 Am. Dec. 315.

FORGERY.—SUFFICIENCY OF THE INDICTMENT.—An indictment alleging that the accused uttered and published a forged check, knowing it to be forged, with intent to cheat and defraud, is sufficient: *State v. Warren*, 109 Mo. 430; 32 Am. St. Rep. 681, and note. See, also, the notes to *Hastings v. Ralston*, 13 Am. St. Rep. 381, and *State v. Cross*, 9 Am. St. Rep. 68.

AM. ST. REP., VOL. XLVIII.—45

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

BERRY *v.* WILCOX.

[44 NEBRASKA, 82.]

ELECTIONS.—RESIDENCE OF A VOTER is the place in which his habitation is fixed, without any present intention of removing therefrom.

ELECTIONS.—ONE'S RESIDENCE FOR THE PURPOSE OF VOTING is where he has his established home, the place where he is habitually present, and to which, when he departs, he intends to return, and the fact that he intends to remove at a future time does not necessarily defeat his residence before he actually does remove.

ELECTIONS.—RESIDENCE OF STUDENTS.—Students at a college, living where it is located, and otherwise qualified to vote, who support themselves, and are emancipated from their father's families, with no intention of returning to their former homes, who seek employment away from the college during vacations, returning there when the term opens, regarding that as their home, and having no formed intention as to their residence after the completion of their course of study, are entitled to vote at the place where the college is located.

Abbott, Selleck & Lane, for the appellant.

Atkinson & Doty, for the appellee.

83 IRVINE, C. At an election held in the city of University Place, in Lancaster county, April 7, 1891, Berry and Wilcox were candidates for city clerk. The whole number of votes cast was one hundred and sixteen, of which Wilcox received sixty-three and Berry fifty-three. Berry instituted this proceeding to contest the election on the ground that illegal votes had been received on behalf of Wilcox sufficient to change the result. In the county court there was a judgment for the incumbent, from which the contestant appealed to the district court, where a hearing was had with the same result, and the contestant

now appeals to this court. The parties entered into a stipulation in regard to the facts, and this stipulation constitutes the only evidence in the case. From the stipulation it appears that seventeen votes were cast for Wilcox by students of the Wesleyan University, which has its seat in University Place. The result depends upon the right of these students to vote, and their right depends solely upon the question of their residence in University Place, it being conceded that they had all other qualifications of voters.

The facts as to the residence of these students appear from the stipulation as follows: "That they had been attending Wesleyan University and living in University Place from the commencement of the school year, some time during the month of September, 1890; that their main ^{and} purpose in going to and remaining in University Place was to attend said university for the purpose of obtaining an education; that all the said students had, previous to and immediately preceding the time they went to University Place for the purpose of attending the university, resided with their parents in different parts of the state of Nebraska, but were not dependent upon said parents for their support; that each of the said students expected to remain at said University Place during such time as their studies demanded until they had completed their college course; that none of the said students remained at said University Place during the vacation, but went wherever they could secure employment; that all of said students were uncertain and undecided as to their future course or place of residence upon the completion of their college course; that they did not have any special residence in view; that said students were all unmarried men without any business relations or connections at any other place, and that they were not engaged in any other business than that of attending the university; that none of said students were under parental control, and that they regarded University Place as their home; that none of said students had at the time of voting any intention of removing from University Place before the completion of their studies, and that when they took their summer vacation they expected to return to the university upon the opening of the term." It is upon the foregoing facts that the question of their residence must be determined.

Our attention is called to chapter 26, section 32, of the Compiled Statutes, which provides that the judges of election and

registrars of voters, in determining the residence of a person offering to vote, shall be governed by certain rules established in that section. But section 1 of article 7 of the constitution prescribes the qualifications of voters: "Every male person of the age of twenty-one years or upward belonging to either of the following classes, who ^{ss} shall have resided in the state six months, and in the county, precinct, or ward for the term provided by law, shall be an elector," etc.

It is the constitution, then, which requires residence as a qualification for voting, although the legislature may fix the term of residence required in a county, precinct, or ward. What constitutes residence within the meaning of the constitution is, therefore, a judicial question, and not one for the legislature. The question is, what did the word "reside" mean when the constitution was adopted, not what the legislature may say it shall mean. This is very clear. The constitution says likewise that "every male person" shall be an elector. It would be clearly incompetent for the legislature to extend this provision to females by passing an act declaring that, in determining who are male persons, judges of election shall consider both men and women such. We do not say that the section referred to has no force; merely that it cannot be accepted as in any wise enlarging or limiting the provisions of the constitution. We do not even say that the rules prescribed by that section are not correct rules for determining the question of residence; but, if they are so, it is because they are only declaratory of the previous law, and not because the legislature has adopted them. We therefore proceed with the inquiry without any special reference to this statute. The generally accepted definition of "residence," when the term is used with reference to the qualification of voters, is synonymous with "domicile"—"that place . . . in which his habitation is fixed, without any present intention of removing therefrom": *Story on Conflict of Laws*, 43. The older cases, and some of the modern ones, require as an essential element the *animus manendi*, and construe this term as meaning an intention of always remaining. The supreme court of Iowa must have adopted this rule in the case of *Vanderpool v. O'Hanlon*, 53 Iowa, 246, 36 Am. Rep. 216, for in that case it was held that a student at the state university was not a resident of Iowa City, although he ^{ss} did not know what he would do after he graduated, and was not aware that he would leave Iowa City.

The case referred to is one of the latest cases in which this extreme view is taken, and the opinion cites with approval the *Opinion of the Judges*, 5 Met. 587, and *Fry's Election case*, 71 Pa. St. 302; 10 Am. Rep. 698. The former case we shall refer to later. *Fry's Election case* is a carefully considered case, and its result was to hold that students of a college living where it is located, even though they be supported by themselves and emancipated from their father's family with no intention to return to his home, have not such residence as will entitle them to vote at the seat of the college. That case was, however, professedly based to a large extent on early definitions of the terms "inhabitant" and "free-man," as well as upon the debates in the convention which adopted the constitution; and, as the reasoning proceeds upon ancient authorities, the case should properly be considered as among the ancient cases. It is worthy of remark, however, that the statement of facts shows that the students came to the college for no other purpose than to receive an education, and intended to leave after graduating; whereas, in the case before us it is only agreed that their education was the main purpose of the students in coming, and that they had no purpose formed as to their movements after graduation.

In *State v. Griffey*, 5 Neb. 161, it was held that persons who went to a military post in Valley county for the purpose of working there, but without the intention of returning to their former domicile, acquired a residence. And in *Swaney v. Hutchins*, 13 Neb. 266, it was said: "The test of residence, when a party removes from one state to another, seems to be, did he remove from his former residence with the intention of abandoning the same?" In *Putnam v. Johnson*, 10 Mass. 488, it was held that a student at Andover, otherwise qualified and being emancipated from his father's family, was entitled to vote at Andover. ⁸⁷ This case proceeded upon the ground that he had manifestly abandoned his former domicile, and must therefore be domiciled at Andover or no place. The old theory of *animus manendi* was perhaps first combated in that case, the court saying: "In this new and enterprising country it is doubtful whether one-half of the young men at the time of their emancipation fix themselves in any town with an intention of always staying there. They settle in a place by way of experiment, to see whether it will suit their views of business and advancement in life; and with an intention of removing to some more advantageous

position if they should be disappointed. Nevertheless, they have their home in their chosen abode while they remain."

A very instructive opinion was given by the justices of the supreme judicial court to the house of representatives of Massachusetts in 1843: *Opinion of the Judges*, 5 Met. 587; and while, of course, this opinion is open to the criticism of being merely a response to a legislative inquiry, and not an opinion delivered in the judicial determination of a case, still the high character of the judges who signed it, as well as the soundness of the views expressed, entitle it to great weight. The question there proposed was, "Is a residence at a public institution in any town in this commonwealth, for the sole purpose of obtaining an education, a residence within the meaning of the constitution which gives a person, who has his means of support from another place either within or without this commonwealth, a right to vote, or subjects him to the liability to pay taxes in said town?" It was said that none of the circumstances mentioned constitute a test, nor are they very decisive upon the question; that one's residence for the purpose of education would not give one the right to vote if he had a domicile elsewhere, nor would his connection with a public institution for the purpose of education preclude him from voting, if his domicile is there. That what place is any one's domicile is a question of fact; that if a student have a father living, if ^{so} he remain a member of his father's family, if he return to pass his vacations, if he be maintained by his father—these are strong circumstances repelling a presumption of a change of domicile. But if he be separated from his father's family, not maintained by him; if he remove to a college town and take up his abode there without intending to return to his former domicile, these are circumstances more or less conclusive to show the acquisition of a domicile in the town where the college is situated. The same view was taken in *Sanders v. Getchell*, 76 Me. 158; 49 Am. Rep. 606.

The supreme court of Ohio, quoting Story's definition of "Domicile," adds: "It is not, however, necessary that he should intend to remain there for all time. If he lives in a place with the intention of remaining for an indefinite period of time as a place of fixed present domicile, and not as a place of temporary establishment, or for mere transient purposes, it is to all intents and for all purposes his residence": *Sturgeon v. Korte*, 34 Ohio St. 525.

In *Dale v. Irwin*, 78 Ill. 170, the court said: "What is 'a permanent abode'?" Must it be held to be an abode which the party does not intend to abandon at any future time? This, it seems to us, would be a definition too stringent for a country whose people and characteristics are ever on the change. No man in active life in this state can say, wherever he may be placed, this is and ever shall be my permanent abode. It would be safe to say a permanent abode, in the sense of the statute, means nothing more than a domicile, a home, which the party is at liberty to leave, as interest or whim may dictate, but without any present intention to change it."

These authorities, we think, present the law in its true aspect. The fact that one is a student in a university does not of itself entitle him to vote where the university is situated, nor does it prevent his voting there. He resides where he has his established home, the place where he is habitually present, and to which, when he departs, he intends to return. The fact that he may at a future time intend to remove will not necessarily defeat his residence before he actually does remove. It is not necessary that he should have the intention of always remaining, but there must coexist the fact and the intention of making it his present abiding place, and there must be no intention of presently removing. Now, in the case before us, these students came to University Place, their main purpose being to attend the university. They were emancipated from their parents, apparently with no intention of returning to the home of their parents; they regarded University Place as their home, leaving it during vacation and going wherever they could obtain employment, with the intention of returning to University Place at the close of the vacation. They were uncertain as to their course upon graduation, and therefore had no particular future residence in view. There can be no doubt that they had lost their residence at the homes of their parents, and they were men without a country, if they had not acquired one in University Place. We think the county and district courts reached the correct conclusion on these facts in holding that these students had acquired a residence in University Place.

Judgment affirmed.

RESIDENCE, WHAT AND WHERE IS, AND HOW LOST OR CHANGED—*Definitions*.—In almost all cases, outside of attachment statutes, the words "residence," "inhabitaney," "citizenship," and "domicile" are convertible, synonymous terms. For the purposes of this note, as indicated in the

headline above, they may be used interchangeably. The difference in meaning between the words "residence" and "domicile," when applied to attachment laws and bankruptcy statutes, is pointed out in notes to *Frost v. Brisbin*, 32 Am. Dec. 427-429; and *Ringgold v. Barley*, 59 Am. Dec. 111-115, and consists in the fact that within the meaning of such laws "domicile" and "residence" are not convertible terms, for domicile may be in one place, and residence for the time being in another. In other words, a person domiciled abroad may be a resident, while a person domiciled in the state may be a nonresident. In this sense, domicile has a broader meaning than residence. It includes residence, but actual residence is not indispensable, to retain a domicile once acquired. The latter is retained by the mere intention not to change it. Residence, in attachment laws generally, implies an established abode, fixed permanently for a time for business or other purposes, although there may be an intent existing all of the time to return in future to the original domicile: *Frost v. Brisbin*, 19 Wend. 11; 32 Am. Dec. 423, note 427; *Krone v. Cooper*, 43 Ark. 547; *Alston v. Newcomer*, 42 Miss. 186; *Long v. Ryan*, 30 Gratt. 718; *Foster v. Hall*, 4 Humph. 345. In almost all other cases the word "residence" is synonymous with "inhabitaney" or "domicile," in legal phraseology: *De Meli v. De Meli*, 120 N. Y. 485; 17 Am. St. Rep. 652; *Langdon v. Doud*, 6 Allen, 423; 83 Am. Dec. 641; *People v. Platt*, 117 N. Y. 159; *Sturgeon v. Korte*, 34 Ohio St. 525; *State v. Aldrich*, 14 R. I. 171; *Wood v. Roeder*, 45 Neb. 311; *Abington v. North Bridgewater*, 23 Pick. 170; *State v. Ross*, 23 N. J. L. 528; *Moore v. Wilkins*, 10 N. H. 456; *Church v. Crossman*, 49 Iowa, 447. Note to *Frost v. Brisbin*, 32 Am. Dec. 428, and *Ringgold v. Barley*, 59 Am. Dec. 112. In regard to questions of citizenship, the disposition of property after death, and of like purposes, every person must have a permanent residence or domicile, and for these purposes he can have but one domicile: *Gilman v. Gilman*, 52 Me. 165; 83 Am. Dec. 502; *Abington v. North Bridgewater*, 23 Pick. 170; *Thorndike v. Boston*, 1 Met. 242. In a strict legal sense a person's domicile or permanent residence may be defined to be that place where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. Two things must concur to make a man a resident, and to also make the place his domicile, namely, actual residence and an intention to make the place his home, and if such intent exists the residence may be long or short, according to the circumstances: *Hairston v. Hairston*, 27 Miss. 704; 61 Am. Dec. 580; *Price v. Price*, 156 Pa. St. 617; *Wood v. Roeder*, 45 Neb. 311; *Wilbraham v. Ludlow*, 99 Mass. 587; *Lyman v. Fiske*, 17 Pick. 231; 28 Am. Dec. 293; *Pearce v. State*, 1 Sneed, 63; 60 Am. Dec. 135; *Brown v. Ashbough*, 40 How. Pr. 260; *Hart v. Lindsey*, 17 N. H. 235; 43 Am. Dec. 597; *McIntyre v. Chappell*, 4 Tex. 187; *Henrietta Township v. Oxford Township*, 2 Ohio St. 32; *McKewen v. McGuire*, 15 La. Ann. 637.

In those cases where domicile and residence are used synonymously, it is necessary that a person reside in a place with an intention to make it his home, in order to constitute it his domicile. Residing and engaging in business in a particular place do not of themselves make that the domicile of the person. In order to have that effect there must, in addition, be a mental determination and actual intent of making a home there: *Viles v. Waltham*, 157 Mass. 542; 34 Am. St. Rep. 311; *Gilman v. Gilman*, 52 Me. 165; 83 Am. Dec. 502; *Hairston v. Hairston*, 27 Miss. 704; 61 Am. Dec. 580; *Hart v. Lindsey*, 17 N. H. 235; 43 Am. Dec. 597; *State v. Dayton*, 77 Me. 678; *McLean v. Junin*, 45 La. Ann. 604.

If a married man has two places of residence at different times of the year, that is deemed his domicile which he selects or describes or deems to be his home, or which appears to be the center of his affairs, or where he votes or exercises the rights and duties of a citizen: *Charlton County v. Moberly*, 50 Me. 239; *Hairston v. Hairston*, 27 Miss. 704; 61 Am. Dec. 530. Wherever a man lives permanently is presumed to be his residence or domicile: *Shepard v. Wright*, 113 N. Y. 582. The domicile or residence of a person of full age, and under no disability, is deemed to be the place where his family permanently resides: *Daniel v. Sullivan*, 46 Ga. 277; *Pearce v. State*, 1 Sneed, 63; 60 Am. Dec. 135.

"Judicial citizenship or that species of citizenship intended by the constitution and laws of Congress, in reference to the jurisdiction of the courts of the United States, is nothing more or less than residence or domicile in a particular state, the person claiming to be a citizen of such state being at the same time a citizen of the United States. This domicile may be changed from one state to another, if the removal be bona fide, and with intention to abandon his residence and to fix it permanently in the state to which he removes": *Read v. Bertrand*, 4 Wash. C. C. 514.

It is a rule of universal application, that for all purposes a person must have a residence or domicile somewhere; that he can have but one, and that the residence or domicile of origin, or the one once acquired, continues to exist until another is acquired elsewhere: *Ayer v. Weeks*, 65 N. H. 248; 23 Am. St. Rep. 37; *Gilman v. Gilman*, 52 Me. 165; 86 Am. Dec. 502; *Firth v. Firth*, 50 N. J. Eq. 137; *Clark v. Libens*, 26 N. J. L. 207; *Ringgold v. Barley*, 5 Md. 186; 59 Am. Dec. 107, and extended note; *Thorndike v. Boston*, 1 Met. 242; *Jennison v. Hapgood*, 10 Pick. 77; *Littlefield v. Brooks*, 50 Me. 475; *De Meli v. De Meli*, 120 N. Y. 485; 17 Am. St. Rep. 652; *Bradley ads. Lowry*, 1 Spear Eq. 1; 39 Am. Dec. 142; *Shepherd v. Cassiday*, 20 Tex. 24; 70 Am. Dec. 372; *Kellogg v. Supervisors*, 42 Wis. 97.

While in transit, and until the new residence is acquired, the old domicile remains: *Littlefield v. Brooks*, 50 Me. 475; *Bradley v. Lowry*, 1 Spear Eq. 1; 39 Am. Dec. 142. Residence once acquired and established continues until proved to have been lost or changed. The burden of proving the loss or change is on the party asserting it: *Starke v. Scott*, 78 Va. 180; *Price v. Price*, 156 Pa. St. 617; *Desmare v. United States*, 93 U. S. 605; *Moffett v. Hill*, 131 Ill. 239.

RESIDENCE IS CHANGED from one place to another, or one state to another, only by the abandonment by a person of his first place of domicile with the intention not to return, and by taking up his residence in another place with the intention of permanently residing in that place. In other words, to effect a change of residence or domicile, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence in another place or jurisdiction, with the intention of making the last-acquired residence a permanent home: *People v. Connell*, 28 Ill. App. 285; *Bradley ads. Lowry*, 1 Spear Eq. 1; 39 Am. Dec. 142; *Anderson v. Anderson*, 42 Vt. 350; 1 Am. Rep. 334; *De Meli v. De Meli*, 67 How. Fr. 20; *State v. Casinova*, 1 Tex. 402; *Hyman v. Shlenker*, 44 La. Ann. 108; *Moffett v. Hill*, 131 Ill. 239; *Mead v. Boxborough*, 11 Cush. 352; *Ringgold v. Barley*, 5 Md. 186; 59 Am. Dec. 107, and note; *Jennison v. Hapgood*, 10 Pick. 77; *Wilbraham v. Luntow*, 99 Mass. 587; *Hayes v. Hayes*, 74 Ill. 312; *Wood v. Roeder*, 45 Neb. 311.

"Domicile" is used as synonymous with "legal residence" or "home." The intent of the party whose domicile is in question has great weight in determining its place, but, when once established, it cannot be changed but by intent, coupled with acts verifying the intent; for the domicile of a party in any particular locality is acquired only by a union of intent and of presence: *Hart v. Horn*, 4 Kan. 232; *Stockton v. Staples*, 66 Me. 197; *Hayes v. Hayes*, 74 Ill. 312; *Viles v. Waltham*, 157 Mass. 542; 34 Am. St. Rep. 311, and cases cited in note 314; *Hartford v. Champion*, 58 Conn. 268; *Reed's Appeal*, 71 Pa. St. 378; *Moffett v. Hill*, 131 Ill. 239; *Gilman v. Gilman*, 58 Me. 165; 83 Am. Dec. 502.

Mere intention to change one's residence does not effect that change. Coupled with such intention there must be acts done, one of which must be that of living for some period of time in the place of intended residence. In other words, the domicile is not affected nor changed by forming an intention to remove, unless such intention is carried into effect: *Wood v. Roeder*, 45 Neb. 311; *Penfield v. Chesapeake etc. R. R. Co.*, 29 Fed. Rep. 494; *Carey's Appeal*, 75 Pa. St. 201; *Hallowell v. Saco*, 5 Greenl. 143; *Ringgold v. Barley*, 5 Md. 186; 59 Am. Dec. 107; *Jennison v. Hapgood*, 10 Pick. 77; *Smith v. Croom*, 7 Fla. 81; *State v. Hallett*, 8 Ala. 159.

An intention to abandon a place as the residence and domicile and actual residence at another place, if not accompanied with an intention of remaining there permanently, or at least for an indefinite time, does not produce a change of domicile: *Jennison v. Hapgood*, 10 Pick. 77; *Smith v. Croom*, 7 Fla. 81; *Ringgold v. Barley*, 5 Md. 186; 59 Am. Dec. 107. But if a person actually removes to another place with an intention of remaining there for an indefinite time, and as a place of present domicile, it becomes his place of residence or domicile, notwithstanding he may have a floating intention to return to his old residence at some future time: *State v. Casinova*, 1 Tex. 402; *Anderson v. Anderson*, 42 Vt. 350; 1 Am. Rep. 334; *Ringgold v. Barley*, 5 Md. 186; 59 Am. Dec. 107; *Holmes v. Greene*, 7 Gray, 299; *Harris v. Firth*, 4 Cranch C. C. 710.

After a person has abandoned his residence of origin, his residence is to be considered as in that place where he has voluntarily fixed his habitation, not for mere temporary and special purposes, but with a present intention of making it his home, unless or until something which is uncertain or unexpected shall happen to induce him to adopt some other permanent home: *Firth v. Firth*, 50 N. J. Eq. 137.

The shortest absence, if intended as an abandonment of residence, is sufficient, although the party may soon afterward change his intention; but an extended absence, intended all the time to be temporary for a temporary purpose, followed by a resumption of the former residence, is not an abandonment: *Kreitz v. Behrensmeyer*, 125 Ill. 141; 8 Am. St. Rep. 349.

If, while absent from his place of residence, a person forms an intention to abandon it, his residence there then as effectually ceases as if he had intended not to return when he left: *Hampden v. Levant*, 59 Me. 557.

If an inhabitant of one place removes to another, not intending to remain there permanently, but with an intention of not returning to his former home, and does not so return, he loses his residence in his former home: *Mead v. Boxborough*, 11 Cush. 362. A person residing in a place with the purpose of there remaining for an indefinite time, and without retaining and keeping up any intention to return to his former home or domicile, has his residence in the place where he actually resides: *Wilbraham v. Ludlow*,

99 Mass. 587; *Will of Olson*, 63 Iowa, 147; *Wilton v. Falmouth*, 15 Me. 479; *Graham v. Trimmer*, 6 Kan. 141.

An absence from his residence for months, or even years, on business or pleasure, if all the while the party intended to be absent merely for a temporary purpose, to be followed by a resumption of the former residence, is not an abandonment of or change in residence: *Moffett v. Hill*, 131 Ill. 239; *Tullos v. Lane*, 45 La. Ann. 333; *Lincoln v. Hapgood*, 11 Mass. 350; *Boyd v. Beck*, 29 Ala. 703; *Walker v. Walker*, 1 Mo. App. 404; *Kellar v. Baird*, 5 Heisk. 39; *Cambridge v. Charlestown*, 13 Mass. 501; *Brewer v. Linnaeus*, 36 Me. 428; *Bradley v. Fraser*, 54 Iowa, 289; *Preston v. Culbertson*, 58 Cal. 198; *Risenwick v. Dasis*, 19 Md. 82; *Love v. Cherry*, 24 Iowa, 204; *State v. Judge*, 13 Ala. 805; *Williams v. Roxbury*, 12 Gray, 21. Thus, a minister of the gospel who joins the conference of his church, and is sent to a station or mission in another country, does not thereby forfeit his domicile or residence already acquired, nor acquire a new residence in the country to which he is sent: *Allgood v. Williams*, 92 Ala. 551. The same rule applies to a person who is appointed a United States consul to a foreign country while he is a resident of one of the states: *Wheat v. Smith*, 50 Ark. 267. A sojourn or visit in a foreign country, no matter how long continued, without any intention of remaining there permanently, does not operate to occasion a change of residence: *Gravillon v. Richards*, 13 La. 293; 33 Am. Dec. 563; *Sears v. Boston*, 1 Met. 250.

Mere doubt, or even very strong doubt, of an intention to return, does not affect the place of residence in such case: *White v. Brown*, 1 Wall. Jr. 217.

A Person may Change His Residence from One State to Another if the removal is bona fide, and with intention to abandon his former residence, and to fix it permanently in the state to which he removes. But, if the removal is for a temporary purpose, and with an intention to return to his former state of residence after that is accomplished, he is considered as a mere sojourner in the place of his temporary residence, and still a resident of the state from which he departed: *Read v. Bertrand*, 4 Wash. C. C. 514; *Carter v. Putnam*, 141 Ill. 133.

To effect a change of residence from one state to another, there must be an actual removal, an actual change of domicile, with a bona fide intention of abandoning the former place of residence, and establishing a new one; and the acts of the party must correspond with such purpose: *Kemna v. Brockhaus*, 10 Biss. 128. But when such act and intent concur the party acquires a new residence, and it is immaterial that the purpose was to avoid or escape arrest under a criminal charge in the state from which the party removed: *Young v. Pollak*, 85 Ala. 439. This intention of the party to make the state he removes to the place of his permanent residence is to be gathered from his conduct, his declarations, and from a variety of other circumstances, of all of which the jury are the judges: *Read v. Bertrand*, 4 Wash. C. C. 514; *Bradley vs. Lowry*, 1 Spear Eq. 1; 39 Am. Dec. 142; *Chicago etc. Ry. Co. v. Ohle*, 117 U. S. 123. If a citizen of one state in good faith gives up his residence there, goes to another state, and takes up a permanent residence therein, he loses his former citizenship, and acquires citizenship in the new domicile: *Chicago etc. Ry. Co. v. Ohle*, 117 U. S. 123.

Whether a man has changed his residence from one state to another, so as to have become a citizen of the latter, must depend very largely upon his intention. The mere fact of a prolonged absence from one state, and continued residence in another while attending to business or pleasure,

is not in itself enough to constitute a change of citizenship. It must appear that the person has left the former state with the intention of resigning his citizenship there. The fact that a man continues to vote in the state from which he came, and owns a farm there, tends to show that he is a citizen thereof: *Woodworth v. St. Paul etc. Ry. Co.*, 5 McCrary, 574. Thus, a husband may go to another state in quest of health for his wife, and remain a considerable time without losing his residence in the state from which he departed: *People v. Connell*, 28 Ill. App. 285. A person after a considerable absence from the state, and after losing his residence there, may return to his former place of abode, and acquire a domicile there again if he intends to make it his future home, though on his return he may have left some of his goods in the state from which he returned for some months, as well as an unexpired term in land leased by him there: *Behrensmeyer v. Kreitz*, 135 Ill. 591. An absence of five years from the state does not change the residence of the party if he leaves home merely to seek temporary employment: *Knox v. Walloborough*, 3 Greenl. 455. And a resident of one state does not acquire a residence in another merely by going there to seek employment, with the intention of residing there only if he finds it: *Ross v. Ross*, 103 Mass. 575. A party who leaves the state without any settled intention of acquiring a residence elsewhere, but only with a conditional intention of so doing, does not lose his former residence so long as that intention remains conditional: *Wilkins v. Marshall*, 80 Ill. 74. And, although he may intend never to return, he does not lose his former residence until he acquires another in some other place: *Ayer v. Weeks*, 65 N. H. 248; 23 Am. St. Rep. 37.

To constitute a change of residence, the intention of remaining in the new one must appear, and a visit to another county pending a removal from the state, with intent not to return, does not constitute the party a resident of the county in which he is visiting: *Church v. Crossman*, 49 Iowa, 444.

If a person abandons his residence in one state with the intention of removing to another state, and on his way he and his family make a temporary visit at a point not within either state, this does not gain a residence for him in the place of temporary sojourn. But if the person so intending to change his place of residence reaches his destination in the other state, with the intention of residing there permanently, then he becomes a resident and inhabitant of that state: *Behrensmeyer v. Kreitz*, 135 Ill. 591-594. It has been decided that one who leaves the state with the intention of never returning, and of taking up his abode in another state, thereby loses his residence, even before he has reached and established a new domicile: *Briggs v. Rochester*, 16 Gray, 337.

If a person abandons his residence in one state, with no intention of returning thereto, but with an intention of making his home at a fixed place in another state, the latter state becomes his permanent residence or domicile, although, upon reaching his intended home, he immediately goes with his family to visit a neighbor in the former state, sickens and dies there, without returning to live at his new home: *White v. Tennant*, 31 W. Va. 790; 13 Am. St. Rep. 896. If a person abandons his domicile for the purpose of traveling to regain his health, and dies during his travels, without acquiring any permanent abode or residence at any other place, he does not thereby lose his former domicile, although he may have had no expectation of returning to it (*Still v. Woodville*, 38 Miss. 646), and intended to acquire a new residence: *Smith v. Croom*, 7 Fla. 81. But if he locates at a certain place intending to remain there an indefinite time, and there marries and

resides until his death, his domicile is the place where he dies: *Wall of Olson*, 53 Iowa, 145.

Residence of Students and Others.—The rule is well settled, in accordance with the doctrine maintained in the principal case, that a student who goes to a college town with the intention of remaining there simply as a student, and only until his education is completed, and who does not change his intention, does not acquire a residence there, but retains the domicile of his origin; but when the intention is formed at any time to make such town his domicile in good faith, and to the exclusion of all other places, he then becomes a resident and citizen, and, being otherwise qualified, is entitled to vote there, although he intends to make such town his home only for an indefinite period after the completion, or independent of his term as a student. He must, however, in order to gain a residence in such town, have no other home to go to in case of sickness or infirmity of any kind, and he must intend to make that town his home, at least for an indefinite time, without present intention of changing it: *Padigo v. Grimes*, 113 Ind. 148; *Vanderpool v. O'Hanlon*, 53 Iowa, 246; 36 Am. Rep. 216; *Dale v. Irwin*, 78 Ill. 170; *Granby v. Amherst*, 7 Mass. 1; *Sanders v. Getchell*, 76 Ma. 158; 49 Am. Rep. 606; *Matter of Goodman*, 146 N. Y. 284; *Matter of Garvey*, 147 N. Y. 117.

If a soldier, at the time of his admission as an inmate of a soldier's home, has a legal residence in a place other than that in which the home is situated, he does not necessarily lose such residence while he remains such inmate, nor does he acquire a new residence in the home, unless it is his intention to abandon his former residence and remain permanently in the home: *Wolcott v. Holcomb*, 97 Mich. 361; *Silvey v. Lindsay*, 107 N. Y. 55. If, however, he abandons his former residence and becomes an inmate of such soldier's home, with an intention to make that his future place of residence, and then remains with such intention, he thereby gains a residence where the home is situated: *Stewart v. Kyser*, 105 Cal. 459. The same rules govern the inmates of county infirmaries: *Sturgeon v. Korte*, 34 Ohio St. 525.

A person committed to prison cannot gain a residence where the prison is situated. He retains his residence at his abode or home before his commitment. A residence can only be acquired by voluntary choice, or by right: *People v. Cady*, 143 N. Y. 100. Removal to an insane asylum does not change nor destroy the former residence of the party confined: *Clark v. Whitaker*, 18 Conn. 543; 46 Am. Dec. 837.

PRAY v. OMAHA STREET RAILWAY COMPANY.

[44 NEBRASKA, 267.]

STREET RAILROADS—NEGLIGENCE.—Street railway companies are common carriers, and as such answerable for the negligence of their servants upon the principles of the common law. In providing for the safety of passengers they are bound to exercise the highest degree of care and diligence consistent with their undertaking, and are responsible for the slightest negligence on the part of their employees.

STREET RAILROADS—NEGLIGENCE—OVERCROWDED CARS.—If the employees of a street railway company in charge of its cars undertake to carry a number of persons greatly in excess of the seating capacity of such cars, so that passengers are compelled to stand on the platforms and steps,

and the injury complained of is the direct result of such overcrowded condition, that fact is evidence of negligence on the part of the company.

STREET RAILROADS—NEGLIGENCE—OVERCROWDED CARS.—The fact that a passenger stands or rides on the platform or steps of a crowded street-car, on which there are no vacant seats, is not such contributory negligence per se as bars a recovery for injuries received through the negligence of the railway company or its employees.

STREET RAILROADS—NEGLIGENCE—OVERCROWDED CARS.—It is negligence on the part of a street railway company to carry passengers greatly in excess of the seating capacity of its cars, and permit such passengers to ride on the platforms and footboards thereof, so as to expose them to danger.

STREET RAILROADS—NEGLIGENCE.—A passenger standing on the steps of a moving street-car, unable to secure a seat or standing room within, is presumed to be there with the knowledge and consent of the conductor, and is not guilty of negligence, so as to bar a recovery for injury received by being crowded off of the car, through the concurrent negligence of the car conductor and third persons.

NEGLIGENCE—WHEN QUESTION FOR JURY.—If different minds may draw different conclusions from the facts in evidence to support a charge of negligence, it is a question of fact to be determined by the jury, and not of law for the court to decide.

John O. Yeiser, for the appellant.

John L. Webster, for the appellee.

160 POST, J. About 6 o'clock P. M. of the twenty-ninth day of November, 1892, the plaintiff, a lad fourteen years of age, employed in one of the packing houses at South Omaha, boarded one of the defendant's motor trains in order to reach his home in the city of Omaha. When he approached the train, which was then waiting at the southern terminus of the line, he observed that the seats were all occupied, and that there was not even standing room remaining inside. He, however, secured standing room on the rear platform of the trailer, where he remained until the train started about five minutes later, and until it made the first stop four blocks distant for the purpose of allowing a passenger to alight. At that point he was, according to his testimony, on account of the pressure of passengers from within, compelled to step from his position to the ground in order to make room for the passenger above mentioned, when his place was immediately filled by other passengers, leaving 170 no standing room on the platform. As the train was in the act of starting again he went forward and took a position on the right front step of the trailer, but was unable to get upon the platform on account of the crowd thereon. He, however, remained clinging

to the rod attached to the car and dashboard, holding a dinner pail in one hand until the train had run the distance of one block when he was forced to relinquish his hold, on account of the pressure of the other passengers, and fell, receiving the injuries complained of. He testifies further that the pressure which forced him from the train was occasioned by the movement of the passengers on the platform, but the cause of such movement he does not attempt to explain. Another witness testifies that the conductor was, when the accident occurred, near the front door of the trailer and going forward in the act of collecting fares. So that a reasonable inference is that the movement of the passengers on the front platform was caused by the approach of the conductor forcing his way through the crowd. The district court, on the conclusion of the plaintiff's case, directed a verdict for the defendant, and which is the ruling now assigned as error.

It is necessary to notice but a single paragraph of the petition, viz.: "That said defendant, through carelessness and negligence in not providing cars enough for the transportation between said points, caused a dangerously large crowd of people to board said car on which the plaintiff was a passenger; that the said defendant, through its agents and servants, when said car in which the plaintiff was a passenger was loaded with all the passengers it could safely carry, negligently and carelessly suffered and permitted a large additional number of people to board said car and overcrowd the same; that by reason of so dangerously large a crowd negligently and carelessly suffered and permitted on said car by defendant, the plaintiff was forced off said car to allow fellow-passengers to alight therefrom; that immediately ¹⁷¹ plaintiff proceeded to re-enter said car, and before he could reach a safer position, while standing upon the steps, . . . the crowd so negligently and carelessly permitted upon said car . . . shoved back to get room, and were forced back by the conductor of said line, one of the defendant's servants, while engaged in collecting the fares from said crowd, which pushed against the plaintiff with such force as to break his hold and to throw him from said moving train; that in said manner plaintiff was crowded off of said car by defendant's negligence and carelessness." It was held in *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 38 Am. St. Rep. 753, that street railway companies are common carriers of passengers, and, as such, are answerable for the neg-

ligence of their servants upon the principles of the common law; that in providing for the safety of passengers they are bound to exercise the highest degree of care and diligence consistent with the nature of their undertaking, and are responsible for the slightest negligence on the part of their employees. If it be true, as appears from the plaintiff's evidence, that the defendant's servants in charge of the train undertook to carry a number of persons greatly in excess of its capacity, so that passengers, including the plaintiff, were compelled to stand on the platform and steps of its cars, and the injury complained of is the direct result of such overcrowded conditions, that fact must, in the light of the authorities hereafter cited, be regarded as evidence of negligence, but it is said that the act of riding on the overcrowded train, and particularly on the steps of the trailer, is, under the circumstances of this case, per se, contributory negligence, which will prevent a recovery. In the consideration of that question it is deemed necessary to examine some of the authorities which seem to bear directly upon the subject.

In Ray on Negligence of Imposed Duties, 43, it is said that the front platform of a crowded street-car is not a place of known danger so as to render it negligence per se ¹⁷² for an adult person to stand thereon while the car is in motion.

In *Germantown Passenger Ry. Co. v. Walling*, 97 Pa. St. 55, 39 Am. Rep. 796, the plaintiff voluntarily got upon a car so crowded that he was obliged to stand on one of the steps of the platform, which was also occupied by two other persons, and where, in order to retain his position, he was required to hold with one hand to the dashboard, and with the other to the iron bar under the window of the car. The court, referring to the question of contributory negligence, say: "Street railway companies have all along considered their platforms as a place of safety, and so have the public. Shall the court say that riding on a platform is so dangerous that one who pays for standing there can recover nothing for an injury arising from the company's default?"

In *Meessel v. Lynn etc. R. R. Co.*, 8 Allen, 234, it is said: "The seats inside are not the only places where the managers expect passengers to remain, but it is notorious that they stop habitually to receive passengers to stand inside until the car is full, and continue to stop and receive them even after there is no place to stand except on the steps of the platform. Neither the officers of these corporations, nor the managers

of the cars, nor the traveling public seem to regard this practice as hazardous, nor does experience thus far seem to require that it should be restrained on account of the danger. There is, therefore, no basis upon which the court can decide, upon the evidence reported, that the plaintiff did not use ordinary care."

In *Nolan v. Brooklyn City etc. R. R. Co.*, 87 N. Y. 63, 41 Am. Rep. 345, the plaintiff, a passenger on a street-car, rode on the front platform of his own choice for the purpose of smoking, there being room inside. He was thrown from the car and injured through the defendant's negligence, and was permitted to recover.

In *Topeka City Ry. Co. v. Higgs*, 38 Kan. 379, 5 Am. St. Rep. 754, it was held gross negligence on the part of a street railway company ¹⁷³ to carry persons greatly in excess of the seating capacity of its cars, and permit passengers to ride on the platforms and footboards thereof, so as to expose them to danger of collision with its other trains.

In *Geitz v. Milwaukee City Ry. Co.*, 72 Wis. 307, the plaintiff at the time of the injury was standing on the footboard extending lengthwise along the car, which was crowded with passengers, yet the question of negligence was held to have been properly submitted to the jury.

City Ry. Co. v. Lee, 50 N. J. L. 433, 7 Am. St. Rep. 798, presents substantially the same state of facts as the case last cited, and the judgment in favor of the plaintiff was affirmed. And the doctrine above announced finds support also in the following, among many other, cases: *Maguire v. Middlesex R. R. Co.*, 115 Mass. 239; *Fleck v. Union Ry. Co.*, 134 Mass. 481; *Upham v. Detroit City Ry. Co.*, 85 Mich. 12; *Archer v. Fort Wayne etc. Ry. Co.*, 87 Mich. 101; *Matz v. St. Paul City Ry. Co.*, 52 Minn. 159.

The record is silent on the subject of the defendant's notice of the condition of the train, but, in the absence of evidence, we must presume that the plaintiff, if not invited to become a passenger, was present with the knowledge and consent of the conductor. It follows that the boarding of the crowded train, under the circumstances disclosed, was not such negligence as to alone justify the trial court in directing a verdict against the plaintiff.

Was the plaintiff guilty of contributory negligence in leaving the rear of the train and taking a position on the front step of the trailer? There are certain material facts which

must not be overlooked in the determination of that question. In the first place, the relation of carrier and passenger existed at that time, and the defendant, having voluntarily assumed the responsibility of safely carrying plaintiff, owed him a duty in that regard, and is at least presumptively liable for the concurrent negligence of its servants and third persons: *Sheridan v. Brooklyn City etc. R. R. Co.*, 36 N. Y. 39; 93 Am. Dec. 490; ¹⁷⁴ *Lehr v. Steinway etc. R. R. Co.*, 118 N. Y. 556; *Holly v. Atlanta Street R. R. Co.*, 61 Ga. 215; 84 Am. Rep. 97. It will be remembered, too, that the plaintiff did not voluntarily abandon his position on the rear platform, but was unable to again board the train after standing aside to allow a fellow-passenger to alight. The act of going forward to the front platform was not of itself hazardous, for which the plaintiff should be charged with negligence. In *Dixon v. Brooklyn City etc. R. R. Co.*, 100 N. Y. 170, the plaintiff tried to enter the defendant's car, which was moving slowly, by the rear platform; but, finding it crowded, he passed along by the car in order to reach the front platform, and, in so doing, slipped on the snow and ice thrown up by the defendant's plows, and fell under the wheels. It was held that the question of contributory negligence was rightly submitted to the jury. Nor does the evidence warrant the inference that the plaintiff's position on the front step was either actually or apparently more dangerous than that which he had been compelled to relinquish on the rear platform. Referring to his position on the front step he testifies:

Q. Were you able to get any further in the car at that time? A. No, sir.

Q. Why? A. Because the car was moving, and I would have run a great risk to crowd in.

Q. Had the car not started so soon, could you have gotten further on the platform? A. Yes; I think I could. I am pretty sure I could.

Q. Could you have pulled up any further on the platform without letting go your grip on the hand rails? A. No.

The rule is too well settled in this state to admit of a doubt or to require a citation of the cases, that where different minds may draw different conclusions from the facts ¹⁷⁵ in evidence to support a charge of negligence, it is a question of fact and not of law. In the case at bar the inference that the injury proved was caused by the concurrent negligence

of the defendant in permitting the car to be crowded beyond its capacity, and of the plaintiff's fellow-passengers in forcing him from his position on the step, in the absence of contributory negligence on his part, is, to say the least, a reasonable one. The question was, therefore, one upon which the plaintiff was entitled to the verdict of the jury; hence the court erred in its peremptory direction in favor of the defendant, for which the judgment must be reversed, and the cause remanded for further proceedings in accordance with the views herein stated.

Reversed and remanded.

STREET RAILWAY—DUTY TOWARD PASSENGERS.—A street railway company is bound to exercise the utmost skill, diligence, and human foresight in conveying its passengers, and is liable for slight negligence: *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890; 38 Am. St. Rep. 753, and note with the cases collected.

STREET RAILWAYS—NEGLIGENCE—OVERCROWDED CARS.—When a street railway company undertakes to carry large numbers of persons, vastly in excess of the seating capacity of its cars, and permits passengers to ride on its platforms and footboards without objection, and collects fares from them and stops its cars when in such crowded condition that no seats are attainable, and permits persons to get on and be carried from place to place, and, when the cars are in such crowded condition with passengers riding on footboards, runs them so near the intersection of a switch with the main track that they cannot pass without injury to the passengers, the company is guilty of gross negligence: *Topeka etc. Ry. Co. v. Higgs*, 38 Kan. 375; 5 Am. St. Rep. 754, and note.

STREET RAILWAYS—RIDING ON PLATFORMS—NEGLIGENCE.—It is not necessarily negligent for a passenger to ride on the platform of a street-car: *Nolan v. Brooklyn etc. R. R. Co.*, 87 N. Y. 63; 41 Am. Rep. 345, and extended note; *Thirteenth etc. Street etc. Ry. Co. v. Boudron*, 92 Pa. St. 475; 37 Am. Rep. 707, and extended note; *Muldoon v. Seattle etc. Ry. Co.*, 7 Wash. 528; 38 Am. St. Rep. 901, and note.

WESTERN UNION TELEGRAPH COMPANY v. KEMP.

[44 NEBRASKA, 194.]

TELEGRAPH COMPANIES—STATUTORY REGULATIONS—LIMITATION OF LIABILITY.—A statutory provision that "Any telegraph company is hereby declared to be liable for the nondelivery of dispatches intrusted to its care, and for all mistakes in transmitting messages made by any person in its employ, . . . and any such telegraph company shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks," is equitable, fair, and obligatory on all telegraph companies doing business in the state, and applies to such company when contracting to correctly send a message to another state.

TELEGRAPH COMPANIES—STATUTORY REGULATION—LIMITATION OF LIABILITY.—A stipulation in the blanks of a telegraph company that it "will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message," is void as an attempt to limit its liability when such limitation is in conflict with a statutory provision.

Estabrook & Davis, H. C. Brome, and R. A. Jones, for the appellant.

Reed & Ellis, for the appellee.

195 HARRISON, J. This action was commenced in the district court of Madison county by the defendant in error to recover damages against plaintiff in error which he alleged were caused by the incorrect transmission of a message from Papillion, this state, to Kansas City, Missouri, delivered by him to the company at its place of business in the former place to be sent to the latter. A jury was waived in the district court, and the case submitted to the judge thereof upon a stipulated statement of facts, and from a finding and judgment 196 in favor of defendant in error these proceedings have been prosecuted to the higher court.

This case was before this court prior to this time for review of the proceedings during the trial to a judge of the district court and a jury, and was reversed and remanded for further action. The opinion rendered at that time is reported in 28 Nebraska, 661. The statement of the issues and facts therein made is sufficiently full and complete; hence we do not deem it necessary to repeat it, but for such statement we here refer to that opinion. It was announced in that decision that the requirements embodied in section 12 of chapter 89 a of the Compiled Statutes, as follows: "Any telegraph company engaged in the transmission of telegraphic dispatches is hereby declared to be liable for the nondelivery of dispatches intrusted to its care, and for all mistakes in transmitting messages made by any person in its employ, and for all damages resulting from a failure to perform any other duty required by law, and any such telegraph company shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks"—are equitable and fair and obligatory on any and all telegraph companies doing business in this state, and that any such company contracting to correctly send a message to another state, which incorrectly transmits the same, is liable in all the damages for the breach of its contract which are sustained by

the sender of the message by reason of such breach, and that, applied to the facts in this case, the defendant in error having delivered the message to the company at its office in Papillion, to be sent in the regular course of its business to Kansas City, Missouri, and the company's operator or agent having transmitted it incorrectly in material portions, whereby defendant in error suffered damages, the company was liable for such damages. The determination of these questions, as stated in the former opinion, will not now be changed, but will be followed and adhered to.

¹⁹⁷ The only other point discussed in the brief of plaintiff in error and for decision in the present hearing, and which was not urged or passed upon at the prior presentation of the case in this court, is that one of the agreements or conditions, printed on the form upon which the defendant in error wrote his message, was as follows: "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message"; that the sender was bound by the stipulation quoted, and, as the facts do not show that he did present his claim in writing to the company within the sixty days therein prescribed, he should not have been allowed a judgment for the damages. A clause, such as this particular clause of the stipulations printed upon the form in which the message was written, was considered by this court in the case of *Pacific Tel. Co. v. Underwood*, 37 Neb. 315, 40 Am. St. Rep. 490, and it was then held that if this portion of the conditions printed upon the telegraphic message form was to be looked upon as a contract, it was in violation of section 12, chapter 89 a, of the Compiled Statutes, and an attempt to limit the liability of the company in a manner which the law did not allow. We are satisfied with the rule announced at that time, and will adhere to it.

It follows that the judgment of the district court will be affirmed.

TELEGRAPH COMPANIES—LIMITING LIABILITY FOR NEGLIGENCE.—A telegraph company is a common carrier of intelligence for hire, bound to promptly and correctly transmit all messages intrusted to it, and cannot by contract limit or exempt itself from liability for its own negligence: *Pacific Tel. Co. v. Underwood*, 37 Neb. 315; 40 Am. St. Rep. 490, and note. A telegraph corporation cannot by its contract protect itself from the consequences of the negligence of its servants in failing to deliver a message with reasonable diligence: *Western Union Tel. Co. v. Linn*, 87 Tex. 7; 47 Am. St. Rep. 58, and note.

TELEGRAPH COMPANIES—VALIDITY OF STIPULATION LIMITING TIME FOR PRESENTMENT OF CLAIM.—Notwithstanding a stipulation printed upon a blank on which a telegraph message is sent that “the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission,” the company is liable for a statutory penalty, though the claim for it is not presented within such time: *Mathis v. Western Union Tel. Co.*, 94 Ga. 338; 47 Am. St. Rep. 167, and note with the cases collected showing the conflict of authority on this proposition.

BADGER LUMBER COMPANY v. HOLMES.

[44 NEBRASKA, 244.]

MECHANICS' LIENS—PROPERTY COVERED—APPORTIONMENT.—If, under a contract to furnish material to erect a building upon each of several lots, the material furnished is used indiscriminately in erecting each of the buildings on each lot, the whole debt may be charged to all of the lots, but all of the debt for all of the material cannot be charged to part of the lots.

MECHANICS' LIENS—APPORTIONMENT.—If it is sought to charge part only of certain lots for material furnished to erect buildings upon each of such lots, the amount of material furnished must be apportioned so that the part of the real estate charged with the mechanic's lien shall bear no greater amount of the expense than the value of the material actually used in the construction of the improvement made on such part.

Harwood, Ames & Pettis, for the appellants.

A. Watkins and Dawes, Croffoth & Cunningham, for the appellees.

245 **RAGAN, C.** On the twenty-fifth day of August, 1890, the Badger Lumber Company, a corporation dealing in lumber in the city of Lincoln, filed in the office of the register of deeds, in Lancaster county, a “verified account of items” of certain material which it alleged it had, previous to that time, furnished for the erection of a “dwelling-house” upon certain real estate. This “verified account of items” recited that in the month of August, 1889, one Cadwalader entered into a verbal contract with the Badger Lumber Company for lumber and other material for the erection of a dwelling-house on lots 1, 2, 8, 10, 11, 12, in block 8, in Avondale addition to the city of Lincoln; that in pursuance of said verbal contract the Badger Lumber Company, between the fourteenth day of August, 1889, and the second day of May, 1890, furnished the material mentioned in said account on said prem-

ises, and that such material was used on said premises in the construction of said "dwelling-house," and claimed a lien against said premises for such material for a balance of four hundred and ninety-two dollars and eighteen cents remaining unpaid. The Badger Lumber Company brought this action in the district court of Lancaster county, making the "verified account of items" filed in the office of the register of deeds of said county the basis of its suit, and in its petition set out the making of the verbal contract with Cadwalader to furnish material for the erection of a "dwelling-house" on said real estate; that it had ²⁴⁶ furnished such material; the making, verification, and filing of the "account of items" of material furnished under the contract, and the balance remaining due thereon, and prayed that it might be decreed a lien upon said real estate for the balance due it for the material furnished under the contract with Cadwalader. Numerous parties were made defendants to the action, among them Cadwalader and wife, and W. W. Holmes and wife, the latter of whom had become the owners of those portions of said premises mentioned in the court's decree. The district court found and decreed that there was a balance of five hundred and eighty dollars due from Cadwalader and wife to the Badger Lumber Company for material which it had furnished Cadwalader under his verbal contract with the lumber company, and to secure its payment decreed the lumber company a lien on the south fifty feet of lots 1 and 2, the north fifty feet of lots 11 and 12, the south fifty feet of lots 11 and 12, and the west forty-five feet of lot 10, in block 3, in Avondale addition to the city of Lincoln; and from this decree the representatives of W. W. Holmes have appealed.

The undisputed evidence is that the verbal contract between the Badger Lumber Company and Cadwalader was that the former would furnish material to the latter for erecting a building on each of the six lots mentioned in the "verified account of items" filed in the office of the register of deeds by the Badger Lumber Company; that the material, in pursuance of said contract, was used indiscriminately by Cadwalader in erecting these buildings, one on each of said six lots. But the evidence does not show, nor was there any attempt to show, what proportion of the material mentioned was used in constructing the buildings on the lots and parts of lots which, by the decree of the district court, was made liable for

the balance due the Badger Lumber Company from Cadwalader. In *Byrd v. Cochran*, 89 Neb. 109, Harrison, J., speaking for this court, said: "When a subcontractor paints two separate ²⁴⁷ houses and furnishes the paint and other materials necessary for use in the painting, . . . in order to recover upon a mechanic's lien filed against one of the houses, and the lot upon which it stands, it must be shown that the amount charged against the one house and lot is the value of the labor performed upon, and materials furnished for, such house, or an estimate made by some method or plan which will produce a certain definite result, and mere approximation or guess work will not suffice to establish the lien": *Doolittle v. Plenz*, 16 Neb. 153. This case is decisive of this appeal. Here the contract was to furnish material to erect six buildings upon six lots, the material was so furnished, and it was used indiscriminately in building each of the six buildings. The whole debt then might be charged to all six of the lots: *Wakefield v. Latey*, 39 Neb. 285. But all the debt for all the material cannot be charged to a part of the lots. If it is sought to charge a part only of the lots for material furnished under the contract, then the amount of the material furnished must be apportioned so that the parts charged shall bear no greater amount of the expense than the value of the material actually used on said parts in the construction of the improvements made thereon.

The finding and decree of the district court in favor of the Badger Lumber Company only is reversed, and the cause remanded to the district court for further proceedings in accordance with this opinion. All the costs of this appeal are to be taxed to the Badger Lumber Company.

Judgment accordingly. —

MECHANICS' LIENS—PROPERTY COVERED.—When materials have been furnished under a single and entire contract for a number of buildings erected on contiguous lots owned by the person to whom the material is furnished, a materialman's lien will attach to all of the buildings and lots, and in an action to enforce such lien it does not devolve upon the materialman to show how much of the material is placed in each building: *Maryland Brick Co. v. Spilman*, 76 Md. 337; 35 Am. St. Rep. 431, and note; *Lyon v. Logan*, 68 Tex. 521; 2 Am. St. Rep. 511, and note. See, also, the extended note to *Chapin v. Perse etc. Paper Works*, 79 Am. Dec. 273.

**WESTERN UNION TELEGRAPH COMPANY v. CALL
PUBLISHING COMPANY.**

[44 NEBRASKA, 328.]

TELEGRAPH COMPANIES—DISCRIMINATION.—A CONSTITUTIONAL PROVISION simply and expressly granting the right to prevent by legislation “unjust discrimination” by telegraph companies must be construed as establishing the limits of legislative authority upon this subject, and not as giving authority to declare all discriminations as unjust.

TELEGRAPH COMPANIES.—TO CONSTITUTE AN UNJUST DISCRIMINATION in rates by a telegraph company, there must be a difference in rates to patrons under substantially similar conditions as to service.

TELEGRAPH COMPANIES—DISCRIMINATION—STATUTORY REGULATION.—A statute regulating telegraph companies and prohibiting all partiality or discrimination between patrons in the handling of business, or in rates for similar services, or as to terms of payment or delivery, or in favor of persons transmitting messages to the greater distance, is valid and merely declaratory of the common law, and cannot be construed so as to require a telegraph company to transmit messages for two patrons under different conditions at the same rate.

TELEGRAPH COMPANIES ARE COMMON CARRIERS OF INTELLIGENCE with rights and duties analogous to those of public carriers of goods and passengers.

TELEGRAPH COMPANIES—DISCRIMINATION.—Telegraph companies are bound to charge no more for their services than is reasonable, and, under like conditions, they must render services to all patrons on equal terms. They must not so discriminate in rates between different patrons as to give to one an undue preference over another, but it is not an undue preference to make to one patron a less rate than to another, when there exist differences in conditions as to the expense or difficulty of the services rendered, which fairly justify such a difference in rates.

TELEGRAPH COMPANIES—DISCRIMINATION.—Although a telegraph company charges one patron a different rate for services than that charged another patron under a substantial difference in conditions affecting the difficulty or expense of performing the services, no cause of action arises unless it can be shown that the difference in rates is disproportionate to the difference in conditions.

H. D. Estabrook and Harwood, Ames & Pettis, for the appellant.

W. Leese and J. M. Stewart, for the appellee.

328 IRVINE, C. The Call Publishing Company is a corporation publishing a daily newspaper in the city of Lincoln. It brought this suit against the Western Union Telegraph Company, alleging that since July 1, 1888, it had been receiving from the telegraph company the dispatches of the Associated Press collected by that organization at Chicago and transmitted daily from Chicago to Lincoln as well as to other cities; that there existed between the Associated Press and

the telegraph company a contract which prevented the Call company from procuring its news otherwise than over the ~~222~~ lines of the telegraph company; that during said period the telegraph company had charged and collected from the Call company \$75 per month for transmitting such dispatches, not exceeding 1,500 words each day; that the State Journal company published in the city of Lincoln a daily newspaper which had been during the whole of such period and prior thereto receiving the same dispatches; that during the whole of said period the telegraph company unjustly discriminated in favor of the State Journal company and against the Call company, and gave to the State Journal company an undue advantage, in that it charged the State Journal company for the same, like, and contemporaneous services as were rendered to the Call company only the sum of \$1.50 per hundred words daily per month; that the amount charged and collected by the telegraph company from the Call company was excessive and unjust to the amount of the excess of the charge to it over that to the State Journal company; that immediately upon discovering such discrimination the Call company demanded repayment of such excess, which was refused. Damages were alleged on this account in the sum of \$1,962, for which judgment was prayed.

The telegraph company admitted the charges made to the Call company, and admitted that it charged the State Journal company for its dispatches \$125 per month, but denied that it had given the State Journal company any undue advantage, or that it had unjustly discriminated in favor of the State Journal company. It further alleged that the Call company published an evening paper, and received over the telegraph company's lines dispatches not exceeding 1,500 words per day, all transmitted and delivered in the daytime, and that this charge was fair and reasonable, and was no greater than was charged other persons for similar services. It further alleged that it had accepted the provisions of the act of Congress of 1866, in regard to telegraph companies, and pleaded that the subject matter of the ~~222~~ action was within the exclusive jurisdiction of the federal courts; and it further pleaded that it at all times had been ready to transmit all dispatches with impartiality in the order in which they were received, and had ever been willing to offer the same and equal facilities to the plaintiff and all publishers of newspapers, and to furnish dispatches for pub-

lication to all newspapers on the same conditions as to payment and delivery. The reply was a general denial. There was a verdict for the plaintiff for \$975, upon which judgment was rendered, and the telegraph company prosecutes error.

The errors assigned relate to the instructions given and refused, and to the sufficiency of the evidence. The assignments of error in regard to the instructions group themselves in the same manner as in the case of *Hiatt v. Kinkaid*, 40 Neb. 178. One assignment is directed against the instructions given by the court en masse. Another is directed against those asked by the telegraph company and refused. Some of those given by the court were manifestly correct, and at least one asked by the telegraph company was substantially covered by the court's charge. These assignments must, therefore, be overruled, and we are remitted in an examination of the case to a consideration of the sufficiency of the evidence.

The evidence shows, without substantial conflict, that prior to July, 1888, a newspaper had been published in the city of Lincoln known as the *State Democrat*. This paper had acquired what is styled a "franchise" in the Northwestern Associated Press, and had been receiving the dispatches of that organization, paying to the Associated Press \$20 per month therefor, and paying to the telegraph company for transmitting and delivering the dispatches \$75 per month for a maximum of 1,400 words per day. The manner in which this contract was brought about was that Mr. Calhoun, the proprietor of the *State Democrat*, negotiated with the manager of the press association for procuring its news, and was by that manager informed that he should first make terms with the telegraph company for transmitting the messages. Negotiations were entered into between Mr. Calhoun and the telegraph company, resulting in an offer by the telegraph company to transmit 1,400 words per day for \$75 per month, and this offer was accepted by Mr. Calhoun. About July 1, 1888, Mr. Calhoun sold his paper to the Call company, and assigned to that company the franchise which he had acquired in the Northwestern Associated Press. No new contract is disclosed between the Call company and telegraph company, but the telegraph company continued to deliver and the *Call* to receive the dispatches in the same manner as they had been transmitted and received to and by the *Democrat* before the sale, and the Call company paid the

rate of \$75 per month. The paper published by the Call company was an evening paper, published between 3 and 4 o'clock in the afternoon.

The State Journal company published a morning paper. It was also a member of the Associated Press, and received over the wires of the telegraph company dispatches not to exceed 5,600 words a day, for which it paid, during this period, the sum of \$125 per month. It also was a member of the United Press, another association for the collection of news, and received through that association over the wires of the Postal Telegraph Company from 7,500 to 8,000 words per day, for which it paid to the Postal company \$200.

The Associated Press transmits its news in two groups, called "reports." The day report is transmitted between 11 A. M. and about 2:30 P. M., and is for the especial benefit of evening papers. It is this report which the Call company received. The night report is usually transmitted at night, and generally between 7 P. M. and 3 A. M., and is for the especial benefit of morning papers. The Journal company's contract strictly included only the night report, but for many years it has in fact received ^{and} both day and night reports. Prior to the acquisition by the *Democrat* of its franchise in the Associated Press the day report to the *Journal* was relayed at Omaha, whence it was usually transmitted to Lincoln by wire, but sometimes by mail. The Journal company sent to the office of the telegraph company for this report, and usually obtained it about 4 P. M. After the *Democrat's* acquisition of the franchise the day report was transmitted from Chicago directly, except when the weather or other influences required a relay at Omaha. It was sent in time for use by the afternoon paper, was committed to writing on manifold paper, one copy delivered to the *Democrat*, and, after its sale, to the *Call*, and the other to the *Journal*. The *Journal* was not permitted to use this report until after it had been published in the *Call*. It was also shown that in order to be of any service to the *Call* the day report must be delivered to it not later than 3 o'clock in the afternoon, while the night report to the *Journal* might be transmitted at any time prior to about 3 o'clock in the morning. Prior to the contract between the *Democrat* and the telegraph company for the day report, the telegraph company used but one wire between Omaha and Lincoln. In order to promptly transmit the day report to the *Democrat* the telegraph company was required

to erect another wire and to employ an additional operator at Lincoln. Neither this wire nor this operator was employed exclusively for transmitting the report. Other business between the two cities demanded additional facilities, and this wire and this operator, when not engaged in transmitting the press report, were used for commercial business. But the necessity of transmitting this report was one of the elements, and evidently a large one, in requiring the telegraph company to so increase its facilities. During the hours within which the day report must be transmitted the facilities of the telegraph company are taxed with a great burden of commercial business, and during those hours certain wires are leased to individuals ~~and~~ to accommodate their business. After 4 o'clock in the afternoon these leased wires are free, and can be used by the telegraph company for other purposes. During the night, when the night report is transmitted, not only are these leased wires free for use by the telegraph company, but there is not the same pressure of commercial business generally, and it is the established usage of telegraph companies, on account of these circumstances, to transmit messages during the night at less rates than in the daytime. There is also evidence tending to show that there were more morning papers to divide the aggregate cost of transmitting the night report, than there were evening papers to divide the aggregate cost of transmitting the day report.

There was some question made as to whether or not the *Call* and the *Journal* were in any sense competitors in such a way that either could be affected by the relative rates charged. On this point we have no doubt that a state of competition was shown. One was a morning paper, the other an evening paper, and the same persons frequently buy or subscribe to both; but it was shown that the advertising rates of a newspaper depend chiefly upon its circulation, and that its circulation depends largely upon its ability to supply the news to its patrons. That a paper with good facilities for obtaining and publishing the news will, other things being equal, exceed in circulation a paper with poorer facilities; and that these influences operate upon newspapers having the same field of circulation, although one be published in the morning and the other in the evening. Indeed it would hardly require evidence to establish such patent facts.

From the foregoing statement of the evidence it will be seen that the following propositions were established: 1. That

the actual rate charged to the *Call* was much greater than the actual rate charged to the *Journal*; 2. That the two papers were in such sense competitors, that if one, for a given sum, could not obtain the same news ³³⁴ facilities as the other for the same sum, the difference would operate to the disadvantage of the former; 3. That from the requirements of the two papers, based upon their respective hours of publication, there was a marked and substantial difference in conditions affecting the convenience and expense to the telegraph company in transmitting to each its dispatches; 4. That there was no evidence of any character showing to what extent this difference in conditions affected the telegraph company. There was no evidence tending to show that the charge to the Call company was in itself unreasonably high, that the charge to the Journal company was unreasonably low, or that the charge to either was greater or less than the ordinary or reasonable charge to others for similar services. It follows, therefore, that the verdict was sustained by the evidence if, as a matter of law, it was sufficient to show either that another person was obtaining dispatches for a less sum than the plaintiff without regard to differences in conditions, or if it was sufficient to show a difference in rate accompanied by a difference in conditions, leaving to the jury, without other evidence, the duty of comparing the difference in rates with the difference in conditions, and determining without other aid whether or not the difference in rates was disproportionate to the difference in conditions. But the verdict was not sustained by the evidence if a mere difference in rates without regard to conditions was insufficient to ground a right of action, or, a difference both in rates and conditions being shown, it was also necessary to establish by evidence that these differences were disproportionate.

The action was evidently begun under section 8 of chapter 89 a of the Compiled Statutes, providing that "it shall be unlawful for any telegraph company, association, or organization engaged in the business of forwarding dispatches by telegraph to demand, collect, or receive from any publisher or proprietor of a newspaper any greater sum for a given service than it demands, charges, or collects from the publisher or ³³⁵ proprietor of any other newspaper for a like service, . . . and . . . such telegraph company or association shall be liable for all damages sustained by the person or parties in consequence of such discrimination." Our con-

stitution contains an express grant of authority to legislate upon this subject. Article 11, section 7, of the constitution is as follows: "The legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in all charges of express, telegraph, and railroad companies in this state, and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises." In the absence of such a provision in a state constitution there could be little doubt of the power of the legislature in the premises. But *expressio unius est exclusio alterius*, and, the constitution containing this express grant of power, the provision quoted must be taken as establishing the limits of legislative authority upon this subject. We refer to the constitutional provision because it simply grants the right to prevent by legislation "unjust discrimination." This phrase has been frequently used by the courts and legislatures, and has obtained a well-settled construction. It is not every discrimination which is unjust. So many cases illustrate this principle that it would be difficult to collate them. But the general nature of the decisions may be readily seen from an examination of the note to *Root v. Long Island R. R. Co.*, 11 Am. St. Rep. 643. In construing our statute it is necessary to bear in mind the constitutional limitation quoted, and the statute bears a just and reasonable construction within that limitation. It provides in its fifth section that all telegraph companies shall transmit all dispatches with impartiality in the order in which they are received, and use due diligence in their delivery without discrimination as to any person or party to whom they may be directed. This section evidently refers to the duty of the telegraph company as to the mode of conducting its business and not to the charges ³²⁶ therefor, and forbids partiality or discrimination in the transmission of messages. Section 7 is very similar in its terms to what is known "as the long and short haul clause" of the interstate commerce act, and forbids the charging of a greater sum for the transmission of a message over a given distance than it charges for a similar message over a greater distance, but adds this significant proviso: "That dispatches transmitted during the night and dispatches for publication in newspapers may be forwarded and delivered at reduced rates; such rates must, however, be uniform to all patrons for the same service." Section 8 we have already quoted so far as it is material.

Section 9 provides: "Every telegraph company and every press association engaged in the transmission, collection, distribution, or publication of dispatches shall afford the same and equal facilities to all publishers of newspapers, and furnish the dispatches, collected by them for publication in any given locality, to all newspapers there published, on the same conditions as to payment and delivery."

An analysis of these provisions discloses that the legislature sought, by the act referred to, to prohibit: 1. All partiality or discrimination between patrons in the handling of business; 2. All partiality or discrimination in regard to rates for similar services; 3. All such partiality or discrimination as to terms of payment or delivery; and 4. All discrimination in favor of persons transmitting dispatches to the greater distance. Without violence to the language of the act, and without giving it an interpretation beyond the constitutional grant of power, it cannot be construed so as to require a telegraph company to transmit messages to two patrons under different conditions at the same rate. So interpreted we do not think that the act, in so far as it affects civil actions, and disregarding the penalties it imposes, is anything more than declaratory of the common law. In the present state of civilization it would be idle to assert that a telegraph company is not charged ²²⁷ with a public function. The telegraph company in this case does not so assert. It is now the established law that a telegraph company is a public carrier of intelligence, with rights and duties analogous to those of a public carrier of goods or passengers. The law regulating the duties of railroads and other carriers is, therefore, largely applicable to telegraph companies. The act of Congress known as the "Interstate Commerce Act" contains few new features, and was chiefly designed to carry into the statutes of the United States (the United States as such not having any common law) the principles of the common law already enforced by the states in their domestic affairs. England and many of the states have adopted similar statutes, not so much to engraft new principles upon the law as to make certain and more readily enforce principles already established.

It is argued by the telegraph company that no cause of action can be predicated upon the mere fact that another patron obtained services for a lesser rate, unless it be shown that the rate charged the complainant is in itself unreason-

able and excessive. There are cases to this effect, but we cannot lend our assent either to their reasoning or to their conclusion. On the contrary, we believe the true rule to be that rates must not only be reasonable in themselves, but must be relatively reasonable; that is, that a person or corporation engaged in public business, and obligated to render its services to all persons having occasion to avail themselves thereof, is bound, in fixing its rates, to observe two rules: 1. Its rates must be reasonable; and 2. It must not, without a just and reasonable ground for discrimination, render to one patron services at a less rate than it renders to another, where such discrimination operates to the disadvantage of that other: *Board of Trade v. Chicago etc. R. R. Co.*, 1 Int. Com. Rep. 215; *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 309; *Scofield v. Lake Shore etc. Ry. Co.*, 43 Ohio St. 571; 54 Am. Rep. 846; *Chicago etc. R. R. Co. v. People*, 67 Ill. 11; 16 Am. Rep. 599; *Indianapolis etc. R. R. Co. v. Ervin*, 118 Ill. 250; 59 Am. Rep. 369; *Messenger v. Pennsylvania R. R. Co.*, 36 N. J. L. 407; 13 Am. Rep. 457; *Atwater v. Delaware etc. R. R. Co.*, 48 N. J. L. 55; 57 Am. Rep. 543; *McDuffee v. Portland etc. R. R. Co.*, 52 N. H. 430; 13 Am. Rep. 72; *Houston etc. Ry. Co. v. Rust*, 58 Tex. 98; *Ragan v. Aiken*, 9 Lea, 609; 42 Am. Rep. 684. But it is not unjust discrimination, it is not contrary to the common law, and it is not contrary to our statutes to make a difference in rates where the expense or difficulty of performing the services renders such discrimination fair and reasonable. Many of the cases already cited illustrate this principle. In addition thereto there may be cited *Interstate Commerce Commission v. Baltimore etc. R. R. Co.*, 43 Fed. Rep. 37; *Bayles v. Kansas Pac. Ry. Co.*, 13 Col. 181; *Root v. Long Island R. R. Co.*, 114 N. Y. 300; 11 Am. St. Rep. 643; *Savitz v. Ohio etc. Ry. Co.*, 49 Ill. App. 315. With the general rule announced in the latter cases we concur, but we do not wish to commit ourselves to its application in all of them. Some cases justify a discrimination merely on account of the quantity of business transacted. In the language of *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 309, and *Scofield v. Lake Shore etc. Ry. Co.*, 43 Ohio St. 571, 54 Am. Rep. 846, such discrimination in favor of the patron having the larger business tends to create monopoly, destroy competition, and is contrary to public policy. The same objection can be urged to the giving of privileged rates for the purpose of obtaining the business of a particular patron, and a discrimination on this ground is, we

think, very justly condemned by the house of lords in the case of *London etc. R. R. Co. v. Evershed*, L. R. 3 App. Cas. 1029. Many of the cases cited construe statutes, but they were statutes declaring what we think to be common-law rules, so that whether this case be viewed as one under our statutes relating to telegraph companies, or one based upon the common law, we think the principles governing it are the same. These are that the telegraph company was bound: 1. To charge for services no ~~339~~ more than what was reasonable; 2. That under like conditions it must render services to all patrons on equal terms; 3. That it must not so discriminate in its rates to different patrons as to give one an undue preference over another; but, 4. It is not an undue preference to make to one patron a less rate than to another when there exist differences in conditions as to the expense or difficulty of the services rendered which fairly justify such a difference in rates.

As we have already stated, a considerable difference in the absolute rate charged the Call company and the Journal company was shown, but there were also shown a difference in conditions affecting the expense and difficulty of rendering the services which at common law would justify some difference in rates, and this difference was one which the proviso quoted from the seventh section of our statute expressly recognizes as justifying a discrimination in this state. There was no evidence to show that the rate charged the Call company was unreasonably high. There was no evidence to show that the rate charged the Journal company was unreasonably low. There was no evidence to show what difference in rates was demanded or justified by the exigencies of the differences in conditions of service. We do not think that the enforcement of contracts deliberately entered into should be put to the hazard of a mere conjecture by a jury without evidence upon which to base its verdict. How can it be said that a jury acts upon the evidence and reaches a verdict solely upon consideration thereof when, having established a difference in rates and a difference in conditions, without anything to show how one difference affects the other, or to what extent it is permitted to measure one against the other, and to say that to the extent of \$1 or to the extent of \$1,000 the difference in rates was disproportionate to the difference in conditions? It may be said that it would be difficult to produce evidence to show to what extent such

²⁴⁰ differences in conditions reasonably affect rates. This may be true, but the answer is, that whatever may be the difficulties of the proof, a verdict must be based upon the proof, and a verdict must be founded upon evidence and not upon the conjecture of the jury, or its general judgment as to what is fair without evidence whereon to found such judgment.

The chief justice takes a different view, and thinks there is found in the evidence a basis for the verdict. This conclusion is arrived at by considering the service performed for the *Journal*, so far as the day report is concerned, as similar in its conditions to that performed for the *Call*. We agree with him that it is the fair inference from the evidence of the witness Hathaway that the sum of \$125 per month paid by the *Journal* is intended to include compensation for both day and night reports, but we do not think that any basis of comparison is thus afforded. The chief justice argues that because the day report is now taken from the wires on manifold paper and one copy given to the *Call* and the other to the *Journal* the conditions of service as to this report are the same. In this we think there is overlooked the fact that it is only on account of the *Call's* contract that the telegraph company is required to deliver the report to either paper at the time or in the manner in which it is now delivered. At the risk of some repetition we shall point out what are conceived to be the differences in the conditions affecting the two papers. Before the *Call*, or rather its predecessor, the *Democrat*, began to take the report, the day report was delivered to the *Journal* at the convenience of the telegraph company. The *Journal* had no contract requiring the delivery of this report at any particular time. This is shown by the testimony both of Mr. Calhoun and Mr. Horton. The *Journal* makes use of this day report only to assist it in editing the night report, and did not then have, nor has it now, any use for the day report until evening. Indeed, now that ²⁴¹ there is an evening paper in Lincoln, for the purposes of the *Journal* it might wait until the *Call* appeared and use the dispatches published in that paper, without depending upon the telegraph company at all. Under the former conditions, therefore, commercial business was given the right of way on the wires, and the day report was transmitted during lulls in the commercial business without any requirement that it should go to Lincoln before evening. In taking advantage of this

right to give commercial business the preference there was then a delay of several hours at Omaha. According to the testimony on behalf of both parties the day report is of no use to the *Call* unless it is all received by 3 o'clock, or within a few minutes thereafter, and this report now has the right of way during the hours of its transmission as against commercial business. In order to accommodate this business the telegraph company was compelled to increase its facilities between Omaha and Lincoln. The evidence is undisputed upon this. Mr. Horton says, in answer to a question as to what the telegraph company did to enable it to transmit the day report:

"I put up an additional wire between Omaha and Lincoln over the Missouri Pacific Railway. We had to employ an additional operator at Lincoln to take the afternoon report. A portion of his time, of course, was utilized in other business.

"Q. What portion of the time was devoted to this exclusively? A. From 11 o'clock to 3:30.

"Q. How much was his salary per month? A. Sixty dollars."

On cross-examination the same witness was asked whether it was not the growth of commercial business that made it necessary to put in a new wire for this report. His answer was: "That was partly it, certainly. We would not have built a wire on purpose to accommodate one newspaper at \$75 a month." From this we think it appears, ²⁴³ not that the wire was erected chiefly on account of the commercial business, but that it was the necessity of supplying the day report to the *Call* which was the immediate cause of erecting the wire. Under the old conditions the *Journal* paid the same rate which it does now for its report. Those conditions were then, and are now, sufficient for the purposes of the *Journal*. The fact that it now gets the day report on manifold paper as early as the *Call* is a matter of no consequence to the *Journal*, as it is not allowed to use the report until after the *Call* is published. Both Mr. Cox and Mr. Calhoun testify to this. To hold that the conditions are now similar, and that the *Journal* and *Call* must have the same rate, would require either that the telegraph company make its rate for the increased service as low as it was for the former service, or else that it increase the rate charged the *Journal*, although the *Journal* is in nowise interested in the increase of service.

We think, therefore, that the conditions of service which the *Call* requires and which the *Journal* requires are so different as to leave no basis for comparison.

Reversed and remanded. —

MR. CHIEF JUSTICE NORVAL dissented, on the ground that the verdict and judgment of the lower court were sustained by the evidence, and that the recovery awarded was proper under the rule that when a telegraph company charges one person a higher rate than it exacts from another for the transmission of dispatches under like conditions, the difference between the charges is the measure of damages the one who has been discriminated against is entitled to recover: Citing *Cook v. Chicago etc. Ry. Co.*, 81 Iowa, 551; 25 Am. St. Rep. 512; *Scofield v. Railway Co.*, 43 Ohio St. 571; 54 Am. Rep. 848; *Louisville etc. R. R. Co. v. Wilson*, 132 Ind. 517; *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 309; *Samuels v. Louisville etc. R. R. Co.*, 31 Fed. Rep. 57.

TELEGRAPH COMPANIES—DISCRIMINATION.—Right to make is discussed in the extended note to *Central Union Teleph. Co. v. Falley*, 10 Am. St. Rep. 131.

TELEGRAPH COMPANIES AS COMMON CARRIERS.—Under the laws of South Dakota a telegraph company offering to carry telegraphic messages for the public is a common carrier of such messages: *Kirby v. Western Union Tel. Co.*, 4 S. Dak. 105; 46 Am. St. Rep. 765. This question, over which there is a great difference of judicial opinion, is fully discussed in the notes to *Pacific Tel. Co. v. Underwood*, 40 Am. St. Rep. 494, and the extended notes to *Camp v. Western Union Tel. Co.*, 71 Am. Dec. 465; *Birney v. Printing Tel. Co.*, 81 Am. Dec. 613; *Western Union Tel. Co. v. Blanchard*, 45 Am. Rep. 487; and *Leonard v. New York etc. Tel. Co.*, 1 Am. Rep. 460.

WEIR v. THOMAS.

[44 NEBRASKA, 507.]

DEFINITION.—THE WORD "BETWEEN," when it refers to a period of time from one day, month, or year to another, excludes both dates. "Between" two days is exclusive of both.

MECHANICS' LIENS.—AS BETWEEN A MORTGAGE recorded on a certain date, and claim for a mechanic's lien, in which the material is alleged to have been delivered "between" that date and a subsequent day, the lien of the mortgage is senior and superior to that of the materialman.

Harwood, Ames & Pettis, for the appellant.

Mockett, Rainbolt & Polk, S. L. Geisthardt, Darnall & Babcock, and *J. S. Kirkpatrick*, for the appellee.

508 RYAN, C. In its petition the firm of A. H. Weir & Co. alleged that in pursuance of a contract with F. J. Andrews it had furnished material for a building on and between

August 21 and January 22, 1891, for which, after crediting all payments, there still remains due a balance of four hundred and four dollars and thirty cents, for which sum, with interest, there was a prayer for a foreclosure. Sarah F. Harris, one of the defendants, appeals from the decree, which postponed her rights to those of A. H. Weir & Co. Her mortgage on the premises, against which the mechanic's lien was claimed, was filed on August 21, 1890. In the itemized account attached to the affidavit filed for a lien there were descriptions of lumber, but no date was specially given in connection with any of these items earlier than August 23, 1890. To establish its priority over this mortgage, however, the following language, with which the statement of account was prefaced, was relied upon by plaintiff: "Lincoln, Neb., December 29, 1890. Estimate on original bill made by A. H. Weir & Co. For Susie L. Thomas job. F. D. Andrews, contractor. Delivered between August 21, 1890, and January 22, 1891." If this language fairly implies that the two dates named are included by the use of the word "between," the finding of the district court adverse to the mortgage in question is sustainable, otherwise not.

In the case of *Bunce v. Reed*, 16 Barb. 347, was involved the definition of the word "between," found in the same connection as above. Judge Hand said: "The ⁵⁰⁰ affidavit of publication is defective in this case unless the words 'between the seventh day of December, 1850, and the first day of March, 1851,' supply the defect. The seventh day of December was Saturday, and that was the last day notice could have been published. It has been decided that 'till' includes the day to which it is prefixed: *Dakins v. Wagner*, 3 Dowl. P. C. 535. But 'between,' when properly predicable of time, is intermediate, and strictly does not include in this case either the 7th of December or 1st of March. Between two days was exclusive of both: *Atkins v. Boylston Fire etc. Ins. Co.*, 5 Met. 440; 39 Am. Dec. 692. The affidavit does not show a publication eighty-four days."

In *Atkins v. Boylston Fire etc. Co.*, 5 Met. 440, 39 Am. Dec. 692, the coffee insured was "to be shipped between February 1 and July 15, 1840," under the terms of the policy. In the opinion of the court there was the following language: "It is undoubtedly true that the word 'between' is not always used to denote an intermediate space of time or place, as the plaintiff's counsel has remarked. We speak of a battle between

two armies, a combat, a controversy, or a suit at law between two or more parties; but the word thus used refers to the actions of the parties, and does not denote locality or time. But if it should be said that there was a combat between two persons between two buildings, the latter word would undoubtedly refer to the intermediate space between the buildings, while the former word would denote the action of the parties. But it was argued that the word 'between' is not always used as exclusive of the termini when it refers to locality. Thus, we speak of a road between one town and another, although the road extends from the center of one town to the other; and this, in common parlance, is a description sufficiently intelligible, although the road in fact penetrates each town. But if all the land between two buildings or between two other lots of land be granted, then certainly only the intermediate land between the two lots of land, or the two buildings, would pass by the grant. 510 And we think the word 'between' has the same meaning when it refers to a period of time from one day, month, or year to another. If this policy had insured the plaintiff's property to be shipped between February and July, it would clearly not cover any property shipped in either of those months. So we think the days mentioned in the policy are excluded. We think the word 'between' has the same meaning in this respect as the words used in the second policy. In that policy the goods insured are to be shipped subsequently to the 14th of July and prior to the 15th of October next following. This would be construing the contract according to the most common meaning of the word 'between,' and there is nothing in the contract to intimate that the word was used in any other sense."

This meaning of the word "between" not only is sanctioned by the only adjudicated cases which we have been able to find, but as well it has the approval of our own judgment. From this it inevitably results that the lien in favor of A. H. Weir & Co. related back from the time of its filing so as to include August 22d and exclude August 21st. The mortgage to Sarah F. Harris, which was filed for record on August 21st, should therefore have been decreed senior and superior to the mechanic's lien of A. H. Weir & Co. This conclusion seems to be somewhat at variance with the following language at the close of the opinion of this court in *Noll v. Kenneally*, 37 Neb. 885, to wit: "The fair inference to be drawn from the

statement in the account for the lien we are considering is that the materials were furnished between the dates therein named, and that the last were furnished on the date last given: See *Manly v. Downing*, 15 Neb. 637; *Hayden v. Wulfsing*, 19 Mo. App. 353; *Bangs v. Berg*, 82 Iowa, 350; *Johnson v. Stout*, 42 Minn. 514." An examination of the cases cited will show that they support the proposition that when it appears from the statements in the affidavit, or from the itemized account thereto attached, that the labor or material ⁵¹¹ was furnished within the prescribed statutory time immediately antecedent to filing the same, it is a sufficient compliance with the requirements of the mechanic's lien law to render such filing effective, and as this was the only question in dispute which involved the sufficiency of the sworn statements filed to secure a lien, such language as implies more is but dictum. This explanation is made upon the suggestion of the writer of the opinion referred to, and has his entire approval.

The judgment of the district court, in so far as thereby the rights of A. H. Weir & Co. were adjudged superior to the lien of the mortgage made to Sarah F. Harris, is reversed and this cause is remanded to said district court with directions to modify its decree accordingly.

Reversed and remanded. _____

MECHANICS' LIENS—PRIORITY BETWEEN AND MORTGAGES.—When, between the time of the execution and recording of a mortgage and the issue of mortgage bonds thereon, a mechanic's lien attaches to the mortgaged premises, the holders of such mortgage bonds without actual notice of the mechanic's lien have a lien on the mortgaged premises relating back to the time when the mortgage was recorded, prior and superior to that of the mechanic's lien: *Central Trust Co. v. Continental Iron Works*, 51 N. J. Eq. 605; 40 Am. St. Rep. 539, and note. The lien of a mortgage for the purchase price of land cannot be displaced or postponed by a mechanic's lien for material furnished for a building thereon which attaches simultaneously with the acquisition of title by the mortgagor and the execution of the mortgage: *Russell v. Grant*, 122 Mo. 161; 43 Am. St. Rep. 563, and note. See, also, the note to *Kilpatrick v. Kansas City etc. R. R. Co.*, 41 Am. St. Rep. 753.

ROCHESTER LOAN AND BANKING COMPANY v. LIBERTY INSURANCE COMPANY.

[44 N. H. 557.]

INSURANCE—WAIVER OF PROOF OF LOSS.—An insurance company by refusing to pay a loss, and defending on the ground that the policy in suit was not in force at the time of the loss, thereby waives the right to be furnished with any proof of loss as required by the policy.

INSURANCE—PROOF OF LOSS.—An affidavit by the insured describing the premises insured, stating their loss and the date thereof, the amount of damage and of the insurance, and that the cause of the fire is unknown, is a substantial compliance with the terms of a policy requiring the insured to furnish the insurer with proof of loss.

INSURANCE—TITLE TO PROPERTY—INSURABLE INTEREST.—Although the insured premises have been conveyed to the insured without consideration, and for the fraudulent purpose of placing them beyond the reach of the grantor's creditors, this is not any defense for the insurer under a policy providing that it shall be void if the interest of the insured in the premises is other than unconditional and sole ownership.

INSURANCE.—AN INTEREST IN PROPERTY TO BE INSURABLE does not necessarily depend upon the sole ownership of the property. It may be a special or limited ownership disconnected from any title, lien, or possession.

INSURANCE—INSURABLE INTEREST.—If, by a loss, the holder of an interest in property is deprived of its possession, enjoyment, or profit, or a security or lien resting thereon, or other certain benefits growing out of, or dependent upon it, he has an insurable interest therein.

INSURANCE—INSURABLE INTEREST IN PERSONALTY.—Possession with claim of ownership of personal property invests one with an insurable interest therein, and, if an insurance company insures such property, and loss occurs, it cannot defend against payment on the ground that the insurer holds the property in trust for another, even to enable such other to consummate a fraud, if it affects the insurance without inquiry as to the title, and without express and positive false representations as to the ownership of the title believed in and acted upon by the insurer.

INSURANCE—INSURABLE INTEREST IN REAL ESTATE.—If a policy of insurance is issued to one who holds the legal title to real estate, without inquiry by the insurer as to whether any other person is interested in such property, and no representations are made by the insured further than that he is the owner of the property, it is no defense to an action on the policy that the insured, though holding the legal title, is a mere trustee for an undisclosed beneficiary.

INSURANCE—VACANT PROPERTY—WAIVER.—A provision in a policy of insurance rendering it void if the insured property is, at the date of the policy, or shall afterward become, vacant and unoccupied, is for the benefit of the insurer, and may be waived by him, and the existence of the vacancy at the date of the policy, or afterward, does not render it void, but only voidable at the election of the insurer.

INSURANCE—VACANT PREMISES—WAIVER—ESTOPPEL.—If an insurer issues a policy on property with actual knowledge on the part of himself

or his agent that the insured premises are at the time vacant and unoccupied, he thereby waives a condition in the policy that it shall be void if the property is, at the time insurance is issued thereon, vacant and unoccupied, and he is estopped from alleging such vacancy as a defense to an action to recover for a loss under the policy.

INSURANCE—NOTICE TO AGENT AS NOTICE TO INSURER.—Notice to an insurance agent who issues a policy of facts relating to the subject matter of the insurance is notice to the company, and if he fails to properly state them in the policy, when relied upon and trusted to do so, the company is not permitted to escape liability on that ground.

J. H. Macomber, for the appellants.

J. Fawcett, for the appellee.

541 RAGAN, C. This action was brought in the district court of Douglas county by L. G. Bangs against the Liberty Insurance Company of the city of New York (hereinafter called the "insurance company"). The action was based on an ordinary fire insurance policy issued by the insurance company to Bangs on certain real estate situate in the city of Omaha. The Rochester Loan & Banking Company (hereinafter called the "loan company") was joined as a party plaintiff, because the policy provided that the loss, if any, should be payable to it as mortgagee. At the close of the evidence the jury, in obedience to a peremptory instruction of the district court, returned a verdict in favor of the insurance company, and, to reverse the judgment of dismissal pronounced on such verdict, Bangs and the loan company have prosecuted to this court a petition in error.

1. The policy in suit contained, among other things, the following provisions: That the policy should be void if the interest of the insured in the insured premises be other than unconditional and sole ownership; if the insured premises be or become vacant or unoccupied and so remain for ten days; that if a fire occurred the insured, within sixty days, should render a statement to the company, signed and sworn to by the insured, stating the knowledge and belief of the assured as to the time and origin of the fire, etc. One of the defenses interposed by the insurance company to the action was that the insured did not furnish it, the company, "proofs of loss as required by the terms and conditions of said policy of insurance." The fire occurred on the seventh day of November, 1891, and on the first day of December, 1891, Bangs made and furnished the insurance company an affidavit in words and figures as follows:

"STATE OF IOWA, }
CARROLL COUNTY. } ss.

"I, L. G. Bangs, being duly sworn, depose and say: ⁵⁴² That my house on lot 3 of Allen's subdivision of lot 5, Ragan's addition to Omaha, Nebraska, was destroyed by fire on the night of November 7, 1891; that the causes of the fire are unknown to me; that the damage done to my buildings was about \$1,000, and that said building was insured in the Liberty Insurance Company for \$900 by policy dated April 28, 1891; that I have made inquiry and am unable to find anything about the origin of the fire. The policy on said buildings was for \$800 on the house and \$100 on the barn.

"L. G. BANGS.

"Subscribed and sworn to," etc.

We remark: 1. This was a substantial compliance with the terms of the policy requiring Bangs to furnish the insurance company proofs of loss: *Hanover Fire Ins. Co. v. Gustin*, 40 Neb. 828. 2. That if Bangs had wholly failed to furnish the insurance company any proofs of loss whatever, such failure, under the circumstances of this case, would afford the insurance company no defense whatever to this action. Here, as we shall presently see, the insurance company refuses to pay the loss, and defends against this action on the ground that the policy in suit was, at the date of the loss of the insured property, not in force. In *Phenix Ins. Co. v. Bachelder*, 32 Neb. 490, 29 Am. St. Rep. 448, this court, speaking through its present chief justice, Norval, said: "The absolute denial by the insurer of all liability, on the ground that the policy was not in force at the time of the loss, is a waiver of the preliminary proofs of loss required by the policy": See, also, *Western Home Ins. Co. v. Richardson*, 40 Neb. 1. In *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473, it was held: "The right of an insurance company to notice of loss is a right which the company may waive; and when the insurer denies all liability for the loss, and refuses to pay the same, and places such denial and refusal upon grounds other than the failure of the insured to give notice of the loss, such denial and refusal avoid the necessity of such notice": See, also, ⁵⁴³ *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473. The precise question was squarely presented and decided in *Dwelling House Ins. Co. v. Brewster*, 43 Neb. 528, where Harrison, J., speaking for this court to the point, said: "Proofs of loss required by a con-

dition of an insurance policy are waived when the insurance company denies any liability for the loss on the ground that the policy was not in force at the date of the loss." We conclude, therefore, that the insurance company waived the defense under consideration, in view of the fact that it defended the action on the ground that the policy was not in force at the date of the loss; and, if the insurance company had not waived such defense, that the evidence establishes that the insured sufficiently complied with the provisions of the policy in reference to furnishing the insurance company proof of loss.

2. The second defense of the insurance company was that Bangs, at the time of the issuance of the policy in suit, was not the unconditional and sole owner of the real estate insured; that such real estate was in fact the property of the loan company, the title to which property was held in trust for it by Bangs. The policy in suit was issued on the 28th of April, 1891. It is undisputed that prior to the 21st of April, 1891, the loan company was the owner and held the legal title to the insured real estate. On the twenty-first day of April, 1891, the loan company, at its home office in the state of New Hampshire, executed to Bangs an absolute warranty deed for this property, which was recorded in the office of the register of deeds some time in the following May. On the trial of this action Bangs swore that he was the owner of this real estate, and had been since the date of his deed, and that he purchased it of the loan company at private sale. The president of the loan company testified on the trial that Bangs was the owner of the property. We are unable to understand upon what theory the learned district judge reached the conclusion, if he did reach such conclusion, that this evidence ⁵⁴⁴ was insufficient to establish that Bangs was the unconditional owner of the insured property. The president of the loan company and Bangs, at the time of the issuance of the policy in suit, resided in Carroll, Iowa; and Bangs admitted in his testimony that he had never seen this property, and that he did not furnish the money which paid the insurance premium. The evidence of the president of the loan company was that he or the loan company took out the insurance on the property in the name of Bangs, and that he or the loan company paid the premium; that he had corresponded with certain real estate agents in the city of Omaha for the purposes of having them effect a sale of this property,

and to procure a tenant for the property and collect rents. But when it is remembered that the loan company had a mortgage upon this real estate, then its conduct in the premises was entirely consistent with Bang's ownership of the property. Nor are we able to understand how Bangs could be deprived of the title to his property because a person holding a mortgage on it should insure it in Bangs' name for the mortgagee's benefit. In any event, this evidence, and the effect of it, was not for the learned district court, but for the jury, and had the court permitted this case to go to the jury, and it had returned a special finding that Bangs, at the time the policy in suit was issued, was not the unconditional owner of the real estate, the evidence in this record would not support such a finding.

Considerable stress is placed by counsel for the insurance company upon the fact that it does not appear from the evidence what, if any, consideration Bangs paid the loan company for this property, but we do not think that is a matter which concerns the insurance company. The loan company may have given its property to Bangs, and if so, he would nevertheless be the owner of it. Indeed, it would seem that had the loan company conveyed the title to this property to Bangs without consideration, and for the fraudulent purpose of placing it beyond the reach of the ⁵⁴⁵ loan company's creditors, that that would not afford any defense to the insurance company. *German Ins. Co. v. Hyman*, 34 Neb. 704, was an action on an insurance policy issued on a stock of millinery to Mrs. Hyman. The insurance company defended on the ground that Mrs. Hyman was not the owner of the goods insured and destroyed; that they had been purchased with the money and proceeds of property given her by her husband for the purpose of defrauding his creditors. Post, J., in discussing and overruling this defense, said: "Suppose plaintiff in error were a trespasser instead of an insurer, and was called upon to answer for a conversion of the property. Would it be heard in defense to say that the title of the insured had been acquired in fraud of the rights of a third party? Certainly not. Nor is there any rule of law or morals which will sanction such a defense in this action. It is said that had the plaintiff in error known of the business record of Louis Hyman—that is, the fact that he had once made an assignment—it would have refused to insure the property. It is a sufficient answer to this claim that there is no rule of

law which imposes upon the owner of property the duty to volunteer such information to an insurance company. An interest, to be insurable, does not depend necessarily upon the ownership of the property. It may be a special or limited ownership disconnected from any title, lien, or possession. If the holder of an interest in the property will suffer loss by its destruction, he may indemnify himself therefrom by a contract of insurance. If, by the loss, the holder of the interest is deprived of the possession, enjoyment, or profit of the property, or a security or lien resting thereon, or other certain benefits growing out of or depending upon it, he has an insurable interest." From this it seems that possession with claim of ownership of personal property invests one with an insurable interest therein; and that if an insurance company insures such property, and a loss occurs, it cannot defend against the payment of such loss on ⁵⁴⁸ the ground that the insured party held the property in trust for some other person, even to enable such third person to consummate a fraud, where it effected such insurance without inquiry as to the insured's actual title, and without the express and positive false representations of the insured as to his actual title believed in and acted upon by the insurance company. And it seems that where a policy is issued to one who holds the legal title to real estate, where no inquiries are made as to whether any other person is interested in such property, and no representations are made by the insured further than that he is the owner of the property, that it is not a defense to the insurance company, in an action on such policy, that the insured, though holding a legal title to the premises, was a mere trustee for an undisclosed beneficiary. If any other person than Bangs has any interest or ownership in this real estate, or any part of it, it does not appear from the evidence before us, further than the lien thereon by the loan company by virtue of its mortgage. We are not called upon to decide, nor do we decide, whether the provision in the policy requiring the insured to be the unconditional and sole owner of the insured property is complied with when such property is real estate and the insured has the legal title thereto, even if it should develop that he held such title in trust for the use of some other person. That question is not before us.

3. The third defense of the insurance company was that the insured property, at the time of the issuance of the policy, was vacant and at the date of the fire had been vacant

and unoccupied for ten days. The reply of the insured admits that the property was vacant as stated, but pleads in avoidance of this defense a waiver or estoppel thereof by the company. The provision in an insurance policy rendering it void because the insured property is, at the time of its insurance, or shall afterward become, vacant and unoccupied for a certain time, is inserted therein ⁵⁴⁷ for the benefit of the insurer; it is a provision which the insurer may waive; and the existence of the vacancy at the date of the insurance, or the happening of the vacancy afterward, does not render the policy void, but voidable, at the election of the insurer. On the twentieth day of April, 1891, the president of the loan company at Carroll, Iowa, addressed a letter to the agents of the insurance company in Omaha, Nebraska, in which he made this inquiry: "Please let me know what rate you will give me for three years' risk on the following properties: One thousand dollars on a one and one-half story frame dwelling-house, with addition, on lot 3, Allen's subdivision of lot 5, Ragan's addition to Omaha?" This is the property covered by the insurance policy in suit. On the 25th of April, 1891, the agents of the insurance company answered this letter, acknowledging its receipt, stating that the rate for one year was fifty cents, for three years one per cent, for five years one and one-half per cent, and then said: "The one and one-half story on lot 3, Allen's subdivision of lot 5, Ragan's addition, we would not wish to carry more than \$800 on this dwelling. The last-described dwelling is vacant, but the barn is occupied." On the 27th of April the president of the loan company wrote to the agents of the insurance company as follows: "Please send me policy on the one and one-half story dwelling on the insured property, \$800 on the dwelling and \$100 on the barn. Make the policy in the name of L. G. Bangs, present owner, with mortgage clause loss, if any, payable to the Rochester Loan & Banking Company. Send policy to me and I will return draft for premium." In pursuance of this correspondence the agents of the insurance company issued the policy in suit, and on the 29th of April, 1891, inclosed it in a letter to the president of the loan company at Carroll, Iowa. On the 30th of the same month the president of the loan company transmitted to the agents of the insurance company the premium on the policy.

⁵⁴⁸ It would seem almost unnecessary to cite authorities to show that since the insured property was vacant and un-

occupied at the date of the issuance of the policy in suit, which fact was actually known by the insurance company, and with that knowledge actually before it it chose to insure the property, that in doing so it elected to and did waive the conditions in the policy that the same should be void if the property was, at the time it was insured, vacant. The knowledge of the agents of the insurance company, that the property was vacant at the date of the issuance of the policy, was the knowledge of the company. Notice to an insurance agent who issues a policy of facts relating to the subject matter of the insurance is notice to the company, and, if he fails to properly state them in the policy when relied upon and trusted to do so, the company should not be permitted to escape liability on that ground: *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; 4 Am. Rep. 532. In *Williams v. Niagara Fire Ins. Co.*, 50 Iowa, 561, it was held: "Notwithstanding the policy provided that if the premises became unoccupied during the life of the policy, without the written consent of the company indorsed thereon, the policy should be void, it was held that where an agent insured an unoccupied building and received the premium therefor, the company was estopped from denying that the policy had a legal existence." And in *Aurora etc. Ins. Co. v. Kranich*, 36 Mich. 289, it was held: "The provision in a policy that 'if at any time during the continuance of this policy . . . the insured property . . . shall become vacant or unoccupied' the insurer shall be absolved from all liability, is held to have no application to the case of buildings that are vacant at the time the policy is issued, the insurer having notice of the fact." To the same effect see *Short v. Home Ins. Co.*, 90 N. Y. 16; 43 Am. Rep. 138; *Bennett v. Agricultural Ins. Co.*, 106 N. Y. 243.

The evidence in the record, then, does not sustain the defense ⁵⁴⁹ of the insurance company that the policy in suit was not in force at the date of the loss, because of the fact that the insured property was, and had been, vacant for ten days at the time of its destruction, and was vacant at the time the policy was issued; but the evidence does sustain the plea of confession and avoidance interposed to this defense by the insured, that the company, by its conduct in insuring the property, knowing that it was vacant at the time, had estopped itself from interposing this defense. It must be borne in mind that the condition of the property, so far as occupancy is concerned, was the same at the time it was de-

stroyed as at the date of its insurance. The judgment of the district court is reversed and the cause remanded.

Reversed and remanded.

INSURANCE—WAIVER OF PROOFS OF LOSS BY DENIAL OF LIABILITY.—An absolute denial of liability by an insurer, for a total loss after due notice thereof, constitutes a waiver of further proofs of loss: *Roe v. Dwelling House Ins. Co.*, 149 Pa. St. 94; 34 Am. St. Rep. 595, and note.

INSURANCE—INTEREST—TITLE.—It is not necessary that the insured have an interest, either legal or equitable, in the property insured. It is enough that he is so situated in regard to it that he would be liable to loss should it be injured by the peril insured against: *Berry v. American etc. Co.*, 132 N. Y. 49; 28 Am. St. Rep. 548, and note. It is well settled that insurable interest need not amount to a right of property or possession. Whenever a legal connection can be shown to exist between injury to the thing insured and loss to the party insuring, it will suffice: *McDonald v. Black*, 20 Ohio, 185; 55 Am. Dec. 448; extended note to *Strong v. Manufacturer's Ins. Co.*, 20 Am. Dec. 510, 511.

INSURANCE—INTEREST OF TRUSTEE: See the extended note to *Strong v. Manufacturers' Ins. Co.*, 20 Am. Dec. 515; and see, also, the case of *Roberts v. Firemen's Ins. Co.*, 165 Pa. St. 55; 44 Am. St. Rep. 642.

INSURANCE—NOTICE TO AGENT AS NOTICE TO COMPANY.—Notice to the general agent of an insurer is notice to the insurer: *Schaeffer v. Farmers' etc. Ins. Co.*, 80 Md. 563; 45 Am. St. Rep. 361, and note. An insurance company is bound by its agent's knowledge of title to the property insured: *Haire v. Ohio etc. Ins. Co.*, 93 Mich. 481; 32 Am. St. Rep. 516, and note. The cases discussing the question as to when notice to an agent is imputed to the insurer are collected in the note to *Follette v. Mutual etc. Assn.*, 28 Am. St. Rep. 696.

ERICKSON v. FIRST NATIONAL BANK.

[44 NEBRASKA, 622.]

ALTERATION OF INSTRUMENTS—RATIFICATION—ESTOPPEL.—If the holder of a note materially altered without the knowledge or consent of the maker relies upon a subsequent ratification by, or estoppel in pais against, such maker, the ratification or estoppel must be pleaded.

ALTERATION OF INSTRUMENTS—WHEN MATERIAL.—The fraudulent erasure of the name of the original payee of a note after its execution, by a party to the instrument, and the substitution of another without the consent of the maker, is a material alteration invalidating it as to the maker, even in the hands of a bona fide holder.

ALTERATION OF INSTRUMENTS—INJUNCTION TO PREVENT TRANSFER.—The maker of a note materially altered after its execution, and void as to him, is not entitled to an injunction to prevent its transfer or collection, as he has an adequate remedy at law.

NEGOTIABLE INSTRUMENTS—ENJOINING TRANSFER.—If a negotiable instrument is about to be transferred before due, so as to cut off defenses of the maker, he may enjoin its transfer and have it delivered up for cancellation, but it is otherwise if the instrument is non-negotiable.

ALTERATION OF INSTRUMENTS—ENJOINING TRANSFER.—The fact that the maker of a note materially altered after its execution, and void as to him, is apprehensive that witnesses by whom he expects to establish a defense against the note may die or move away, does not entitle him to an injunction restraining the negotiation of the note.

Sears & Thomas, for the appellants.

H. H. Bowes, for the appellee.

624 NORVAL, C. J. This was an action brought by Erick Erickson in the district court of Burt county to restrain the defendants from the negotiation of a certain promissory note executed by the plaintiff and one Erick Munk, and for the cancellation of said note. From a decree in favor of the plaintiff, the defendants have prosecuted an appeal to this court.

The petition sets up two grounds for relief, namely, that the plaintiff was induced to sign the note as the surety for one Munk by the false and fraudulent representations of the latter, and that the note, after its execution, has been materially altered and changed by erasing the name of the original payee, and inserting in lieu thereof the name of the First National Bank of Oakland, without the knowledge and consent of the plaintiff. The answer admits that the defendant bank purchased the note, and denies all other averments in the petition. The trial court found that the note had been materially altered, as alleged by the plaintiff, and its decision was placed upon that ground alone.

The proofs in the record show that one Erick Munk, an oculist of the city of Omaha, prior to the month of December, 1892, had made occasional professional visits to Oakland, and, on the second day of said month, he called upon the plaintiff in Oakland and induced him to sign a note as surety in the sum of fifteen hundred dollars, due in six months, and upon the representation of said Munk that he was about to purchase the half interest in the business of one Smith, an oculist and aurist of either Des Moines, Iowa, or Cincinnati, Ohio, and that the note was to be used for that purpose. The note was executed in blank as to the payee, it being agreed that Smith's name should be inserted as the payee when his initials should be ascertained, which Mr. Munk subsequently did, by writing in the name of D. B. 625 Smith. Afterward, without the knowledge or consent of appellee, Mr. Munk erased the name of D. B. Smith, and inserted the name of the First National Bank of Oakland, as payee.

The note plainly showed that the erasure had been made, and, in this condition, it was sold by Mr. Munk to the bank, who informed the officers of the bank at the time of what had been done. It also appears that the appellant Bickman, the president of the bank, went to the plaintiff before purchasing the note and inquired if he had signed a note with Mr. Munk for fifteen hundred dollars. Erickson replied that he had. The note, however, was not shown him, nor did he know at the time that it had been altered. Subsequently, the bank notified the plaintiff of the purchase of the note. There was introduced on the trial evidence for the purpose of showing that the plaintiff ratified the alteration of the instrument after the delivery and negotiation, with knowledge of the circumstances attending the change of the payee, also evidence for the purpose of establishing an estoppel against the appellee. It is doubtful whether the evidence upon these questions was sufficient to establish either a ratification or an estoppel. Whether it does or not is wholly immaterial, since no such issues were tendered by the pleadings. The alteration is specifically set out in the answer. Whether the instrument had been materially changed after its execution and delivery was raised by the answer, but not so either as to the question of ratification, or whether the plaintiff had been estopped by his acts from denying the validity of the note in question. If the defendants desired to rely either upon an estoppel or ratification, they should have pleaded in the answer the facts upon which they base such defenses. The doctrine is plain, and needs neither authority nor elaboration to substantiate.

It is urged that a partnership was formed between Erickson and Munk for the purpose of purchasing the business of Mr. Smith, and that by reason thereof Munk ^{was} was authorized to make the alteration. A sufficient answer to this contention is, that no partnership is alleged nor proved.

It is conceded, and there is no doubt of it, that the fraudulent erasure of the name of the original payee of a promissory note, after its execution by a party to the instrument and the substitution of another without the consent of the maker, is a material alteration. The doctrine is elementary: *Davis v. Bauer*, 41 Ohio St. 257; *German Bank v. Dunn*, 62 Mo. 79; *Stoddard v. Penniman*, 103 Mass. 366; 11 Am. Rep. 363; *Patch v. Washburn*, 16 Gray, 82; *Bell v. Mahin*, 69 Iowa, 408; *Cumberland Bank v. Hall*, 6 N. J. L. 215. It is equally

as well settled that the material alteration of an instrument invalidates it as to the maker, who has not assented to or ratified the change, even in the hands of a bona fide holder for value: See cases cited above, and *Brown v. Straw*, 6 Neb. 536; 29 Am. Rep. 369; *State Savings Bank v. Shaffer*, 9 Neb. 1; 31 Am. Rep. 394; *Davis v. Henry*, 13 Neb. 497; *Hurlbut v. Hall*, 39 Neb. 889. There can be no question that, if suit were brought upon this note against the plaintiff, he could avail himself of the defense that he had been discharged by the change of the instrument. The plaintiff having a complete defense at law, is he entitled to relief in equity? We think the answer can only be in the negative. It is a familiar doctrine of equity jurisdiction that the equitable powers of a court may be invoked by a person, where the relief afforded at law is not plain or is inadequate, but where the aggrieved party has a full and complete remedy at law, equity will not interfere by injunction. In 10 American and English Encyclopedia of Law, page 792, the rule is correctly summarized in the following language: "If, in an action at law, the plaintiff can obtain full and adequate relief, a suit in equity for an injunction cannot be maintained by him. Nor can a defendant invoke the aid of a court of equity upon mere legal grounds, because in such case his defense is available at law. To entitle the defendant to relief he must have ⁶²⁷ an equitable defense which is not available at law, or a good defense at law which, by reason of fraud or accident, without any negligence on his part, he was prevented from using." The text is sustained by numerous authorities cited in the note on the same page. Applying the same rule to the facts in the case at bar, it is obvious that the appellee is in no position to invoke the interposition of a court of equity. His defense against the note is a legal one, not equitable. Full and complete relief can be had at law, therefore a court of equity will not lend its extraordinary aid by injunction. If appellee's defense could be cut off by a transfer of the note to a good faith purchaser, then, we concede, he would be entitled to restrain such transfer; but, as we have already seen, the note is absolutely void as to the appellee in whosoever hands it may come, unless there has been a ratification of the change by the appellee, or he has by his own acts and conduct been estopped from denying the validity of the instrument.

In *Hullhorst v. Scharner*, 15 Neb. 62, it is held that a court

of equity will enjoin the transfer of a negotiable note obtained by duress and fraud, and in *Wilhelmson v. Bentley*, 25 Neb. 473, it was ruled that where a negotiable note is tainted with the vice of usury, and the payee is about to transfer the same to a bona fide purchaser, the maker may enjoin such transfer. These cases are not similar to the one at bar, for the reason that the transfer of the notes in the cases mentioned, to an innocent purchaser for value before maturity, would have cut off all the defenses of the makers. In such cases the makers have the undoubted right to take the initiative and enjoin the negotiation of the notes, since the remedy afforded at law was wholly inadequate. Where a negotiable note is about to be transferred before due so as to cut off the defense of the maker, equity, at the suit of the latter, will enjoin the negotiation and order the instrument to be delivered up for cancellation; but otherwise if the note is non-negotiable: *Perrins v. 628 Striker*, 7 Paige, 598; *Morse v. Hovey*, 9 Paige, 197.

No authority has been cited in the briefs, nor after diligent search have we been able to find a single case which holds that a court of equity will assume jurisdiction to restrain the transfer or collection of a promissory note which has been materially changed after its execution; but there are numerous adjudications laying down the rule that equity will not interfere by injunction: See *Dorsey v. Monnett*, 20 Atl. Rep. 196 (Md., June 19, 1890); *Northern Pac. R. R. Co. v. Cannon*, 49 Fed. Rep. 517; *Johnson v. Andrews*, 28 Ga. 17; *Globe Mut. Life Ins. Co. v. Reals*, 79 N. Y. 202.

The *American Waterworks Co. v. Venner*, 18 N. Y. Supp. 379, was an action brought for the purpose, among others, of restraining the defendants from bringing actions upon, or transferring, certain promissory notes given by the plaintiff and payable upon demand, the plaintiff claiming the right to setoff or counterclaim the indebtedness of the defendants to it. It was held that a court of equity will not interfere by injunction, since the defense claimed against the notes was as available at law as in equity.

Grand Chute v. Winegar, 15 Wall. 373, was a suit in equity, by a municipal corporation, to enjoin the obligee of certain bonds issued by the corporation from prosecuting suits on such bonds and to cancel the same, on the ground that the bonds were issued without authority and in violation of law. Relief was denied because the plaintiff had a perfect and complete defense to the bonds at law.

It was held in *Allerton v. Belden*, 49 N. Y. 373, that the interposition of a court of equity may be sought when equitable relief exists against the note, unless, from the form of the note, the defense is not available at law. That was an action by an accommodation indorser of a note discounted at a usurious rate of interest to annul the note, suit being brought after the maturity of the instrument, it being ~~also~~ alleged in the bill that the makers were insolvent, that plaintiff had requested the holder to bring an action on the note, and that he declined to do so, but intended to delay action until plaintiff's security became worthless, and proof of usury impossible. Relief was denied. The court in the opinion say: "The allegations in his complaint disclose a perfect defense at law to any action which might be brought against him on his indorsement, and no fact is stated showing any necessity for the interposition of a court of equity, or entitling the plaintiff to become an actor in the matter. The mere fact that a party has made an agreement, or given a security which is void for usury, is not, and never was, sufficient to entitle him to apply to a court of equity to have the contract annulled. The right to this relief exists only where, from the form of the security, the defense cannot be made available at law, or where the instrument sought to be avoided is a cloud upon the title to land, or some other necessity for the interposition of a court of equity is shown."

In *Fowler v. Palmer*, 62 N. Y. 533, it is held that an action cannot be maintained to cancel a note and to restrain the bringing of a suit thereon, or for selling or disposing of a promissory note past due, upon the ground that it has been paid.

Town of Venice v. Woodruff, 62 N. Y. 462, 20 Am. Rep. 495, was an action to have certain bonds delivered up and canceled, and to restrain the holders from transferring them. The bonds were void even in the hands of a bona fide holder. It was decided that the suit could not be maintained. In the opinion of the court it is said: "The cases in which a court of equity exercises its jurisdiction to decree the surrender and cancellation of written instruments are, in general, where the instrument has been obtained by fraud, where a defense exists which would be cognizable only in a court of equity, where the instrument is negotiable, and by a transfer the transferee may acquire rights which the present ~~also~~ holder does not possess, and where the instrument is a cloud

upon the title of the plaintiff to real estate. . . . There must exist some circumstance establishing the necessity of a resort to equity to prevent an injury which might be irreparable, and which equity alone is competent to avert. If the mere fact that a defense exists to a written instrument were sufficient to authorize an application to a court of equity to decree its surrender and cancellation, it is obvious that every controversy in which the claim of either party was evidenced by a writing could be drawn to the equity side of the court, and tried in the mode provided for the trial of equitable actions, instead of being disposed of in the ordinary manner by a jury. Whether, therefore, the question be regarded as one of jurisdiction or of practice, it is established by the later decisions that some special ground for equitable relief must be shown, and that the mere fact that the instrument ought not to be enforced is insufficient, standing alone, to justify a resort to an equitable action."

Upon principle we are constrained to hold that plaintiff is not entitled to enjoin the transfer or collection of the note. It is argued that the remedy afforded at law is not so speedy as in equity, since he must wait the pleasure of the holders of the note to bring suit thereon before he can make his defense, and by that time the witnesses to prove the alteration of the instrument may have died or moved away. The fact that the bank has failed to bring an action upon the note, and that the defense may be lost by reason of his witnesses being scattered, is insufficient to invoke the powers of equity. We are not aware of any authority which sustains an equitable action upon such ground, and it is not believed that any such can be found. The appellee has ample authority, under the provisions of sections 421 to 427 of the Code of Civil Procedure, to perpetuate the testimony of his witnesses, even before suit is brought ⁶³¹ against him: *Allerton v. Belden*, 49 N. Y. 373; *Minturn v. Farmers' Loan etc. Co.*, 3 N. Y. 498; *Globe etc. Life Ins. Co. v. Reals*, 79 N. Y. 203.

The decree of the district court is reversed and the action dismissed.

ALTERATION OF INSTRUMENTS—RATIFICATION OF.—One may ratify or consent to the alteration of an instrument after it has been done: *Note to Draper v. Wood*, 17 Am. Rep. 106.

ALTERATION OF INSTRUMENTS.—CHANGING THE NAME OF THE PAYEE of an instrument is a material alteration: *Extended note to Woodworth v. Bank*, 10 Am. Dec. 271.

MONDAY v. O'NEIL.

[44 NEBRASKA, 724.]

CROPS—RIGHT OF TENANT TO CROP ON MORTGAGED PREMISES.—A crop planted by a tenant for years after the rendition of a decree, to which he is a party, foreclosing a mortgage on the land, belongs to the tenant and not to the purchaser, provided the former is permitted to retain possession until after the crop matures, although the foreclosure sale has been confirmed in the meantime, and notice given by the purchaser to the tenant that he is expected to pay rent to him in money or in kind.

CROPS—RIGHT OF TENANT TO.—If a tenancy is so uncertain that the tenant cannot know that his estate is to terminate before a crop planted by him can ripen, he is entitled to re-enter and harvest the crop when it matures.

Frick & Dolezal, for the appellant.

C. Hollenbeck, for the appellee.

725 IRVINE, C. This case was tried in the district court on a stipulation of facts. The court instructed the jury to return a verdict for the defendant, and from the judgment rendered thereon the plaintiff prosecutes error.

The action was one in the nature of trover for eighty acres of corn grown and a part thereof standing on the west one-half of the northwest quarter of section 13, township 18, range 5, in Dodge county. The essential facts, as disclosed by the stipulation, are as follows: On the fourteenth day of January, 1889, one Stanford, who was then the owner of the land described in the petition, executed a mortgage thereon to the J. T. Robinson Notion Company. On the 3d of January, 1891, an action was brought to foreclose this mortgage, the parties defendant being Stanford and wife and O'Neil, the defendant in this case, the petition alleging that O'Neil claimed a leasehold interest in the premises, but that such interest was inferior to the interest of the plaintiff. All the defendants made default, and on April 23, 1891, a decree of foreclosure was rendered. On June 26, 1891, the land was sold under the decree of foreclosure to the plaintiff. On the 27th of June the sale was confirmed and a deed executed, which was the same day recorded. O'Neil was the tenant of Stanford for one year from March 1, 1891, and the corn in question was planted by O'Neil in May, 1891, and was growing at the time of the sale and confirmation. No lease was made by the plaintiff to O'Neil, but O'Neil continued in possession after the sale, and Monday made no effort to obtain

possession, except that at different times during the summer of 1891 he notified O'Neil not to pay rent to Stanford, and that he would insist on either the rent or a portion of the crops.

The question presented is, therefore, whether, under the foregoing state of facts, Monday or O'Neil was the owner of ⁷²⁶ the crops growing on the land, but not matured at the time the sale was confirmed. Since the briefs were filed the cases of *Yeazel v. White*, 40 Neb. 432, and *Foss v. Marr*, 40 Neb. 559, have been decided. Their effect is to limit the inquiry here to a much narrower field than that covered by the briefs. In *Yeazel v. White*, 40 Neb. 432, it was decided that the owner of land sold upon execution retains the right of possession, and is entitled to the usufruct of such land until confirmation of the sale, and that, therefore, the judgment debtor is not accountable to the purchaser for hay cut upon the land after sale and before confirmation. In *Foss v. Marr*, 40 Neb. 559, it was held that a mature crop of corn standing upon land sold at judicial sale, and not taken into account by the appraisers, did not pass to the purchaser, but remained the property of the mortgagor, who had planted and cultivated it. In the latter case some stress was laid upon the fact that the crop was matured, and the language of the supreme court of Iowa in *Hecht v. Dettman*, 56 Iowa, 679, 41 Am. Rep. 131, wherein a distinction is drawn between a growing crop and one already matured but not severed, was quoted as confirming the conclusion reached. The language used in *Hecht v. Dettman*, 56 Iowa, 679, 41 Am. Rep. 131, was, however, employed to distinguish that case from *Downard v. Groff*, 40 Iowa, 597, holding that the right to growing crops passes to the purchaser at a judicial sale. *Downard v. Groff*, 40 Iowa, 597, followed the general current of authority, and recognized that *Cassilly v. Rhodes*, 12 Ohio, 88, was opposed to the conclusion reached, stating truly that *Cassilly v. Rhodes* was based upon a construction of the Ohio appraisement law. *Foss v. Marr*, 40 Neb. 559, was based upon the doctrine of *Cassilly v. Rhodes*, 12 Ohio, 88, our appraisement law being similar to that of Ohio, and the reasons given by the Ohio court for departing from the general rule because of the effect of the appraisement law being deemed sound and applicable to this state. The court did not, in *Foss v. Marr*, 40 Neb. 559, undertake to decide that growing crops do pass to the purchaser; on the contrary, in the last paragraph

⁷²⁷ of the opinion it is expressly stated that that question was neither presented nor decided. *Cassilly v. Rhodes*, 12 Ohio, 88, was a case where the crop involved was one which had not matured, and the language of the opinion refers to it throughout as a growing crop. The reason of the decision was that the value of the annual crops is not included in the appraisement made prior to the sale, and that the debtor's rights therein can be saved only by regarding such crops as personalty requiring a separate levy. This reasoning, which is approved in *Foss v. Marr*, 40 Neb. 559, is equally applicable to a growing crop as to one matured. In *Houts v. Shwalter*, 10 Ohio St. 125, *Cassilly v. Rhodes*, 12 Ohio, 88, was reaffirmed, and the crop there in controversy was also a growing crop. It will be remembered that Monday, after he obtained title to the land, did not enter into possession thereof, but suffered O'Neil to remain in possession, merely notifying him that Monday would expect either rent or a portion of the crop; that is, he treated O'Neil as his tenant, demanding rent either in money or in kind. O'Neil's conduct is not sufficiently disclosed to establish whether or not there was an attornment by him to Monday. Assuming that there was not, it would seem that he was holding adversely; and, if so, it is not apparent how Monday could obtain the crop. If he were not holding adversely, then his relationship to Monday would seem to be that of a tenant at will. At the common law, when a tenancy is uncertain so that the tenant cannot know that his estate will terminate before the crop can ripen, the tenant is entitled to re-enter and harvest the crop at maturity. This is the law in this state: *Sornberger v. Berggren*, 20 Neb. 399; *McKean v. Smoyer*, 37 Neb. 694. Under this principle it would seem clear that O'Neil was entitled to the crop.

In opposition to this view it is argued that the foreclosure suit had been begun, and, indeed, a decree of foreclosure rendered before the crop was planted, but we do not ⁷²⁸ think this fact material. O'Neil knew, of course, that a sale might be made and confirmed before his crop would mature, but he could not know that such would be the case. We do not think that he was obliged to abandon the land, or permit it to lie uncultivated, merely because there was a possibility, or a probability, that his estate would be determined before the crop would mature. Public policy requires that the law should be so construed as to encourage rather than discourage the tillage of lands under such circumstances. The lan-

guage of the supreme court of Ohio in *Houts v. Showalter*, 10 Ohio St. 125, is peculiarly applicable: "Under our system, frequent advertisements and offers for sale, and, occasionally, revaluations, are necessary before a sale can be effected. When an appraisement is made, it cannot be foreseen when a sale will be effected. It is not for the interest of any party, nor for the public interest, that the land should thenceforth lie waste; then there may have been no crop sown or planted; but when the sale comes to be made, there may be growing crops put into the ground in the meantime." This language was used with reference to the period between appraisement and sale, but it applies with all the more force to the period between decree and sale. We are not determining in this case what the rights of the parties would be had Monday secured possession and evicted O'Neil before the crop matured. What we hold is that, following the reasoning in *Cassilly v. Rhodes*, 10 Ohio, 88, and *Foss v. Marr*, 40 Neb. 559, the tenant should be protected in his crop, unless, before it is matured, something happens to deprive him of the right thereto, and that, therefore, where the purchaser permits the tenant to remain in possession until the crop is harvested, the title thereto remains in the tenant and does not pass to the purchaser. We have referred to O'Neil as the tenant, but what has been said is applicable to the mortgagor himself. We have treated O'Neil as if he were himself the mortgagor, because, without inquiry as to ⁷²⁹ whether he would otherwise have any higher rights, having been made a defendant in the foreclosure suit, a decree having there been rendered barring his estate, it is clear that in this proceeding he stands in no better position than had he been the mortgagor instead of the mortgagor's tenant. Under the view of the law above presented the plaintiff was not, under the stipulation, entitled to recover, and the peremptory instruction given by the trial court was correct.

Judgment affirmed. —

CROPS—RIGHT OF TENANT TO.—The fact that one who rents land from a disisee, and raises crops thereon, knows that another person claims to be the owner of such land, does not entitle the latter, though found to be such owner, to such crops, because the disisee is entitled to all crops grown while he maintains his adverse possession, and his tenant has the same right: *Johnston v. Fish*, 105 Cal. 420; 45 Am. St. Rep. 53.

CROPS ON MORTGAGED PREMISES—TO WHOM BELONG ON FORECLOSURE. The sale by a mortgagor, prior to a foreclosure sale of the mortgaged land,

of a ripening crop standing thereon passes the title to the crop to the vendee of the mortgagor, as against the mortgagee, or the purchaser at such foreclosure sale: *First Nat. Bank v. Beegle*, 52 Kan. 709; 39 Am. St. Rep. 365, and note. As between a purchaser of land at a foreclosure sale and the mortgagor's tenant, crops planted by the latter and matured when the deed is executed do not pass by the sale: *Hecht v. Deitman*, 56 Iowa, 679; 41 Am. Rep. 131, and note. See, also, the extended note to *Cross v. Pendleton*, 19 Am. Dec. 752.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

CUNNINGHAM v. PARKER.

[146 NEW YORK, 29.]

CONDITION SUBSEQUENT.—A DEVISE OR BEQUEST OF PROPERTY ON CONDITION or proviso that the beneficiary shall pay certain legacies within four years after the decease of the testator, adding that the property so devised is charged with payment of the same, does not involve a forfeiture as a consequence of a failure to pay within the time designated.

DEVISES AND LEGACIES, CHARGING DEBTS UPON.—A devise of property on condition that the beneficiary pay certain legacies, and declaring that the property is charged with the payment of the same, does not operate to charge the debts of the decedent upon such property, though the testator in his will first directs the payment of his debts and expenses by his executor.

Emory A. Chase, for the appellant.

John A. Griswold, for the respondent.

21 FINCH, J. The plaintiff's complaint is framed for a recovery under the provisions of the code, allowing actions against devisees or heirs at law, for the purpose of applying real estate descended or devised to the payment of the general debts of the intestate or testator. There are two modes of reaching that result, differing in the form and character of the proceeding, and also in the scope of the ultimate relief. Within three years from the granting of letters, creditors may apply to the surrogate by a petition setting forth the prescribed facts, and asking for a sale of the land and an application of the proceeds. Such a sale carries the title of the decedents, unaffected by the acts of heirs or devisees, except that where no letters have been issued within four years

after the death of the testator or intestate, a purchaser or mortgagee from an heir or devisee in good faith and for value is protected: Code, sec. 2777. This proceeding was not taken by the creditors, and the prescribed three years having elapsed could not be taken, and so the creditors resorted to the second method provided, and brought this action under section 1837 and those which follow. But the resulting sale has a greater respect for the rights of those claiming under the heir or devisee than is given by the proceeding within three years before the surrogate. If the land has not been aliened the debt may be collected out of it, and the judgment as a lien has priority over ^{as} a judgment against the heir or devisee for his individual debt or demand (Code, sec. 1852), but the right of a purchaser in good faith and for value is explicitly saved and protected, although he claims under the heir or devisee: Code, sec. 1853. With this understanding we are prepared to consider the character of the remedy in its application to the facts disclosed.

The debtor and testator was Daniel Whitford. By his will he made a devise to his son Alexander in these words: "I give, devise, and bequeath unto my beloved son, Alexander Whitford, all the rest, residue, and remainder of my estate, both real and personal, of what nature or kind soever, to have and to hold the same to him, his heirs, and assigns forever, on the condition and proviso that he pay to the above-named legatees, respectively, the legacies herein given within the period of four years after my decease, without interest; and the real estate so devised to my son, Alexander Whitford, is charged with the payment of the same." This devise the son accepted, and went into possession of the land, becoming thereby liable to payment of the legacies, amounting to about one thousand dollars. Letters testamentary were issued to Alexander, June 25, 1888. He borrowed of one Hamilton on April 1, 1890, the sum of two thousand two hundred dollars, and secured the loan by his bond and a mortgage on the land devised, in which his wife joined. Hamilton is dead, but his executors defend in his behalf. Alexander is dead, leaving a widow and one daughter, Eldora, who is made a defendant. After his death the heirs of Daniel claimed the land as forfeited to them because of Alexander's omission to perform the condition of paying the legacies within the prescribed four years, and were let into possession under an arrangement not at all material, since the mortgagee, whose rights are

here involved, was no party to it and unaffected by it. Under a decree in this action the land has been sold, and the sole remaining controversy is over the priority of right in the proceeds as between the general creditors of Daniel and the holders of the Hamilton mortgage. The courts below have given a preference to the creditors, proceeding upon the theory that the devise to Alexander ^{ss} was forfeited and the land descended to the five heirs of Daniel, of whom Alexander was one, and that as to four-fifths of the land the Hamilton mortgage was never a lien.

It was conceded, at least by the respondent's line of argument, that the judgment preferring the creditors to the mortgagee can only be sustained upon one of two theories: either that Alexander lost the premises by forfeiture, or that the general debts were by the will charged on the land. In the one case the mortgage lien is gone as to four-fifths of the land, and in the other is made by the will subject to the priority of the creditors; but if neither proposition be correct, it follows that the mortgagee, who has been found to have taken the security in good faith and for value, and without actual notice of unpaid debts of the testator, can hold and enforce his lien against the creditors in the present action.

There is no room for reasonable doubt that the devise to Alexander, whether the condition of payment of legacies be deemed precedent or subsequent, did not involve a forfeiture as the consequence of a failure to pay. The whole subject was considered in *Graves v. Deterling*, 120 N. Y. 447, and the authorities reviewed, and the existing rule was affirmed that where there is no provision for re-entry or forfeiture, and nothing to support an inference that the estate was intended to depend upon performance of the condition, the words used will be held to import a covenant, and not a condition. Here there is no express provision for a forfeiture, no disposition consequent upon such a result or contemplating it in any manner, but, on the contrary, an explicit charge of the legacies upon the land in the hands of the devisee.

Nor is there any reasonable doubt that the will in this case did not, by its terms or language merely, operate to charge the debts upon the land. The contention of the learned counsel for the respondent is, that the will first directs payment of debts and expenses by the executor, and then, after bequeathing certain legacies, gives the rest, residue, and remainder to Alexander, who is made executor, and that the

direction to him to pay operates to charge the debts upon the ³⁴ land. There are some early cases which the learned counsel cites tending toward his conclusion, but the subject has been since discussed in this court in a great many aspects, and the rule declared that such language, in and of itself, is not sufficient to produce the charge. In *In re Rochester*, 110 N. Y. 159, that was said, although there was the usual formal clause directing payment of debts, a general residuary clause, and an appointment as executor of one of the devisees of such residue. And the general subject was further discussed in *Brill v. Wright*, 112 N. Y. 130; 8 Am. St. Rep. 717. While it appears that at the death of Daniel Whitford his personal estate was insufficient to pay debts, it is not shown what his financial condition was when he made his will, or the disproportion, if any, between debts and assets. No such extrinsic facts were proved as to warrant the inference claimed, even if the question as to debts is identical with that as to legacies: *Briggs v. Carroll*, 117 N. Y. 288. Indeed, the plaintiff's complaint itself alleges that none of the debts were charged upon the land.

It follows that the distribution made proceeded upon a wrong principle, and disregarded the rights of the mortgagee.

The judgment should be reversed so far as appealed from, and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

LEGACIES UPON CONDITION, WHEN WILL VEST, notwithstanding a failure to perform the condition, is discussed in the extended note to *Nunnery v. Carter*, 78 Am. Dec. 234-236.

DEVISE—CHARGING LEGACIES UPON.—Where real estate is devised to an executor or other person, "after the payment of" legacies, or with the legacies "to be first paid," the real estate so devised is chargeable with the payment of the legacies: Extended note to *Brill v. Wright*, 8 Am. St. Rep. 723; also the note to *Birdsall v. Hewlett*, 19 Am. Dec. 394.

MATTER OF SMITH.

[146 NEW YORK, 68.]

STATUTES INVOLVING RESTRAINT OF PERSONAL LIBERTY, INTERPRETATION OF.—Where a right to quarantine and restrain a person is claimed, it must satisfactorily appear not only that it has been conferred by law, but also that the facts were present to justify its exercise.

HEALTH LAWS—RIGHT TO QUARANTINE PERSONS.—Under a statute authorizing the board of health to require the isolation of all persons and things infected or exposed to smallpox, no isolation can be required, unless there has been an infection or an actual exposure to the disease, and an order of such board that whenever any person shall refuse to be vaccinated, he shall be immediately quarantined, and continued in quarantine until he consents to such vaccination, cannot justify the quarantining of persons on the ground that they lived or were doing business in a part of the city in which this disease existed, and that such business was of a character likely to expose them to it, if, in fact, such exposure is not shown to have taken place.

HEALTH LAWS—VACCINATION—POWER TO COMPEL.—Under a statute giving the board of health of a municipality power to guard against the introduction of infectious or contagious diseases, by the exercise of proper medical inspection and control over all persons and things arriving from infected places, and liable from any cause to communicate contagion, and to require the isolation of all persons infected with, or exposed to, such disease, such board has no power to declare that whenever any person shall refuse to be vaccinated he shall be immediately quarantined, and continued in quarantine until he consents to such vaccination.

HABEAS CORPUS to procure the discharge of the petitioners from the custody of Z. Emery Taylor, health commissioner of the city of Brooklyn. The persons seeking their liberty alleged in their petition that they were imprisoned at their house in the city of Brooklyn upon the order and direction of the commissioner of health, and not by virtue of any judgment or process issuing from any court. They averred that they had not been exposed to, nor were they afflicted with, any disease, contagious or otherwise. The commissioner of health sought to justify his acts on the ground that the relators had been quarantined by his orders, and by the authority vested in him by law to take necessary precautions for the protection of the public health against the smallpox. The relators had refused to permit themselves to be vaccinated, and smallpox had prevailed and become an epidemic in the city. It was further claimed that the relators, who were engaged in an express and delivery business, had been specially exposed to this disease from the fact that their business required them to be much in one of the worst infected

parts of the city, and that they transported trunks, bedding, furniture, and other articles which might come from infected points and be infected with the germs of the disease. The defendants were placed in quarantine on their own premises, and required to remain there until they consented to be vaccinated. A proclamation had been issued declaring the measures deemed necessary by the commissioner of health, among which measures so designated were: "1. Thorough and sufficient vaccination of every citizen who has not been successfully vaccinated within such period of time as in the judgment of the commissioner of health renders such person immune should be procured; 2. Whenever any person in said city shall refuse to be vaccinated, such person shall be immediately quarantined and detained in quarantine until he consents to such vaccination." The return to the writ, being demurred to, was by the trial court adjudged insufficient, and the relators were discharged, but on appeal to the general term this order of discharge was reversed.

Charles J. Patterson, for the appellants.

Alexander H. Van Cott, for the respondent.

⁷³ GRAY, J. The question presented, like all those which involve the right to restrain the citizen in his personal liberty, or to interfere with his pursuit of a lawful avocation, demands a careful consideration of the provisions of law under which the right is alleged to be conferred. Where such a right is claimed, it must appear very clearly and satisfactorily, not only that it has been conferred by the law, but, also, that in its exercise the facts were present which justified it. The validity of the law is not so much called in question as the right to enforce its provisions is. For his authority ⁷⁴ the respondent refers to certain provisions of the charter of the city of Brooklyn, chapter 583, title 12, where the health commissioner is empowered as follows: "SEC. 5. In the presence of great and imminent peril to public health of the city of Brooklyn, by reason of impending pestilence, it shall be the duty of said commissioner to take such measures, . . . for the preservation of the public health from such impending pestilence, as he may in good faith declare the public safety and health to demand, and the mayor of the said city, and the president of the medical society of Kings county, shall also in writing approve. And such peril shall not be deemed to exist except when and for such period of time as the

mayor, president of the medical society, and the health commissioner shall by proclamation declare." The provisions of section 14 of chapter 661 of the laws of 1893 (the "Public Health Law"), which relates to "contagious and infectious diseases," are also referred to. They are that, "Every such local board of health shall guard against the introduction of contagious and infectious diseases by the exercise of proper and vigilant medical inspection and control of all persons and things arriving in the municipality from infected places, or which from any cause are liable to communicate contagion. It shall require the isolation of all persons and things infected with or exposed to such disease, and provide suitable places for the treatment and care of sick persons who cannot otherwise be provided for. . . . It shall provide at stated intervals a suitable supply of vaccine virus, etc., . . . and at all times provide thorough and safe vaccination for all persons in need of the same." It would seem from a consideration of these provisions of law that while responsibility and a wide authority have been conferred upon the respondent in the administration of his important office, nevertheless the statute contemplates, when persons or property are to be affected by the isolation mentioned, that the fact must exist, either that they are infected with the contagious disease, or that they were exposed to it. But I find no warrant for the rather extraordinary declaration ⁷⁵ of the commissioner that "wherever any person shall refuse to be vaccinated, such person shall be immediately quarantined and continued in quarantine until he consents to such vaccination." Of course, if we could regard it as a mere expression of his opinion as to what measures would be necessary to prevent pestilence, this document would not demand our consideration; but, being issued officially, and with the formal approval of the mayor and the president of the medical society of Kings county, as required by the city charter, it assumes the importance of a public and official paper, and the inquiry suggests itself as to the authority for its terms. That the powers conferred upon the health commissioner by the provisions of the city charter give to him the right to compel the vaccination of every citizen in the city of Brooklyn, if he would escape quarantine, seems an unnecessary, and it is an unwarrantable inference, from the language. It is difficult to suppose that the legislature would invest local officials with such arbitrary authority over their

fellow-citizens, and the language of an act would have to be very plain before the court would be warranted in giving it such a construction. But the legislature has done nothing of the kind. In the presence of imminent peril to the public health of the city, by reason of an impending pestilence, he may take such measures as he declares the public safety demands, and which are approved by the mayor and the president of the medical society. This language is sufficient to confer the needed authority to do all acts which in his judgment, as approved by his associates in the matter, are necessary to be done to improve the sanitary conditions of the city, and to preserve the public health from being affected. That authority would, undoubtedly, be sufficient to deal summarily with cases where persons are stricken with a contagious or infectious disease, or have been actually exposed to it, and it is broad enough for every practical purpose in dealing with the facts of any case presented; but the authority is not given to direct, or to carry out, a quarantine of all persons who refuse to permit themselves to be vaccinated, and it cannot be implied. * Certainly no power should be implied from an act which is not necessary to its due execution; and where the liberty and the property of persons are sought to be brought within its operation, the case must be clearly seen to be within those intended to be reached.

Passing to the question of what power is vested in the commissioner by virtue of his office, under the Public Health Law, it is very clear that an "isolation of all persons and things" is only permitted when they are "infected with or exposed to" contagious and infectious diseases. That that language means, when speaking of persons and things "exposed" to disease, the actual fact and not a mere possibility is plain from the language which precedes it in the section. The local board of health is to guard against the introduction of contagious and infectious diseases, by the exercise of medical inspection and control of persons and things, either arriving from infected places, or from any cause liable to communicate contagion. Obviously, there must be an inspection of persons and things, and the resulting discovery, if they are not actually "infected" with disease, that they have been "exposed" to it, and that the conditions actually exist for a communication of contagion, in order to bring into operation the power to isolate. The meaning of the particular language in the section is, and it should read, that the

board of health shall "require the isolation of all persons and things infected with or who have been exposed to such diseases." In the present case the relators are not alleged to have been infected with any contagious or infectious disease, or to have been exposed to such. The allegations of the commissioner of health are based only upon information and belief, and, when referring to the necessity for the stringent measures adopted toward the relators, they simply assert the prosecution of a general express business, which is, in part, carried on through what "has been one of the worst infected centers of the city." It is not alleged that the business had included the carrying of infected articles, or articles from infected centers, or that the relators had been exposed to "contagion; but possibilities, merely, are alleged. It is alleged that the business may include the carrying of articles which may come from infected centers, and the relators might be seized with smallpox; and, if they were permitted to continue in their business without being vaccinated, they might be the means of serious consequences to other citizens with whom they came in contact. Such allegations fall far short of stating facts, upon which the commissioner of health would be authorized to take such drastic measures as to effect the imprisonment of citizens by quarantining them in their houses. He had no jurisdiction to make the order here, unless there was, in fact, before him a case where the parties were either infected with, or had been actually exposed to, the disease of smallpox. It was necessary to that jurisdiction that the danger should actually have existed, in the infection of the person or things, or in their having been exposed to the disease: See *People v. Board of Health*, 140 N. Y. 1; 37 Am. St. Rep. 522. While he was vested with great and extensive powers, in order, in the presence of danger, to act summarily for the preservation of the public health, he was bound to show a state of facts which justified such an exercise of those powers.

I think no one will dispute the right of the legislature to enact such measures as will protect all persons from the impending calamity of a pestilence, and to vest in local authorities such comprehensive powers as will enable them to act competently and effectively. That those powers would be conferred without regulating or controlling their exercise is not to be supposed, and the legislature has not relieved officials from the responsibility of showing that the exercise of

their powers was justified by the facts of the case. The question here is not whether the legislature had the power to enact the provisions of section 24 of the health law; but whether the respondent has shown that a state of facts existed, warranting the exercise of the extraordinary authority conferred upon him. Like all enactments which may affect the liberty of the person, this one must be construed strictly; with the saving ⁷⁸ consideration, however, that, as the legislature contemplated an extraordinary and dangerous emergency for the exercise of the power conferred, some latitude of a reasonable discretion is to be allowed to the local authorities upon the facts of a case.

As the respondent has utterly failed to show any facts which warranted the isolation of the relators, they were properly discharged, and the order of the general term should be reversed, and that of the special term affirmed.

All concur, except HAIGHT, J., not voting.

Ordered accordingly. —

HEALTH LAWS—VACCINATION.—POWER TO COMPEL, and to provide penalties for a refusal to submit to, is discussed in the extended note to *Hurt v. Warner*, 47 Am. St. Rep. 546, 547.

HEALTH LAWS.—The validity of laws providing for the quarantining of persons is the subject of the extended notes to *Train v. Boston Disinfecting Co.*, 59 Am. Rep. 117, and *Markham v. Brown*, 92 Am. Dec. 76. See, also, the extended note to *Hurt v. Warner*, 47 Am. St. Rep. 541.

MATTER OF JAMES.

[146 NEW YORK, 78.]

GIFTS.—A PROMISE MADE OR A BOND GIVEN WITHOUT ANY CONSIDERATION cannot be enforced against the donor, nor against his executors or administrators. This rule remains applicable, however meritorious the consideration, as where the donor and the donee are husband and wife or parent and child.

CORPORATIONS—DIVIDENDS, TO WHOM BELONG.—If a testator by his will gives to his wife for her sole enjoyment and benefit during her life, without restraint, deduction, or interference in any manner, one-half of all the income of his property of every kind, and to his legal heirs the remainder of such income during the life of his wife, after payment of taxes, etc., and to his legal heirs the reversion and ownership of his estate at her death, and such testator has stock in corporations, the only income of which is from the sale of lands received by such corporations in payment of work upon railways constructed by them, divi-

dends paid by the corporations out of the proceeds of such sale should be treated as income between the wife and the heir, and she is therefore entitled to one-half thereof.

WILLS.—IN THE CONSTRUCTION OF WILLS, THE INTENTION of the testator, when apparent, overrides all established rules of interpretation.

WILLS—TENANT FOR LIFE AND REMAINDERMAN—CONFLICTS BETWEEN.—When there is anything in the will from which it may be fairly inferred that the testator expected the tenant for life to enjoy the property specifically, it cannot be converted into money or public funds, and the remainderman must take his chances in anything remaining after the termination of the life estate.

THE following is the will construed in this case:

"I, F. P. James, of Philipstown, Putnam county, New York, being of sound mind, declare this my last will and testament, revoking all former wills and codicils. I give and bequeath to my beloved wife Julia, for her sole use, enjoyment, and benefit during her life, without restraint, deduction, or interference in any manner whatsoever, as follows:

"*First.* One-half of the income of all my property of every kind of which I may die possessed.

"*Second.* The use, enjoyment, rental, and occupation of my two residences, one known as 'Cragside,' in Cold Spring and Philipstown, New York, and the other known as No. 400 Fifth avenue, New York City.

"*Third.* I give, devise, and bequeath absolutely to my said wife all the household furniture, pictures, plate, books, ornaments, horses, carriages, farm implements, and property of every description in or upon or appertaining in any manner to the two houses and residences aforesaid. The said devices and bequests to my said wife to be in lieu of dower and right of dower. I give, devise, and bequeath to my legal heirs the remainder of the income from my property during the life of my wife after the payment and discharge of all taxes, assessments, and charges, interest and obligation against my estate, except as hereinafter provided, in case of interference. I give, devise, and bequeath to my legal heirs, except as herein provided otherwise, the reversion and ownership of all my estate and property after the death of my wife, with the reservation, exception, and direction that in the event of any of my legal heirs making any attempt, directly or indirectly, in any manner or form, to interfere with or restrain in any manner my beloved wife from full enjoyment, use, management, and direction and disposition of the property and income of my estate, as herein devised, then, and in that event,

such one of my legal heirs as shall do or perform or aid or abet the performance of such an act, or cause the same to be done, shall be forever debarred from any part, parcel, interest, or ownership, or inheritance to any of my property, and be excluded from sharing in the same, and the share that would otherwise have gone to him or her shall be divided among the remaining heirs according to law. I authorize and direct my executrix in her discretion to sell and convey such portion of my property as may be requisite or necessary to pay and discharge my just debts and obligations.

"I constitute and appoint my wife, Julia L. James, my sole executrix, and direct that no bond, obligation, or surety be required from her."

Mr. James in his lifetime had been the senior member of the banking and brokerage firm of F. P. James & Co., of which Horace S. Taylor had been a copartner. There were no written articles of copartnership. Mr. Taylor died a few days before Mr. James. Various objections were filed to the account of the executrix of Mr. James' will, and cross-appals were prosecuted from the judgment of the general term modifying and affirming as modified a decree of the surrogate court settling the accounts of such executrix.

William W. Goodrich, William P. Quin, and Frank E. Smith, for the appellants.

William C. Wallace, Frank E. Smith, Robert Mazet, and Charles S. Clark, for the respondents.

Walter M. Rosebault, for the executors of E. D. James and another.

92 GRAY, J. The first of the questions we shall consider is one which arises upon the appeal of the executrix. She made a personal claim, amounting to one hundred and twenty-seven thousand one hundred and twenty-three dollars and sixteen cents, which the surrogate allowed, but which the general term, upon appeal, disallowed. The facts upon which it was based are these: In 1879, a few years before the death of Mr. James, he executed and delivered to his wife two bonds, one of which was conditioned for the payment of forty-three thousand nine hundred and twenty dollars, one year after date, and the other for the payment of thirty thousand seven hundred and twenty dollars, one year after date. Both bonds bore interest and were secured by mortgages upon

lands in the state of Iowa, the legal and record title to which was in Mr. James. A few days afterward, Mr. James conveyed all of the lands covered by these mortgages to a grand-nephew of Mrs. James, at the time an infant of the age of nine years. It was found with respect to this latter transaction that it was advised as a mode of delaying, and to enable legal proceedings to be taken to defeat, the payment of taxes, which ^{as} had been laid upon them, and which were believed to be illegal. In 1882 a suit was commenced to foreclose the mortgages by Mrs. James, who made her husband and the infant Wheeler, the grantee of the lands, parties defendant. Process in the suit was served outside of the state of Iowa upon the defendants, but Mr. James did not appear. In 1883 judgment of foreclosure and sale was entered, in which the amount due to Mrs. James upon the bonds was fixed at ninety-four thousand nine hundred and seventy-three dollars and eighty-three cents. No sale was made during the lifetime of Mr. James under the decree, but, after his death and in 1885, Mrs. James caused a sale to be made, at which the mortgaged premises were sold for the sum of five thousand two hundred and eighty dollars. The decree of foreclosure and sale gave no judgment against Mr. James personally, forasmuch as the district court in Iowa had acquired no jurisdiction to render judgment in personam upon a service without the state and without personal appearance of the party served. The claim of the executrix is for the whole sum secured by the two bonds, with interest from their date, less the amount realized upon the sale of the lands. The surrogate found, with respect to the delivery of the bonds and mortgages, that they were a gift by Mr. James to his wife, and that he was not indebted to her at the time in any sum whatsoever. He allowed her claim on the ground that they were enforceable obligations in the hands of Mrs. James against the estate of her husband, regarded either as a gift, or as a provision for her in addition to the bequests of the will. I think that the general term correctly held that the executrix had no claim upon these bonds which she could enforce against the estate in her hands, and that she had obtained all the relief in the foreclosure suit to which she was entitled. These bonds amounted, simply, to the promise of Mr. James to pay, at some future day, the sum mentioned, without any consideration to support that promise. Such a voluntary promise cannot be enforced against the donor, or against his

executors or administrators: See Pomeroy's Equity Jurisprudence, sec. 1148; Story's Equity Jurisprudence, sec. 987. By the latter authority it is stated as follows: "The general ²⁴ principle is established that in no case whatsoever will courts of equity interfere in favor of mere volunteers, whether it be upon a volunteer contract, or a covenant, or a settlement, however meritorious may be the consideration, and although they stand in the relation of a wife or child."

The question of the validity of a gift, in the form of a promise to pay, only, without consideration, was elaborately considered in *Harris v. Clark*, 3 N. Y. 93, 51 Am. Dec. 352, and it was there held, to quote the language of Judge Ruggles, "that a voluntary promissory note without consideration is not, as the law now stands, the subject of a valid gift by the maker, either as a present donation, or as a gift to take effect at the death of the donor." The fact that in that case the subject of the gift was a bill or draft does not affect its application to the case of a bond, inasmuch as no presumption of a valuable consideration obtains from the presence of the seal, in view of the findings of fact that the bonds were executed and delivered as a gift, and not because of any indebtedness. In *Whitaker v. Whitaker*, 52 N. Y. 368, 11 Am. Rep. 711, the question discussed was whether a meritorious consideration was sufficient in equity to sustain a promissory note given by a husband to his wife, as against his collateral heirs, and the conclusion reached by Judge Peckham (in which all his associates concurred), after a review of the English authorities, was that the law was well settled, contrary to the doctrine in the early case of *Wright v. Wright*, 1 Cow. 598, "that a meritorious consideration, or the duty to provide for a wife or child, is not sufficient to support an executory covenant." The case of *Hunt v. Johnson*, 44 N. Y. 27, 4 Am. Rep. 631, was referred to in the opinion and deemed to be without the rule, because it was a case of an executed sale or transfer of real estate, to uphold which natural affection is undoubtedly a sufficient consideration. Nor does the fact that the gift in *Whitaker v. Whitaker*, 52 N. Y. 368, 11 Am. Rep. 711, was of a promissory note, which the husband made in his lifetime for the purpose of making a provision for his wife, affect the question as an authority in point, for the same reason that I have mentioned in reference to the case of *Harris v. Clark*, 3 N. Y. 93, 51 Am. Dec. 352. ²⁵ It is unnecessary to discuss a question which has

been well treated at the general term, further than to say that I think that they were right in holding that, while the Iowa judgment of foreclosure had no effect to create a personal liability upon the bond, it was conclusive as to the ownership of the mortgages and the right of Mrs. James to have the lands therein described sold, and the proceeds applied upon the amount represented by the bonds. The importance of that holding seems to be that the contestants upon the accounting are precluded from inquiring either as to the right of the executrix to sell the land, or as to whether she held the mortgage in trust for the firm of F. P. James & Co.

Another question, as to which the executrix has appealed, is with reference to the payment to her of two thousand five hundred dollars upon the day of the testator's death. It seems that, in the morning of that day, and while Mr. James was in fact dying, a clerk of F. P. James & Co., holding a power of attorney to sign checks for the firm, was requested by some one acting as a messenger from the residence, to draw two checks for Mrs. James' account, one for one thousand dollars and the other for fifteen hundred dollars. Upon the clerk's demurring to the request, he was assured that it was all right, and he then drew the checks, which the messenger caused to be cashed, and deposited to the individual credit of Mrs. James. The surrogate found that these checks were delivered to Mrs. James by her husband's authority; but the general term has reversed the surrogate in that respect, holding that there is no evidence to sustain the finding. I think their conclusion was correct, and that the facts of the transaction would not warrant any inference that the authority of the clerk, under the power which he held from the firm, had been validly called into exercise. If the transaction had been merely one as to which all we knew was that the clerk had delivered the checks to Mrs. James, an inference might have been possible, which is quite rebutted by the circumstance that the clerk only drew and delivered them when moved to do so by a messenger, whose source of authority to make the request was not shown to be in Mr. James.

•• One of the most important questions raised upon the accounting was, whether dividends received upon the stocks of certain railroad construction companies should be treated as capital or as income. Two of the companies constructed

railroads, and, upon their sale, received land grants in payment. The other company also constructed and sold a railroad, but received in part payment a certificate of indebtedness secured by a mortgage upon land. The surrogate apportioned the dividends paid by these corporations since the death of Mr. James by holding so much as were derived from the purchase price of lands sold to be capital, and so much as were derived from interest on deferred payments on contracts of sale, or upon the certificate of indebtedness, he held to be income. The general term reversed that ruling, and held that all the dividends were income. If there was nothing in the language of this will which evidenced an intention, on the part of the testator, that his widow should have and enjoy as income whatever actually came into the estate eo nomine, and as he had been himself in the habit of receiving, I should hesitate very much to say that the general term were correct. Undoubtedly, the dividends declared by these companies were from their capital, because they had no source of income other than from their sales of land, and dividends could not be derived in any other way. These corporations were peculiar, in that their only business, after the expenditure of their capital in the construction of railroads, was to sell the lands received in payment, and to divide the proceeds, as received, among their stockholders. In that respect, of course, there was a distinction between them and corporations which are engaged in ordinary business enterprises, and receive returns in the way of earnings upon the invested capital. Their dividends were, in truth, ordinary, and not extraordinary, for the reason that they were the only ones which they could, in the nature of things, make. I think, however, we may consider the question before us upon a broader ground, where, in connection with kindred questions, it may be disposed of by the application of the rule of intention. Whether the rule, with ⁹⁷ relation to the respective rights of the life tenant and remaindermen, shall so apply, in the case of a testator's estate, as that the personalty shall be converted and invested in such permanent and legally recognized forms as shall benefit both the tenant for life and the remainderman, may depend upon the form and language of the will. It seems to me that in this case the intention of the testator, that his personal estate shall remain in specie, the income of which should be received and enjoyed by his wife as it had been by himself,

is manifest. At the time when he made his will he had no children, nor descendants of children. The will was drawn at his own dictation and peculiarly expresses his great affection for his wife, and his desire that her enjoyment of his estate, and the benefits which she was to derive from it, were to be without any regard to those who, after her death, were to have the reversion of his property, and whom he defines by the very general and generic term of his "legal heirs." In the first place, his language is, "I give and bequeath to my beloved wife Julia, for her sole use, enjoyment, and benefit during her life, without restraint, deduction, or interference in any manner whatsoever, as follows: *First*. One-half of the income of all my property of every kind of which I may die possessed." He then gives her the use of his town and country residences, and makes the absolute bequest of all household furniture, pictures, plate, books, ornaments, horses, carriages, farm implements, and property of every description, in, or upon, or appertaining in any manner to the two houses and residences. He then proceeds as follows: "I give, devise, and bequeath to my legal heirs the remainder of the income from my property during the life of my wife after the payment and discharge of all taxes, etc. . . . except as hereinafter provided in case of interference. I give, etc., to my legal heirs . . . the reversion and ownership of all my estate and property after the death of my wife, with the reservation, exception, and direction that in the event of any of my legal heirs making any attempt, directly or indirectly, in any manner or form, ^{as} to interfere with or restrain in any manner my beloved wife from full enjoyment, use, management and direction, and disposition of the property and income of my estate, as herein devised, then and in that event such one of my legal heirs as shall do or perform or aid or abet the performance of such an act, or cause the same to be done, shall be forever debarred from any part, parcel, interest, or ownership, or inheritance to any of my property. . . . I authorize and direct my executrix in her discretion to sell and convey such portion of my property as may be requisite or necessary to pay and discharge my just debts and obligations."

It stands out very clearly from the peculiar and strong language selected by the testator that the interest which was to be enjoyed by his "legal heirs" in the estate was subordinated to the interest of his wife. To him she was everything, and

they were merely kindred, having by law certain claims which he was not indisposed to recognize, and which he provided for in the manner described. Although in the case of *Woodward v. James*, 115 N. Y. 346, we held that a legal trust was created of the testator's real and personal estate, not given to the widow absolutely for her life, we reached that conclusion, inasmuch as it was necessary, because of the authority and duty imposed upon the widow, that the legal title should be vested in her as trustee. Of course, there was nothing in the language used in the will, which conveyed the idea that the testator intended or thought of a trust; but the exigencies of the situation, in our judgment, required the creation of a trust by implication. The question might have been a very different one, if the language of the will spoke of a trust, or indicated the notion of the testator that his wife, with respect to the management and use of the property, should be clothed with the duties of a trustee and guided by the strict rules to which trustees are subjected. In this case, while a trust is created by implication, all of the stringent injunctions of the testator with respect to his widow's use, enjoyment, or control of the property remain with all their meaning. The one-half of the income of "all of his property of every kind," of which he might die seised, is given to his wife "without restraint, deduction, or interference, in any manner whatsoever." Such language, in connection with that subsequently used, enjoining his legal heirs against attempting to interfere with the "full enjoyment, use, management and direction, and disposition of the property and income of his estate," under penalty of being excluded from any interest or share therein, contains most significant expressions of an intention that his widow should have a half of the income of his property "of every kind," which could not be cut down, and which she was fully to enjoy and manage. It is also significant that the direction to sell is only in the event of a sale becoming necessary to discharge debts. I cannot read this will without not only inferring the intention of the testator to have been that his property should remain in specie for his wife's benefit, and subject to her uncontrolled management, but also seeing therein that intention to be plainly expressed. It is inconceivable that Mr. James, in drawing a will in such language, had the intention that his widow should at once convert and capitalize the estate in such forms of investment as the law sanctions, by rules established for

the construction of wills colorless as to any expression of intention. To quote the words of Lord Chancellor Cottenham in *Pickering v. Pickering*, 4 Mylne & C. 300, "I think it would be a violation of the testator's intention not to allow the wife to enjoy the income of the property as it is." This case differs from others which have been cited, in that the testamentary disposition was not strictly of an estate to be enjoyed in succession by different persons. One-half of the income of the testator's property is given to his legal heirs, and though it may have proved to be, as counsel has put it, an illusory gift, because of the burdens imposed upon their share of first discharging thereout all the taxes and charges against the estate, nevertheless the situation was, and is, that of a division of the income of the property between the widow and the testator's legal heirs. To the extent that their half of the income is applied in payment of taxes and other charges, their reversionary ¹⁰⁰ interest is protected and benefited, and they can only complain of the testator's subordinating their interests so completely to those of his widow. The counsel for the heirs has made a very able and ingenious argument, which he has fortified by reasoning upon cases in the English courts, as well as upon some in this country; but all the cases that I have seen recognize that the rule of intention must always override established rules of construction. It is only where the instrument fails to express or to disclose an intention that we must resort to the rules which have been established by the decisions of the courts. That an intention is manifest in the will in question I have endeavored to show. We have only to put ourselves in the testator's situation, when he was making his will, and therein providing for the enjoyment of his estate by his wife, to be impressed with the conviction that he had no idea of constituting a technical trust, with all its duties and obligations; but, without children or descendants, he draws a will in his own strong language, making what he supposed to be an ample provision for his wife during her life, and one in harmony with the conditions under which she had lived. He cares little for others, in comparison, if we may judge from the language of his will, but he recognizes the claims of that general class designated as his "legal heirs."

I deem it of considerable significance, when considering this case in connection with others, to which our attention has been referred, and in addition to the difference in the

facts and phraseology upon which I have commented, that this testamentary disposition was not that of a gift of the residuary estate to trustees; although even in such a case a plain intention discoverable in the will would prevail against an arbitrary rule of law. In Jarman on Wills, *613, it is said, with reference to a residuary devise, that the same principle applies "if an intention that the property shall be enjoyed in specie can be collected from the terms in which either the life interest or the ulterior subject of disposition, or both these interests, is or are bequeathed." In this case, as in every other case where a will is the subject of construction, it is the intention ¹⁰¹ of the testator, and not the rule of construction, which is to govern when they come in conflict. In 2 Redfield on Wills, *478, it is said that, "Where there is anything in the will from which it may fairly be inferred that the testator expected the tenant for life to enjoy the property specifically, it cannot be converted into money or public funds, but the remainderman must take his chance of anything remaining after termination of the life estate." These latter remarks were made with reference to the case of *Howe v. Earl of Dartmouth*, 7 Ves. 137.

Howe v. Earl of Dartmouth, 7 Ves. 137, is considered to be the leading case in England upon the question whether property bequeathed by a testator shall be retained in specie, or, whether, if of the perishable class of securities, it shall be converted in such a way as to produce capital bearing interest. The rule as laid down by Lord Chancellor Eldon in that case, as explained by subsequent decisions, among which is particularly to be mentioned that of Lord Cottenham in *Pickering v. Pickering*, 4 Mylne & C. 300, is this: That where there is a residuary bequest of personal estate, to be enjoyed by several persons in succession, a court of equity, in the absence of any evidence of a contrary intention, will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession, and, as the only means of giving effect to such intention, will direct the conversion of personalty into permanent investments of a recognized character. Lord Eldon laid down the rule in that case, because of the absence of language in the will from which the direction of the testator might be inferred, that his estate should continue as it was. Some difference of opinion has existed among the English judges with respect to the application of the rule laid down in *Howe v. Earl of Dartmouth*, 7 Ves. 137, which, in the

recent case of *Macdonald v. Irvine*, L. R. 8 Ch. Div. 101, is adverted to in the opinion of Lord Justice Thesiger. In the previous case of *Hinves v. Hinves*, 3 Hare, 611, Vice-Chancellor Wigram had said: "The court, in applying the rule, has leant against conversion as strongly as is consistent with the supposition ¹⁰² that the rule itself is well founded." In *Morgan v. Morgan*, 14 Beav. 72, the master of the rolls, Sir John Romilly, said that "the effect of the later cases has been to allow small indications of intention to prevent the application of the rule." Lord Thesiger, referring to the leaning of these judges, with others, against the application of the rule, adopts the following words of Lord Romilly: "That unless there can be gathered from the will some expression of intention that the property is to be enjoyed in specie, the rule in *Howe v. Earl of Dartmouth*, 7 Ves. 137, is to prevail. It is therefore incumbent on the persons contesting the application of that rule, and on the court which forbids that application, to point out the words in the will which exclude it, and if this cannot be done, the rule must apply. . . . In almost all, if not all, the cases which have been cited in argument, where such an intention was found to exist, . . . we find either words in their natural and literal sense importing use or enjoyment of the property in the state in which the testator left it at his death, or directions contained in the will, as to the conversion of the property, which were inconsistent with a conversion by the court taking place upon the death of the testator." In that case the lords justices divided in opinion as to whether any of the elements existed in the will under consideration to show the intention of the testator that the case should be taken out of the general rule; but they all agreed, if there was a sufficient indication of intention in the will itself to that effect, that the personalty should remain in specie until after the death of the testator's wife. While there the testator gave to his wife for life "all the income, dividends, and annual proceeds of his entire estate," there were not present these significant words of injunction against any "deduction," or any interference with her use, enjoyment, or management.

In *Blann v. Bell*, 2 De Gex, M. & G. 775, the principle was distinctly recognized that the intention in the will should govern upon the question of the retention of property in specie, and that where it is seen to exist, the case will be ¹⁰³ taken out of the general rule. In *Collins v. Collins*, 2 Mylne & K. 703, the language of the gift to the wife is not unlike, in its

effect, to that in the present case. The testator there gave "all and every part of his property in every shape, and without any reserve, and in whatever manner situated, for her natural life," and at her death the property was to be divided among his father, brothers, and a sister. Sir John Leach, M. R., held the rule in *Howe v. Earl of Dartmouth*, 7 Ves. 137, did not apply. In this state the rule laid down in the Earl of Dartmouth's case was early adopted, as applicable in the absence of any indication of an intention on the part of the testator that the legatee for life should enjoy the property in its then state: See *Spear v. Tinkham*, 2 Barb. Ch. 211, and other cases cited on brief for heirs. In every case in this, or any other, state, however stringently that rule is applied as between a tenant for life and remainderman, it is the absence of manifest or plain intention which sets it in operation. In *Clarkson v. Clarkson*, 18 Barb. 646, the decision of the question of the disposition to be made of extraordinary dividends was referred to the discoverable intention of the testator. The case of *King v. Talbot*, 40 N. Y. 76, frequently cited, has no application. The question discussed was with reference to how the discretion of trustees is prudently and lawfully exercised in the investment of moneys held for the benefit of minors, and a very strict rule was laid down.

What I have said is applicable to the question of the right of the widow to retain in specie the personal estate bequeathed, and to her right to have and to enjoy the income from it, as it had been received by the testator in his lifetime.

The testator knew about his investments. They were spread out on his books, and the comprehensive words of a gift of his "property of every kind," "without restraint, deduction, or interference in any manner," are especially significant of the intention that his widow should have whatever came into the estate in the form in which he left it.

The point is also made by the contestants that certain interests and dividends, collected upon certain stocks and ¹⁰⁴ bonds prior to his discharge by the receiver, who was appointed of the firm property, should have been carried to capital instead of being credited to, and distributed as, income. The question concerns the receiver's liquidation of the partnership affairs. In an action brought within a few months of the testator's decease by a creditor of the firm, for the protection and distribution of its assets, a receiver was appointed, who continued until December, 1885, when a judgment in the

action was rendered, settling his accounts and directing him to deliver over the assets in his hands to Mrs. James, who was entitled, in her capacity as executrix of the surviving partner, to settle with the legal representatives of the deceased partner. Under the provisions of Mr. James' will his executrix became vested at once with the title to all of his estate, in the capacity of a trustee for the purposes mentioned. Included in the property of the estate was the testator's interest in the firm of F. P. James & Co. The direction as to his widow's right to one-half of the income applied, of course, as well to that species of property. For the reasons I have just expressed, she was under no obligation to convert and to capitalize those assets, or the income received thereon. The interest of Mr. James' partner, Mr. Taylor, was in one-fifth of the profits of the business, and that interest, which, upon his death, vested in Mrs. Taylor as his executrix, has been settled with. So far as the question of the winding up of the partnership business is concerned, I fail to find any substantial ground for the objection of the contestants as to the treatment by the receiver of the income and expenses. The evidence is that twenty per cent of the income was credited to the Taylor account, to which was also charged its due proportion of the expenses of the receivership. That seems to me to have been a proper method of liquidating the business. The decree in the receivership action passing on the accounts is not open to attack in this proceeding, and, with respect to the right of the executrix of Mr. James to treat as income the particular moneys collected by way of dividends and interest, and paid over to her by the receiver, I do not see how the next of kin ¹⁰⁵ can be heard to complain. That was her right under the provisions of the will, and indirectly, if not directly, they were benefited by all that was income to the estate.

Objection was made by the contestants to the settlement which was effected by the executrix as to the interest of her husband's former partner, Mr. Taylor. He predeceased Mr. James by a few days only, leaving his widow sole executrix. Pending the administration of the receiver, who had been appointed of the partnership property, Mrs. James commenced negotiations for a settlement with Mrs. Taylor as to the claims of the Taylor estate. They eventually agreed upon the sum of twenty-seven thousand dollars, after varying more or less widely in their estimates of what was due upon the Taylor

interest. The settlement was not, however, consummated between them. Mr. Jansen then became the purchaser from Mrs. Taylor, and took from her a transfer of all claims which the Taylor estate had against the assets of F. P. James & Co., including certain lands in Iowa and Texas. However this arrangement was brought about is only matter of inference. There is nothing to show that Mrs. James had any interest in the Jansen purchase. She doubted her right to complete her negotiations with Mrs. Taylor, and the latter was advised by her counsel not to sell to Mrs. James, either individually or as executrix. After Jansen became the representative of the Taylor interest, and when Mrs. James had become possessed of the assets upon the discharge of the receiver, a settlement was reached, upon statements made by an accountant as to the firm affairs, which were based upon figures showing what was due to the James estate, what was due upon the Taylor interest, and what was the total cost of the securities as shown by the firm books. The increase in the figures of the statements, upon which the settlement was made with Jansen, over those in the statement made at the time of the proposed settlement with Mrs. Taylor, was accounted for by reason of the advance in value of the securities. Mrs. James then transferred to Jansen one-fifth of all the securities of the late firm, and received back from him, in cash, the difference between one-fifth of their ¹⁰⁰ cost price and the amount which had been found due from the firm to the Taylor estate. Upon examination of the facts upon which an adjustment of accounts and interests was reached and this settlement was made, and which are quite complicated, I am satisfied that the surrogate reached a correct conclusion, and that the evidence supported the findings which he made. The contestants have not shown that any wrong principle was adopted, or that the facts were wanting to justify that part of his decree upon the accounting. The general term has reviewed his decision, and the question must stop there.

With respect to the question of the propriety of crediting Mr. James' capital with interest to the time of the final settlement, there is no evidence of any agreement to allow interest, and the fact that, in making up previous accounts between the partners, interest had been credited, is not sufficient evidence of usage to dispense with the necessity of proving a special agreement. There were no articles of co-partnership, and all that was found with respect to the part-

nership interests was that Mr. Taylor was to have one-fifth of the profits and was to bear one-fifth of the losses of the business. When their association of interests was dissolved by death, there was nothing upon which a right to claim interest on Mr. James' capital could rest.

As to the claims of Jansen, as assignee of Taylor's executrix, with reference to the lands in Iowa and Texas, they do not seem to have been comprised within the settlement. Such claims must be the subject of future arrangement.

The questions which I have considered with respect to this accounting are all which demand any review by us. The record is very voluminous, and has required much time for its consideration. Without further discussion of the matter, I am satisfied with the correctness of the conclusions reached by the general term, in its order upon the surrogate's decree, and I therefore advise its affirmance, with costs to all parties who have appeared by counsel and have filed briefs upon this appeal, to be paid out of the estate.

¹⁰⁷ All concur, BARTLETT, J., upon all points except as to the alleged dividends of the construction companies, so called, he holding the judgment should be entirely reversed so far as it decides the dividends paid by the companies to be income, and the accounts changed accordingly.

FINCH, J., not voting.

Ordered accordingly.

CONTRACTS—CONSIDERATION—NECESSITY FOR.—There must be a consideration to support every promise: *Stewart v. Jerome*, 71 Mich. 201; 15 Am. St. Rep. 252. An agreement not based upon consideration cannot be enforced: *Mills County Nat. Bank v. Perry*, 72 Iowa, 15; 2 Am. St. Rep. 228, and note; extended note to *Seymour v. Delancy*, 15 Am. Dec. 302.

WILLS—INTERPRETATION—INTENT.—The intent of the testator must govern in the construction of his will, if not contrary to some positive rule of law: *Whitcomb v. Rodman*, 156 Ill. 116; 47 Am. St. Rep. 181, and note with the cases collected.

CORPORATIONS—DIVIDENDS—TO WHOM BELONG—LIFE TENANT AND REMAINDERMAN.—Corporate dividends, whether of stock or payable in money, are nonapportionable, and must be considered as accruing in their entirety as of the date when they are declared, and, as between a life tenant entitled to the income from an estate out of which such dividends are declared and the remainderman, they belong to the life tenant if a profit is declared after his tenancy has commenced; but, if declared out of profits resulting from the sale of real estate owned by the corporation at the testator's death, they belong to the remainderman: *Hite v. Hite*, 93 Ky. 257; 40 Am. St. Rep. 189, and note. If it appears that a stock dividend has

been declared, resulting from the net earnings of a corporation during the time specified, for a portion of which time a life estate existed in respect to the stock upon which the dividend is declared, the court should ascertain the amount of the net earnings embraced within the period of the life estate, and award to the tenant thereof such amount, and the balance to the remaindermen: *Thomas v. Gregg*, 78 Md. 515; 44 Am. St. Rep. 310, and note.

CONVERSE v. SICKLES.

[146 NEW YORK, 200.]

SALE, FRAUDULENT PROCEEDS OF.—WHEN GOODS HAVE BEEN PURCHASED BY FRAUD and without intention to pay therefor, moneys derived from their sale may be followed into the hands of the sheriff, or of an assignee for the benefit of creditors.

A JUDGMENT IN REPLEVIN BASED UPON AN ADMISSION THAT NO DEMAND FOR THE RETURN of the goods replevied had been made, when such demand was necessary to sustain an action, is no more than an adjudication that the action was prematurely brought, and does not estop the plaintiff, after paying to the defendant the value of the goods which were the subject of the action of replevin, from maintaining an action against the defendant to recover the sum so paid on the ground that such goods were procured from the plaintiff by means of a fraudulent sale, which, after the discovery of the fraud, he rescinded.

RES JUDICATA—BY WHAT DETERMINED.—The questions of estoppel, res judicata, or bar cannot be decided from the judgment alone, but must be determined by the aid of the judgment-roll and the clerk's minutes of the trial.

JUDGMENT ESTOPPEL.—IN ORDER TO BAR A SECOND ACTION the circumstances of the first action must have been such that the plaintiff might have recovered for the same cause of action alleged in the second. An adjudication made on grounds purely technical, and where the merits could not come into question, is limited to the point actually decided, and will not preclude a subsequent action brought in a way to avoid the objection which proved fatal in the first.

Frederic R. Kellogg, for the appellants.

Alex. Blumenstiel, for the respondent.

204 **HAIGHT, J.** This action was brought to charge the defendant, as a trustee for the benefit of the plaintiffs, with the sum of five thousand three hundred and twelve dollars and ninety-nine cents, as the proceeds of certain merchandise alleged to have belonged to the plaintiffs, but wrongfully detained by the defendant.

The plaintiffs claimed that they were induced by fraud and deceit to sell and deliver the goods in question to the firm of Fechheimer, Rau & Co., and that shortly thereafter the same were seized by the defendant, who claims to have levied

thereon by virtue of executions issued to him by judgment creditors of the firm; that the plaintiffs, immediately after the discovery of the fraud practiced upon them, disaffirmed the contract of sale and replevied the goods, which they subsequently disposed of. Two actions in replevin were commenced. A portion of the goods were taken in one action and the remainder in the other. When one of the actions was brought to trial the plaintiffs' counsel, in his opening, stated "that he was unable to show that, prior to the commencement of the action, a demand was made upon the sheriff for a return of the goods, and that the same was refused, and conceded that the goods had been taken by the plaintiffs and ³⁰⁵ disposed of." The court thereupon, on motion of the defendant, directed a verdict for the sheriff for the return of the goods, and assessed the value at an amount agreed upon. Similar direction was made in each action, varying only in amounts. No evidence was taken upon the trial of either action; the verdicts being directed solely upon the plaintiffs' opening in each case. A stay of execution upon the judgments was ordered until July 12, 1892, at which time the plaintiffs being advised that it was hopeless to prosecute an appeal, paid the amounts to the sheriff as they claimed under duress of judgment, at the same time demanding from the sheriff, in writing, the return of the money as the proceeds of the goods which they claimed had been procured from them by the fraud and deceit of Fechheimer, Rau & Co. The sheriff having refused to return the money, this action was brought. Upon the trial, the court found, as a conclusion of law, that the judgments in the two replevin actions are binding adjudications against the right of the plaintiffs to maintain this action, and constitute effectual bars to the same, and that the money paid over to the defendant in satisfaction of those judgments was not, therefore, impressed with any trust in favor of the plaintiffs.

If this case is to be treated as an action to recover back the amount paid in satisfaction of the two judgments entered in the replevin actions, it cannot be maintained for reasons well stated in the opinion delivered by the general term. But such we do not understand to be the character of the action. In the demand made upon the defendant for the money paid over, it was stated that it represented the proceeds and value of the goods which were obtained from the plaintiffs by Fechheimer, Rau & Co. by fraud and deceit, and to which neither

Fechheimer, Rau & Co., nor the sheriff, nor the parties he represents, had any right or color of right. In the complaint this fund was alleged to be the proceeds of the goods which had been procured from the plaintiffs by Fechheimer, Rau & Co. by fraud and deceit, and with intent on the part of Fechheimer, Rau & Co. not to pay therefor; that the same had ~~so~~ been demanded from the defendant, and the notice before mentioned served upon him. The complaint then proceeds: "That the said defendant still holds and retains the said sum; that said demand has been wholly refused, and no part of said sum has been paid to said plaintiffs, and that by reason of the foregoing facts the above-named defendant holds the said sum as trustee for these plaintiffs, and the plaintiffs are entitled to compel the said trustee to account to said plaintiffs for the full value and proceeds of said goods, together with interest thereon as aforesaid, which said value, with interest thereon up to July 12, 1892, amounts to the sum of five thousand three hundred and twelve dollars and ninety-nine cents, and that the said defendant be compelled to pay over the whole of said sum for which he may be accountable to the said plaintiffs." The complaint then concludes with the following demand for judgment: "Wherefore, plaintiffs demand judgment against the said defendant, that he be compelled to account to the said plaintiffs for the full value of the said goods and proceeds, with interest thereon as aforesaid, and that he be compelled to pay over to the said plaintiffs the full sum with which he may be found accountable, and for such other and further relief as may be just." It thus appears to us that this action was brought to recover the proceeds derived from the sale of the goods which it is alleged were procured from the plaintiffs by Fechheimer, Rau & Co. through fraud and deceit, without intention to pay therefor, which proceeds are now in the hands of the defendant as sheriff. That such proceeds can be followed into the hands of a sheriff, or of an assignee for the benefit of creditors, is now too well settled to admit of question: *American Sugar etc. Co. v. Fancher*, 145 N. Y. 552.

It is contended, however, that the judgments in the replevin actions are estoppels, res adjudicata, and a bar to the litigation in this action of the question of fraud and rescission. As we have seen, there was no trial of those issues in those actions. The verdict was directed by the court upon the motion of the defendant, based upon the statement of the plaintiffs'

counsel in his opening, that no demand had been made upon the ²⁰⁷ defendant for a return of the goods before the actions were brought. Such a demand was necessary: *Goodwin v. Wertheimer*, 99 N. Y. 149. The actions were, therefore, prematurely brought, and were disposed of upon that ground, without a consideration of the issues now raised, or an opportunity given to be heard with reference thereto. There was no trial or adjudication upon the merits. There is no mention of the merits in the judgments entered. The only expression that appears having any bearing upon that subject is the recital that the jury had duly rendered a verdict in favor of the defendant. This does not conclude the parties. Under the circumstances, it is, in effect, nothing more than a nonsuit. The questions of estoppel, *res adjudicata*, or bar cannot be disposed of from the judgment alone. These questions have to be determined from the judgment-roll, composed of the pleadings, the clerk's minutes of the trial, and the judgment. The pleadings disclose the subject matter in litigation and the issues formed, the minutes of the clerk, the proceedings had upon the trial and the judgment, the award made thereon. A knowledge of the subject matter, issues formed, proceedings had, and determination made is essential in order to determine whether a party has had a day in court with a hearing as to the merits of his controversy. There are many cases in which close distinctions have been made upon the subject of *res adjudicata* as applied to second suits, but in support of our views we deem it unnecessary to here refer to more than the general principles recognized by the cases.

Freeman, in his work on Judgments, at section 263, upon the authority of Smith's Leading Cases, divides judgments which are not a bar to another action, because not on the merits, into the following classes: "1. Where the plaintiff fails for want of jurisdiction in the court to hear his complaint or to grant him relief; 2. Where he has misconceived his action; 3. Where he has not brought the proper parties before the court; 4. Where the decision was on demurrer, and the complaint in the second suit sets forth a cause of action in proper form; 5. Where the first suit was prematurely brought; ²⁰⁸ 6. Where the matter in the first suit is ruled out as inadmissible under the pleadings." At section 260 he says: "The estoppel arising from a judgment or decree is not odious, because it is confined to those points which either were

in fact litigated and determined between the parties, or which were determined in the absence of any actual contest, but not until after a full legal opportunity was given both parties to make such contest as they might deem proper. It follows from this that no judgment can be available as an estoppel unless it is a judgment on the merits." And at section 272 he says: "A judgment of a court possessing competent jurisdiction is final, not only in reference to the matters actually or formally litigated, but as to all other matters which the parties might have litigated and have decided in the cause."

In *Marsh v. Masterton*, 101 N. Y. 401-407, it is said that "in order to bar the second action, the circumstances must be such that the plaintiff might have recovered in the first for the same cause alleged in the second. The estoppel of an adjudication made on grounds purely technical, and where the merits could not come in question, is limited to the point actually decided, and will not preclude a subsequent action brought in a way to avoid the objection which proved fatal in the first. When a suit fails in consequence of a want of jurisdiction, or because the plaintiff misconceives the remedy, or did not bring the proper parties before the court, and not from any inherent defect, the substance of the cause is left at liberty, and may be made the subject of another action. To render a judgment effectual as a bar, the cause of action must be substantially the same."

In *Shaw v. Broadbent*, 129 N. Y. 114-123, Ruger, C. J., says: "In order that the judgment should have the effect claimed, it is not enough that the party produce a record showing a judicial determination of the same question litigated in his favor, but it must also appear that it was rendered upon the merits upon a material point, and substantially upon the same facts presented in the subsequent case."

In *Rose v. Hawley*, 141 N. Y. 366-375, it is said: "Where ²⁰⁹ a party has been defeated in his action by reason of neglect to perform some preliminary act necessary to perfect the cause of action, such as the giving of notice or the like, the judgment is not a bar to another action begun after the cause of action has become perfected by the giving of notice, or the performance of the requisite preliminary act, whatever it may be."

In *Appleby v. Astor Fire Ins. Co.*, 54 N. Y. 253-261, it is

said per curiam that "there was no motion for a nonsuit, but the court upon the whole case was requested to direct a verdict for the defendant. We are of the opinion that this request was, in substance and effect, the same thing as a nonsuit": See, also, *Spelman v. Terry*, 74 N. Y. 451; *Webb v. Buckelew*, 82 N. Y. 559; *Pray v. Hegeman*, 98 N. Y. 358; *Bell v. Merrifield*, 109 N. Y. 210; 4 Am. St. Rep. 436.

It is now urged that the money in the hands of the sheriff sought to be recovered is not shown to be the proceeds of the goods procured by Fechheimer, Rau & Co. from the plaintiffs. Some of it may be money paid for costs, etc., in the replevin actions, but as to the greater portion, we think it must be regarded as the proceeds of the goods. It was paid over to the sheriff as such. The plaintiffs disposed of the goods whilst they were in their hands, pending the determination of the replevin actions. Money has no earmarks, and it makes no difference whether the identical money received by the plaintiffs for the goods was paid over to the sheriff, or other money substituted in its place, as long as it was paid over as the proceeds of the goods.

The trial court refused to pass upon the question of fraud and deceit, or to make findings upon that subject. We do not deem it advisable to now indulge in any expressions of opinion in reference thereto. The evidence upon that subject calls for the careful consideration of the trial court, and the issues raised by the pleadings should be determined by it.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except GRAY, J., not voting.

Judgment reversed.

SALES—RECOVERY OF PROPERTY OBTAINED BY FRAUD.—A purchase of goods by one who promises, but does not intend, to pay for them is such a fraud as will enable the seller to recover the property: *People v. Healy*, 128 Ill. 9; 15 Am. St. Rep. 90, and note; *Blake v. Blackley*, 109 N. C. 257; 26 Am. St. Rep. 566, and note. This question is fully discussed in the monographic note to *Thurston v. Blanchard*, 33 Am. Dec. 702-711.

JUDGMENTS AS RES JUDICATA OR ESTOPPEL, how determined, and test of, is the subject of the extensive note to *Fuhey v. Esterly Machine Co.*, 44 Am. St. Rep. 562-572.

MUTUAL LIFE INSURANCE CO. v. O'DONNELL.

[146 NEW YORK, 275.]

RES JUDICATA—RIGHT TO DEFICIENCY JUDGMENT.—If a judgment is entered directing the sale of premises, and that the defendant shall pay any deficiency that may arise from such sale, it is an adjudication of the rights of the parties, and, while it remains in force, the court has no authority to set aside a deficiency judgment, on the ground that it was agreed between the parties before the judgment was entered that the plaintiff would bid the full amount of the judgment, and that the defendant should not be liable for any deficiency.

A JUDGMENT ON MOTION MAY BE VACATED OR MODIFIED ON THE GROUND THAT IT WAS ENTERED CONTRARY TO AN ORAL AGREEMENT BETWEEN THE PARTIES, though a rule of the court declares that no private agreement or consent between the parties or their attorneys in respect to the proceedings in a cause shall be binding, unless reduced to the form of an order, or unless evidence thereof exists in writing. Hence, if in a suit to foreclose mortgages, an oral agreement is made between the parties or their counsel that the defendant shall not be liable for any deficiency, and, because of such agreement, the defendant consents to the entry of judgment, and does not attend the sale of the property, and such judgment as entered makes the defendant liable for a deficiency resulting from a resale, he may obtain relief from such judgment by a motion in the court wherein it was entered, and may there have it modified so as not to conflict with the oral agreement.

STIPULATIONS, ORAL.—Though a rule of court requires stipulations to be in writing, still the court will not permit a party to be misled, deceived, or defrauded by means of an oral stipulation, and, where such a stipulation has been acted upon, the party making it will not be permitted to retract or take advantage of the actions and omissions of his adversary induced thereby.

PRACTICE—MODE OF TRIAL OF ISSUE ARISING UPON MOTION.—Where a motion is made to modify or to obtain other relief from a judgment on the ground that it was taken contrary to oral stipulations of the parties, it is more satisfactory to have sharply contested issues of fact determined upon common-law evidence taken before the court or a referee, where the parties have an opportunity to cross-examine the witnesses, and to have such motion determined upon affidavits.

David B. Hill, for the appellant.

John C. Churchill, for the respondents.

277 **HAIGHT, J.** This action, together with seven others, was brought for the foreclosure of mortgages on property in Lowville, Lewis county, executed by the defendant O'Donnell to the plaintiff. Upon stipulation the other actions are to abide the result reached in this, so that it only becomes necessary to consider the facts as presented in this case.

The complaint expressly demanded judgment against the defendant O'Donnell for any deficiency that might arise upon

a sale of the premises. O'Donnell interposed an answer, in which, among other things, he alleged an extension of time of payment under a verbal agreement with the plaintiff, and denied that any sum was due for principal or interest. After issue was thus joined, and before the time set for the trial of the action, O'Donnell wrote the plaintiff a letter in which he offered to allow judgment to be perfected at once upon certain conditions therein enumerated. Upon the receipt of the letter the plaintiff sent William Rasquin, Jr., an attorney and managing clerk in the office of the plaintiff's attorney of 278 record in the action, to Lowville to obtain the necessary stipulations and consent to enter judgment. Upon arriving there Rasquin had an interview with the defendant O'Donnell, which resulted in his signing a written stipulation embracing the propositions contained in his letter, and his attorney, Mr. Hilts, who interposed the answer, also signing a stipulation in the action formally withdrawing the answer and waiving the service of all papers, except notice of sale and as to surplus. Thereupon Rasquin, upon an affidavit of regularity and the stipulation of the defendant's attorney, moved at a special term for an order of reference to compute the amount due, which motion was granted, and a reference had in which it was determined by the report that the amount due and unpaid in this action was the sum of five thousand two hundred and five dollars and eighty-two cents; upon which report judgment of foreclosure and sale was subsequently entered by direction of the court, in which it was specifically adjudicated that "if the proceeds of such sale be insufficient to pay the amount so reported due to the plaintiff, with the interest and costs as aforesaid, the said sheriff specify the amount of such deficiency in his report of sale, and that the defendant John O'Donnell pay the same to the plaintiff." Upon the sale the premises were struck off to the plaintiff for the sum of four thousand dollars, and the sheriff reported a deficiency of fourteen hundred and seventy-five dollars and fifty cents, for which amount a deficiency judgment was entered. The defendant O'Donnell thereafter, upon affidavits tending to show an oral stipulation of the attorney, Rasquin, to the effect that the plaintiff, upon the sale of the premises under the judgment, would bid the amount of the judgment and costs made at the time of the making of the stipulation to withdraw the answer, moved the court at a special term for an order vacating and setting aside the deficiency judgment entered herein. This motion was granted.

Can the order so made be sustained? As we have seen, the judgment for the foreclosure and sale was entered after the making of the alleged oral stipulation, and in the judgment it is expressly adjudged that the defendant O'Donnell shall pay any deficiency that may arise upon a sale of the premises. ²⁷⁹ This judgment still remains unmodified and in full force. It is an adjudication as to the rights of the parties as they then existed, and as such is binding upon them. As to the right of the plaintiff to the deficiency judgment, and the facts then existing upon which such right depends, the original judgment must be regarded as *res adjudicata*.

Again, the order vacating the deficiency judgment was based upon an alleged oral stipulation made by Rasquin, the managing clerk of the plaintiff's attorney. Rule 11 of the general rules of practice of the supreme court provides that "no private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order by consent, and entered, or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel." This rule is of somewhat ancient origin. It grew out of the frequent conflict between attorneys as to agreements made with reference to proceedings in actions, and was intended to relieve the courts from the constant determination of controverted questions of fact with reference to such proceedings. Here we have an alleged oral arrangement in reference to the proceedings in a cause made by the attorney or his clerk, which, as it appears to us, comes within the express condemnation of the rule: *Broome v. Wellington*, 1 Sand. 664; *Bain v. Thomas*, 2 Caines, 95; *Leese v. Schermerhorn*, 3 How. Pr. 63; *Morgan etc. Organ Co. v. Pugsley*, 19 Hun, 282; *Rust v. Hauselt*, 8 Abb. N. C. 148. It is thus apparent that the order appealed from, in its present form, cannot be sustained. It absolutely sets aside and vacates a deficiency judgment which, in the seven actions, amounts in round numbers to ten thousand dollars, thus depriving the plaintiff of that amount which it has been adjudged was actually and justly due and owing to it.

The defendant may, however, if entitled thereto, be awarded in a proper proceeding appropriate relief. Such relief may doubtless be obtained by motion. He may be entitled to ²⁸⁰ relief by having the original judgment as entered modified by striking out so much thereof as adjudges that he pay

any deficiency that may arise upon a sale of the premises, or he may be entitled to have a resale of the premises. Whilst the oral stipulation under the rule is not binding and will not be carried into effect by the court, still it will not permit a party to be misled, deceived, or defrauded by means thereof, and in some instances where it has been acted upon the party making it will not be permitted to retract and take advantage of the acts or omissions of his adversary thereby induced: *People v. Stephens*, 52 N. Y. 306, 310. So that, if the defendant O'Donnell, by the oral agreement, was led to believe that the plaintiff would bid the full amount of the judgment, and, relying thereon, neglected to attend the sale and look after his interests thereat, the court may, upon motion and by way of a favor to him, order a resale.

Whether there was an oral agreement by which O'Donnell was misled was sharply controverted before the special term. The question was determined upon affidavits. We do not question the power of the special term to so determine the facts, but we wish to suggest that where so much is involved and the conflict is so sharp, that it would be more satisfactory to have the question determined upon common-law evidence taken by the court, or before a referee appointed for that purpose, where the parties could have an opportunity to cross-examine the witnesses: *Hill v. Hermans*, 59 N. Y. 396.

The order of the general term and that of the special term should be reversed, with costs, and the proceedings remitted to the special term for such further action in the matter as counsel may advise.

All concur.

Ordered accordingly. —

JUDGMENTS IN FORECLOSURE—CONCLUSIVENESS OF.—A decree in a suit foreclosing a mortgage is binding on the parties to the suit and those purchasing from them, or either of them, during its pendency, and it cannot be collaterally attacked if the court had jurisdiction of the parties and of the subject matter: *Norris v. Ile*, 152 Ill. 190; 43 Am. St. Rep. 233, and note.

JUDGMENTS—VACATING ON MOTION—IMPROPER ENTRY.—The court in which a judgment is rendered may vacate it on motion, at any time, upon parol proof that it was entered irregularly and not according to the course of practice of the court: *Keaton v. Bunks*, 10 Ired. 381; 61 Am. Dec. 393, and note.

STIPULATIONS—RELIEF FROM.—A court may, in its discretion, relieve a party from the effect of a stipulation submitting a cause on motion for a nonsuit: *Robinson v. Exempt Fire Co.*, 103 Cal. 1; 42 Am. St. Rep. 93.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

ADAMS v. FITCHBURG RAILROAD COMPANY.

[67 VERMONT, 76.]

CONFLICT OF LAWS.—A PENAL LAW of one state will not support a civil action in another.

STATUTORY CONSTRUCTION—PENAL LAWS, WHAT ARE.—The test to determine whether a statute is penal is to inquire whether its main purpose is to give compensation for an injury or to punish a wrongdoer.

STATUTORY CONSTRUCTION.—A STATUTE IS PENAL, AND, THEREFORE, NOT ENFORCEABLE IN ANOTHER STATE, if it provides that a railway corporation which, by reason of its negligence or carelessness, or of the unfitness, negligence, or carelessness of its servants, has caused the life of a passenger to be lost, shall be subject to a fine of not less than five hundred dollars, and not more than five thousand dollars, to be recovered by indictment, and to be paid to the use of the widow and children of the decedent, or, if there are neither, to the use of the next of kin; and also that the corporation shall be liable for other damages to be assessed with reference to the degree of its culpability, or that of its servants or agents.

ACTION on the case by the plaintiff as administrator of L. C. Adams, who had been killed in the state of Massachusetts while a passenger on a railway train of the defendant corporation. The cause of action was based upon chapter 112, section 212, of the Public Statutes of Massachusetts, which, in the complaint, was alleged to be substantially as follows: "If, by reason of negligence or carelessness of a corporation operating a railroad or street railway, or the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of a passenger or of a person being in the exercise of due diligence, and not a passenger or in the employment of such corporation, is lost, the corpora-

tion shall be punished by fine of not less than five hundred dollars, nor more than five thousand dollars, to be recovered by indictment prosecuted within one year from the time of the injury causing the death, and paid to the executor or administrator, for the use of the widow and children of the deceased, in equal moieties; or, if there are no children, to the use of the widow; or, if no widow, to the use of the next of kin; but a corporation operating a railroad shall not be so liable for the loss of life by a person while walking or being upon its road contrary to law or to the reasonable rules and regulations of the corporation. If the corporation is a railroad corporation it shall also be liable in damages not exceeding five thousand dollars nor less than five hundred dollars, to be assessed with reference to the degree of culpability of the corporation or its servants or agents, and to be recovered in an action of tort, commenced within one year from the injury causing the death, by the executor or administrator of the deceased person for the use of the persons hereinbefore specified in a case of indictment." A demurrer to the complaint was sustained in the trial court, and the plaintiff appealed.

Waterman, Martin & Hitt, for the plaintiff.

Batchelder & Bates, for the defendant.

⁷⁹ MUNSON, J. The plaintiff claims to recover by virtue of the provisions of a public statute of Massachusetts. The suit cannot be maintained if the statute declared upon is held to be penal: *Blaine v. Curtis*, 59 Vt. 120; 59 Am. Rep. 702. So far as we are informed by counsel, or have been able to ascertain by examination, no construction has been placed upon this statute by the Massachusetts court. It thus becomes necessary for us to give to the statute our own interpretation. Its provisions are different from those of any other statute to which our attention has been called. It is not free from expressions which, in themselves, would characterize a statute as remedial, rather than penal. The defendant is made liable in damages, and the ascertainment of the amount is characterized as an assessment. It is certain, however, that the designation of the recovery as damages, or as a forfeiture, is not conclusive as to the character of the statute. A statute giving a right of recovery is often penal as to one party and remedial as to the other. It is said that in such cases the true test is whether the main purpose of the statute is the giving

of compensation for an injury sustained, or the infliction of a punishment upon the wrongdoer. We think an application of this test to the provision in question shows it to be penal. The foundation of the action is the loss of a life by reason of the defendant's negligence. There was no right of action at common law. This statute gives a right of action to the personal representative of the deceased, for the benefit of the widow and children, or widow, or next of kin. If the right of recovery is established, the damages are to be five hundred dollars in any event. Any recovery beyond ^{so} this is to be assessed with reference to the degree of the defendant's culpability. It appears, then, that whatever the damages may be, or whomsoever the person for whose benefit they are recovered, they are not given with reference to the loss sustained. If the recovery could be had only for the benefit of widow and children the statute might, perhaps, more easily be looked upon as remedial. But the recovery may be for the benefit of distant relatives who had no claim upon the deceased for support. And whether the recovery be for the benefit of widow and children or of distant relatives, the health or habits of the deceased may have been such as to preclude the existence of any appreciable pecuniary interest in the continuance of his life. All these matters which enter into the question of compensation are excluded from the inquiry. The wrongdoer is to be punished whether the person receiving the amount of the recovery has sustained a substantial injury or not. If the beneficiary has in fact received an injury, it is in no way made the basis of the recovery. The provision differs in this respect from those which give damages in excess of the injury received. Statutes giving double damages to an aggrieved party are held not to be penal: *Burnett v. Ward*, 42 Vt. 80; *Reed v. Northfield*, 13 Pick. 94; 23 Am. Dec. 662. But in such cases there is an ascertainment of the actual damages, and that ascertainment is the basis of the entire recovery. Here there is no ascertainment of the loss suffered, and, as far as the amount of the verdict is left to the judgment of the jury, it is to be determined by the culpability of the defendant's act, regardless of the injury resulting from it to the persons for whose benefit the suit is brought. It is true that in *Newman v. Waite*, 43 Vt. 587, an amount given without any reference to the damage sustained was held to be given by way of compensation. But in that case, if the statute had merely

created the duty of making the returns, the common law would have enabled the town to recover its actual damages ^{or} for a failure to do so; and it was taken to have been the purpose of the legislature in its further provision to give a certain sum as fixed damages in lieu of actual damages otherwise recoverable, which might not be easily ascertained. But that reasoning is not available here; for in this case the existence of the obligation to carry the deceased with due care did not give these beneficiaries a right to any damages whatever for the neglect complained of. And it is to be noticed that the giving of a fixed sum excludes a consideration of the degree of culpability, as well as of the loss sustained. We think the rule given for determining the unascertained part of the recovery is the controlling feature of the statute. It is difficult to say that an assessment, which is made to depend solely upon the degree of the party's culpability, is not primarily meted out as a punishment. The sum is to be determined by the very considerations that would govern a court in fixing a fine for involuntary manslaughter. The fact that it is given to persons whom the law would have entitled to share in the estate of the deceased cannot control the construction. A statute may be penal, although the entire amount recovered be given directly to the party injured. The disposition of the recovery, and the limitations of the amount recoverable, are the same in the clause declared upon as in the provision for an alternative procedure by indictment contained in the same section. The provision which is clearly penal serves the same purpose as regards compensation, and has no greater effect as regards punishment. In view of these considerations, and in the absence of knowledge of a construction by the Massachusetts court, we hold that the provision sued upon is penal.

Judgment affirmed and cause remanded.

START, J., was absent in county court.

CONFLICT OF LAWS—ENFORCEMENT OF PENAL STATUTE OF ANOTHER STATE.—One state or sovereignty cannot enforce the penal laws of another: *State v. Hall*, 114 N. C. 909; 41 Am. St. Rep. 822; *Ex parte McNeeley*, 36 W. Va. 84; 32 Am. St. Rep. 831, and note; *Higgins v. Central New England etc. R. R. Co.*, 155 Mass. 176; 31 Am. St. Rep. 544. See the extended note to *Attrill v. Huntington*, 14 Am. St. Rep. 350.

STATUTES—PENAL—WHAT ARE.—A penal statute is one which imposes a forfeiture or penalty for transgressing its provisions, or for doing a thing prohibited: *Woolverton v. Taylor*, 132 Ill. 197; 22 Am. St. Rep. 521. See, further, the extended note to *Attrill v. Huntington*, 14 Am. St. Rep. 352.

JERICHO v. UNDERHILL.

[67 VERMONT, 35.]

JUDGMENT ESTOPPEL.—THOUGH UPON A PLEA IN ABATEMENT interposed by the defendant, a judgment is entered in favor of the plaintiff for the full amount of his claim, such judgment is in the nature of a punishment for delay, and its operation is limited to the plaintiff's claim in that case, and it is not admissible in a subsequent controversy between the same parties as evidence of the facts necessary to support the plaintiff's claim.

ASSUMPSIT for the support of a pauper. Verdict and judgment for the plaintiff, from which the defendant appealed.

J. J. Monahan, W. P. Dillingham, and S. O. Shurtleff, for the defendant.

Hard & Bliss, for the plaintiff.

86 TYLER, J. Assumpsit to recover for the support of a pauper from February 7, 1891, to November 22, 1892.

A former suit had been brought before a justice of the peace to recover for the support of the same pauper for a period prior to that for which a recovery is sought in this action. The defendant filed a dilatory plea, averring that the justice, by reason of interest, was disqualified from trying the suit. The justice decided that he was qualified, and rendered judgment for the plaintiff for its damages and costs. The defendant appealed, and the county court heard the cause upon the defendant's plea, the replication thereto traversing the plea and facts found upon the issue joined, and rendered judgment pro forma, dismissing the cause for want of jurisdiction in the justice. The cause passed on exceptions to the supreme court, which reversed the judgment, rendered judgment for the plaintiff, and remanded the cause to the county court for the assessment of damages, holding that that court should have rendered judgment in chief for the plaintiff and assessed the damages: *Jericho v. Underhill*, 64 Vt. 362. After the return of the cause to the county court, pursuant to a stipulation of the parties, the judgment of the justice was affirmed.

To establish its right of recovery in this action the plaintiff introduced in evidence a certified copy of the record in the former suit. The usual judgment was rendered therein 87 which, by the rules of pleading, follows the trial of an issue of fact upon a plea in abatement when the issue is determined in favor of the plaintiff.

"If it [the plea] be to the person, or action, or jurisdiction, and is found for the demandant or plaintiff, he shall recover the thing in demand": 1 Viner's Abridgments, tit. Abatement, L, b.

"It is well settled that if issue be taken upon a plea in abatement, and the jury find for the plaintiff, they must assess the damages in the same manner as when issue is found for the plaintiff upon a plea in bar": *Dodge v. Morse*, 3 N. H. 232, and cases cited.

Though a plea to the jurisdiction is not properly a plea in abatement, it is a dilatory plea, and the consequence of pleading it is the same as in a plea in abatement: 7 Bacon's Abridgments, tit. Pleas and Pleading, E, 2; Gould's Pleadings, c. 5, pl. 2.

This rule, which is as ancient as the common law, is still maintained wherever the common law prevails. It was recognized in this court in the case above cited. A reason given for this peremptory judgment is that the defendant choosing to put the whole weight of his cause on this issue when he might have had a plea in chief, it is an admission that he had no other defense: 1 Bacon's Abridgments, tit. Abatement, P. 1 Chitty on Pleading, 458, gives as a reason that the plea is found to be untrue. Other writers say that the judgment is not peremptory on demurrer, because the party is not supposed to be conversant of the matter in law, while he is supposed to be conversant of the matter in fact by him pleaded: Viner's Abridgments, tit. Abatement, L, b., note. In *Eichorn v. Le Maitre*, 2 Wils. 367, it is said that "wherever a man pleads a fact that he knows to be false, and a verdict be against him, the judgment ought to be final, and every man must be presumed to know whether his plea be true or false; but upon a demurrer to a plea in abatement there shall be a respondeat ^{ss} ouster, because every man shall not be presumed to know the matter of law, which he leaves to the judgment of the court": Stephen on Pleading, 104.

The rule takes no cognizance of the fact that the defendant may have had, or in good faith believed he had, good ground for his dilatory plea, and yet have been unable to maintain it. It does not leave the matter with the court to consider and decide whether the plea was filed for the purpose of delay, or in good faith, and then render final judgment against the defendant, or permit him to answer over, as it may do upon demurrer. The judgment is retributive, and

damages are assessed without reference to the merits of the plaintiff's cause of action.

This severe rule doubtless had its origin in the fact that dilatory pleas were once used for the mere purpose of delay, and to such an extent that statutes 4 and 5 Ann, c. 16, were enacted, by which no such plea could be admitted without affidavit of its truth, or some probable matter shown to the court to induce it to believe it true: 3 Blackstone's Commentaries, 304.

But the penalty ought to be proportionate to the evil which it was designed to remedy. Formerly, in England, when the plaintiff failed to obtain judgment in a case tried upon its merits, upon a plea in bar, the defendant not only recovered his costs, but the plaintiff was amerced, fined, for prosecuting a false claim; and when judgment was for the plaintiff, the defendant was likewise in *misericordia domini regis pro falso clamore*, and fined for his delay of justice: Stephen on Pleading, 109. Under that rule failure of success by a party litigant amounted to a misdemeanor.

As the judgment upon a plea in abatement, when the issue of fact is decided for the plaintiff, is in chief against the defendant and in the nature of punishment for delay, its operation ought to be limited to the plaintiff's claim in that case.

In the present case the main questions, whether the pauper was chargeable upon Underhill and was transient in Jericho, ●● were not adjudicated or considered in the former suit, and yet it is contended that the judgment in that suit is conclusive of those facts. We think it cannot in justice be so held. The true rule is that laid down in *Russell v. Place*, 94 U. S. 606:

"That a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but, to this operation of the judgment, it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit." To the same effect are other cases cited in the defendant's brief.

As the former case was not tried on its merits, the adjudication therein is not a bar to a recovery in the present one. In this view the other point made by the defendant becomes unimportant.

Judgment reversed and cause remanded.

JUDGMENTS—ESTOPPEL.—Before a judgment in one action can operate as a bar to another, it must appear by the record, or by extrinsic evidence, that the precise question involved in the second action was raised and determined in the first: *Bell v. Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436, and note. A plea of the same facts as an estoppel is not good, the same point not being in issue on the record and directly found by the jury: *Eastman v. Cooper*, 15 Pick. 276; 26 Am. Dec. 600. The cases discussing this question will be found collected in the notes to *Fahey v. Heterly Machine Co.*, 44 Am. St. Rep. 562; *Sly v. Hunt*, 38 Am. St. Rep. 405; *Graham v. Culver*, 31 Am. St. Rep. 121; *Hawk v. Evans*, 14 Am. St. Rep. 250, and *Gayer v. Parker*, 8 Am. St. Rep. 229.

ROBINSON v. LEACH.

[67 VERMONT, 128.]

A HOMESTEAD IS SUBJECT TO A NOTE GIVEN AFTER ITS ACQUISITION, BUT IN RENEWAL of a debt existing before that time, under a statute declaring a homestead to be subject to attachment and execution upon causes of action existing at the time it was acquired.

PAYMENT.—THE GIVING OF A NOTE IN RENEWAL of a pre-existing indebtedness does not pay or extinguish it, nor deprive the party of his right to levy upon the homestead if such right existed anterior to such renewal.

APPEAL from an order of a court of insolvency, holding that the homestead of the insolvent was not exempt from a note executed after its acquisition, but in renewal of an indebtedness existing before that time.

Fayette Potter, for the defendant.

J. C. Baker, for the plaintiff.

129 **ROWELL, J.** The question is whether a homestead is exempt from a note given by the homesteader after its acquisition, in renewal of his notes given before its acquisition, the parties to the notes being the same.

The statute subjects the homestead to attachment and levy of execution upon "causes of action existing at the time" it is acquired. It is contended that the cause of action meant is, the claim that the plaintiff makes and declares upon as the ground of his suit, and which is to be litigated on trial. But this construction is too strict. The words "causes of action" are evidently used in a sense broad enough to embrace the debt as distinguished from the evidence of it. The statute is the same for the purposes of this case as though it read "debts existing," etc. Hence, if the original debt can be said to exist, the case is with the plaintiff.

Courts will if they can, when justice requires it, look behind the evidence of the debt and consider the debt itself, and decide according to that. This is always done when mortgage notes are renewed. As long as the original debt can be traced the security remains, no matter how many renewals there have been. So in *Conway v. Seamons*, 55 Vt. 8, 45 Am. Rep. 579, we looked behind a judgment rendered after the defendant's discharge in insolvency, but founded on a note unaffected by the discharge, and held the judgment not discharged because the note was not. The ground of the ¹²⁰ holding was, that although the note as evidence of the indebtedness was merged in the judgment, yet the judgment was not to all intents a new debt, but the old debt in a new form, for the purpose of protecting the right connected therewith before the judgment. The same view was held and applied in *Pinney v. Kimpton*, 46 Vt. 80. There the plaintiff held a note as collateral for signing with another. Having had to pay, he took the note of his principal for the amount, and afterward brought suit on the collateral. It was held that by taking his principal's note he did not discharge his claim on the note he held as collateral. The court said that the debt still existed, though evidenced by the principal's note; that in an action against the principal for the collection of the debt, the plaintiff would in form be confined to his remedy on the note instead of the open account; that in this sense, and for this purpose, it is often said in this state that the giving of a promissory note for an existing debt is prima facie payment; but that it is not payment in the sense of extinguishing the debt, so as to discharge the creditor's claim on property put into his hands by the debtor as collateral security for the debt, unless so agreed.

This principle is entirely applicable here. The new note was but a new evidence of the old debt. True, the old notes were extinguished as affording a ground or cause of action, but the debt evidenced thereby continued to exist for the purpose of preserving the right against the homestead that was originally connected with it. *Weaver's Estate*, 25 Pa. St. 434, is a case precisely like this. There a creditor held the promissory note of his debtor, given before the passage of the homestead act. After its passage he gave up that note, and took in place of it a single bill with warrant of attorney for confession of judgment, and it was held that a judgment entered on the bill was not subject to the act. Even where a

negotiable promissory note given for land, and payable to the vendor, went into the hands of a third person,¹⁸¹ who, while he held it, took a new note therefor payable to himself with a party added as surety, it was held that this was not such a novation of the original contract that a homestead laid off in the land was not subject to levy and sale to satisfy a judgment founded on the bill: *Wofford v. Gaines*, 53 Ga. 485; *Per-rin v. Sargent*, 33 Vt. 84.

The defendant relies on *Hutchins v. Olcott*, 4 Vt. 549, 24 Am. Dec. 634, where it was held that the taking of a negotiable promissory note is an extinguishment of any implied promise on the part of the maker to pay the consideration for which the note was given, and that, therefore, the taking of such a note in payment of an account for labor bestowed on an article is such a manifestation of the intent of the taker to rely on the personal security of the maker, as to be a waiver of any lien given by law on the property. The ground of that decision seems to be that the lien is but an incident of the implied contract, and so when the creditor takes a note, thereby extinguishing that contract, which is the principal thing, he must be taken to intend to waive the lien, which is the incident. If this case is opposed to what we now hold, it must be regarded as departed from to that extent.

Judgment affirmed and ordered to be certified to the court of insolvency.

HOMESTEADS, WHETHER LIABLE FOR ANTECEDENT DEBTS: See the extended notes to *Ousie v. Douglass*, 87 Am. Dec. 464, and *Vanstony v. Thornton*, 34 Am. St. Rep. 495.

PAYMENT—GIVING NOTE FOR PRE-EXISTING DEBT, WHETHER AMOUNTS TO.—When a creditor takes a note for an antecedent debt, it does not operate to extinguish the debt unless it is received by express agreement as payment: *Steinhart v. National Bank*, 94 Cal. 362; 28 Am. St. Rep. 132, and note; *Baker v. Baker*, 2 S. Dak. 261; 39 Am. St. Rep. 776; *Bunker v. Baron*, 79 Me. 62; 1 Am. St. Rep. 282, and note. The acceptance by a creditor of the note of a third person for a pre-existing debt does not discharge the same, unless it is by agreement of the parties taken in payment of the prior debt: *Caldwell v. Hall*, 49 Ark. 508; 4 Am. St. Rep. 64, and note. See the further discussion of this subject contained in the notes to *Hanold v. Kays*, 3 Am. St. Rep. 841; *Aukeny v. Pierce*, 12 Am. Dec. 175; *Varner v. Nobleborough*, 11 Am. Dec. 53, and *Wright v. Crockeryware Co.*, 8 Am. Dec. 71.

HUSE v. ESTABROOKS.

[57 VERMONT, 22.]

A MORTGAGE OF CHATTELS DESCRIBING THEM as two two-year-old heifers and three one-year-old heifers is void for indefiniteness where it does not appear that the mortgagor did not own other heifers of the same age.

TROVER for five heifers. The defendant relied upon a chattel mortgage. Verdict for the plaintiff.

M. Montgomery, for the defendant.

Bates & May, for the plaintiff.

224 ROWELL, J. The plaintiff relies for recovery on a chattel mortgage of which he is assignee, wherein cattle of the kind in question are described as "two two-year-old heifers and three one-year-old heifers," without more. The defendant was never a party to the mortgage, but purchased of the mortgagor after the mortgage was given.

There was no evidence before the referee tending to show that at the time the mortgage was executed the mortgagor "owned or was possessed of any stock of the kind described in the mortgage except what is therein described, and no claim was made that he did not then own and have in his possession all the stock which is described in the mortgage." It is found that the cattle in question were owned and possessed by the mortgagor at the time he gave the mortgage, and are the heifers that he attempted and intended to mortgage.

While it may often be difficult, and sometimes impossible, to describe property of this kind with such certainty that it can be identified without the aid of extrinsic evidence, yet the mortgage must contain some statement concerning the property that will serve to distinguish it from other property of the same kind, when the existence of the thing stated is made to appear, which may be done by evidence aliunde. The object of the mortgage is to convey specific property, not to give a right to any property of the kind mentioned. The extent of the mortgagee's right is to have claim on the identical property mortgaged, and, if the description is so uncertain as to apply equally to any property of the kind described, there can be no identification without proving 225 something not referred to in the mortgage, which is not allowable. The description need not, as this court has said, be

such as to enable one to find the property without inquiry; but it must be such as to suggest the inquiry and afford a basis of identification. The statement of number and ownership has been held to be sufficient in certain circumstances, when it appeared that the mortgagor owned no more at the time than the number stated, and especially has such a statement, when coupled with a statement of location, been held sufficient, if it appeared that the mortgagor had no more at the place named than the number stated. But in this case it is not found that the mortgagor owned no more heifers of the ages mentioned than the number stated. What is reported on this subject amounts to no more than saying that it did not appear whether he did or not. Neither ownership, possession, nor location is stated in the mortgage, nor is it stated that the heifers mentioned were all the heifers of those ages that the mortgagor owned; so the description applies equally to any heifers of the ages stated, and you cannot apply it to the heifers in question without pursuing a line of inquiry not suggested by the mortgage and proving something not referred to in it. The description is, therefore, too indefinite to make the mortgage good against third persons.

As this view is decisive against the plaintiff's right, it is unnecessary to consider any other question.

Judgment reversed and judgment for the defendant to recover his costs.

CHATTEL MORTGAGE—DESCRIPTION—TEST OF.—A description in a chattel mortgage is sufficient if it will enable third persons, aided by the inquiries which the instrument indicates and directs, to identify the property: *Andregg v. Brunskill*, 87 Iowa, 351; 43 Am. St. Rep. 388, and note. This question is fully treated in the note to *Barrett v. Fiech*, 14 Am. St. Rep. 239.

HAMILTON v. GRAY.

[87 VERMONT, 233.]

CHAMPERTY is an agreement between the owner of a claim and a volunteer, that the latter may take the claim and collect it at his own expense, dividing the proceeds with the owner. It is not essential that the agreement should specially refer to, or provide for, the bringing of a suit.

CHAMPERTY.—THE COMMON LAW OF CHAMPERTY IS IN FORCE IN VERMONT, and, therefore, a champertous agreement is void in that state.

ASSUMPSIT to recover for services in collecting a note given to the defendant by one Morey. The plaintiff relied upon

the following contract in writing between himself and defendant:

"This is to certify that I have this day put into the hands of B. F. Hamilton, deputy sheriff, the following notes for collection, which I agree to take one-half of the amount he may get on any or all said notes and release him from the same; and the said Hamilton is to make no charge to me for collecting them only the one-half he may collect.

"MORGAN, VERMONT, May 29th, 1886."

(Then follows a list of claims, including the one against Morey.)

"N. B. The said Hamilton has power from me to settle any of the above notes to the best of his judgment, and I am to take one-half of what he gets and release him from the same.

J. A. GRAY."

"Received of J. A. Gray the following notes, which I agree to try and collect to the best of my ability, and am to have one-half of all I get on them as I think best, and the said Gray hereby agrees to take one-half of what I get and discharge me from the same.

B. F. HAMILTON."

"MORGAN, VT., May 29th, 1886."

Verdict and judgment for the plaintiff.

Dickerman & Young, for the defendant.

E. A. Cook, for the plaintiff.

225 TAFT, J. Champerty is an agreement between the owner of a claim and a volunteer that the latter may take the claim and collect it, dividing the proceeds with the owner, if they prevail—the champertor to carry on the suit at his own expense. This doctrine is based upon the ground that no encouragement should be given to litigation by the introduction of a party to enforce those rights which the owners are not disposed to prosecute. The agreement in this cause is fully within the definition above given. The plaintiff took the claims under an agreement with the defendant to divide between them all that could be collected. 226 He was to be at the expense of collecting the claims, making no charge to the defendant for so doing. It is argued by the plaintiff that the subject matter of a champertous agreement must be a suit, or that one must be in contemplation. Conceding this to be true, we think a suit to enforce the claims fairly within the contemplation of the parties to the agree-

ment. The plaintiff took the claims for collection, and under the agreement he had the right to bring suits, if necessary, to collect the claims, and it is fair to infer the parties had in mind that in the collection of a large number of evidently poor, and some outlawed, claims, suits would become necessary. A champertous agreement was void at common law, and we think the common law as to champerty is in force in this state. It is applicable to our situation and circumstances, and not repugnant to the laws: Revised Laws, sec. 489.

The subject of champerty has been referred to in several cases in our reports: *Danforth v. Streeter*, 28 Vt. 490; *Gregory v. Gleed*, 33 Vt. 405; *Dorwin v. Smith*, 35 Vt. 69; but in none of these cases were the agreements champertous, there being no element of the offense in any of the contracts involved in the litigation. In *Dorwin v. Smith*, 35 Vt. 69, the contract was between parties who had a mutual interest in the result of the suit. In *Gregory v. Gleed*, 33 Vt. 405, the contract was a guaranty by an attorney that he would pay the claim if placed in his hands for collection. In *Danforth v. Streeter*, 28 Vt. 490, Redfield, J., discusses the doctrine to some extent, and says that he is reluctant to believe that the common-law offense of champerty had been adopted as part of the law of this state, but adds, "there are probably other things—than the sale of a chose in action—coming more nearly to the idea of the common-law definition of champerty, such as carrying on suits for a share of the avails, and thereby increasing litigation which the law will still regard as champertous and not countenance." The case then under consideration ²³⁷ was the sale of a chose in action, in suit at the time of the sale, and there was no occasion for the discussion of the rule as to champerty.

The case at bar is strictly within the statement of the case that Redfield, J., intimates may still be regarded as champertous and not countenanced, viz., carrying on suits for a share of the avails.

The words "purchase" and "sale" have been indiscriminately used in connection with the term "champerty," and such use has bred confusion in the books. As above stated, champerty is an agreement by one to take a suit or claim, and, at his own expense, gather in the spoils, dividing them with the owner. It does not imply a purchase; the word "purchase" means to buy by paying a price, and implies a

payment: *Curtis v. Burdick*, 48 Vt. 166. A purchase is that which is obtained for a price in money or its equivalent: Webster's Dictionary.

The doctrine of champerty was fully recognized and applied in *Wright v. Whithead*, 14 Vt. 268, in which case the court, by Williams, C. J., said: "The orator purchased this suit under an agreement to divide whatever sum should be recovered. If he succeeded he was to pay one hundred and fifty dollars; if he failed he was to pay nothing. This was a species of champerty or maintenance which cannot be countenanced in a court of equity."

We have here the same misuse of the word "purchase," for the party made no purchase of the claim; he paid nothing for it, but took a conveyance of it, and agreed to pay one hundred and fifty dollars if he recovered, and was to pay nothing if he failed. The rule is the same at law as in equity.

The contract under consideration being champertons and void, no recovery can be had under it. The other questions arising upon this branch of the case become immaterial, and are not passed upon.

238 There are two other questions in the case. One item in the plaintiff's specifications is the sum of two dollars and eighty cents, his fees as deputy sheriff for serving a writ in favor of the defendant against one Caswell. The question at issue was, whether the sum charged was more than the legal fees for the service. The only point reserved was the objection made to a question in cross-examining the defendant. He was required to answer whether he knew any reason why the fees of two dollars and eighty cents as charged was not correct. His answer was that he did not.

The plaintiff had the right to examine the defendant under the rules applicable to the cross-examination of witnesses: Revised Laws, sec. 1009. There was no error in requiring the defendant to state that he knew nothing upon the subject. If he did know aught in relation to it, the plaintiff had the right to have him state it. It logically follows, then, that he had the right to inquire of the defendant if he did know anything in regard to the matter.

Another item claimed by the plaintiff was one dollar and sixty cents for his attendance as a witness in a suit in favor of the defendant against one Howard. The question reserved in relation to this item was whether the clerk's taxation of

costs in the suit, which included the attendance of the plaintiff as a witness, was admissible in evidence. The fact that the fees for the attendance of the plaintiff as a witness were taxed in behalf of the defendant had a tendency to show that the plaintiff did attend as a witness, and the evidence of the taxation was properly admitted.

Although it did not appear in the case that neither the defendant nor his counsel were present at the taxation, nor that the notary before whom the voucher of the plaintiff's attendance was sworn to was in any way connected with the case, we presume the taxation was made with the defendant's knowledge. The defendant had the benefit of it, and ²²⁹ he cannot now say that the taxation is no evidence of the fact which was the very basis of including the claim in the taxation.

Judgment reversed and cause remanded.

CHAMPERTY—WHAT AGREEMENTS ARE CHAMPERTOUS.—An assignment of a note to an attorney in consideration of his agreement to bring suit thereon at his own costs and expense, and divide with the assignor whatever sum he collects, is champertous and void: *Roberts v. Yancey*, 94 Ky. 243; 42 Am. St. Rep. 357, and note. See the extended note to *Thalhimer v. Brinckerhoff*, 15 Am. Dec. 317.

WOODBURY v. WARREN.

[67 VERMONT, 251.]

HOMESTEAD.—THE OWNER OF A LOT UPON WHICH A DWELLING-HOUSE IS IN PROCESS OF ERECTION for the purpose of being occupied as his home is entitled under the homestead laws to hold it exempt from execution.

W. H. Taylor, for the trustee and claimant.

B. E. Bullard, for the plaintiff.

²⁵² **THOMPSON, J.** The defendant bargained for a building lot in the village of Hardwick in the fall of 1888, and the deed thereof was executed and delivered to him April 20, 1889, and on the same day was filed in the town clerk's office in Hardwick. About the date of the deed the defendant began the erection of a dwelling-house on the lot, and the same was in process of erection during the spring and summer of 1889. The defendant moved his family into this house in December, 1889. He has had no other real estate before nor since he took the deed of this.

The plaintiff's cause of action is for rent due her from defendant for the use of her tenement for the months of June and July, 1889, and which fell due August 1, 1889. This indebtedness was created and fell due while the defendant's house was in process of erection. This action was commenced August 9, 1893.

The fund in the trustee's hands is a balance of a note dated July 29, 1893, given by him to the defendant in part payment of the purchase price of this house and lot.

The plaintiff concedes that under the Revised Laws, section 1076, this fund is exempt from attachment by trustee process, if at the time this indebtedness was created the house and lot were defendant's homestead. We, therefore, construe the agreed statement of facts as raising this question, no other having been argued by counsel on either side.

The plaintiff contends that while the house was in process ²⁵² of erection, the defendant had no homestead in the lot, and that none could accrue until the house was ready for occupation.

In *West River Bank v. Gale*, 42 Vt. 27, and *Lamb v. Mason*, 45 Vt. 500, it was held that the homestead of a debtor was exempt from attachment upon debts contracted after the filing of the deed of the homestead for record in the town clerk's office, and before the occupation of the premises by the debtor as a homestead, he being in the occupancy of the same as a homestead at the time of the attachment. The plaintiff attempts to distinguish these cases from the one at bar, in that there was no house upon the premises involved in the latter case at the time the deed was filed in the town clerk's office, nor at the time when the defendant's debt to her was contracted, and relies upon the Revised Laws, section 1894, in support of this contention.

Section 1894 is as follows: "The homestead of a housekeeper or head of a family, consisting of a dwelling-house, outbuildings, and the land used in connection therewith, not exceeding five hundred dollars in value, and used or kept by such housekeeper or head of a family as a homestead, shall together with the rents, issues, profits, and products thereof, be exempt from attachment and execution, except as hereinafter provided."

Considering the humane purpose of the homestead law, it is too narrow a construction of it to hold that under no circumstances can the debtor's real estate become a homestead,

exempt from attachment, unless there is a dwelling-house actually erected upon it. In *Rice v. Rudd*, 57 Vt. 6, it was said that, "to constitute a homestead within the protection of the exemption law, there must be a dwelling-house upon the land owned by the housekeeper, or one in process of erection, and actually used or set apart and kept for a home and abiding place for the family." This is the correct construction of the statute. Therefore, as against the plaintiff, the lot and house in process of erection thereon when ²⁵⁴ defendant's debt to the plaintiff was contracted were then the defendant's homestead, and exempt from attachment for that debt.

Judgment affirmed, without costs as to the defendant. Judgment as to trustee and claimant reversed, and judgment that trustee is discharged with costs, and that claimant is entitled to the funds in the trustee's hands.

HOMESTEAD IN REALTY—OCCUPATION.—A city lot, purchased with the intention of making it a homestead for the purchaser and his family, is exempt from sale on execution from the time of the purchase, even though unimproved and without a dwelling thereon, if the purchaser incloses it, and uses it, and occupies it with the purpose of making it his home, and uses the proceeds thereof, and such means as he can procure within a reasonable time, to erect a house thereon for his family, provided it does not exceed the constitutional limit: *Denville v. Wides*, 64 Mich. 593; 8 Am. St. Rep. 852, and note. The homestead character does not attach to property until it is actually occupied as a home; and a mere intention to occupy it, though subsequently carried out, is not sufficient: *Christy v. Dyer*, 14 Iowa, 438; 81 Am. Dec. 493, and note. See, also, the note to *Arendt v. Mace*, 9 Am. St. Rep. 209.

MASON v. HORTON.

[67 VERMONT, 266.]

EASEMENTS.—If the owner of lands so uses them that one parcel has an easement and the other is subject to a corresponding servitude, and such parcels are afterward distributed among his heirs, they are respectively subject to the same servitude and entitled to the same easement as before.

EASEMENTS—EXTINGUISHMENT OF BY NONUSER.—If a person having an easement to discharge water at a certain place on the lands of another does not exercise this right for twenty-six years, during which time the water is used by the other, this does not extinguish the right, if the use so made of the water did not interfere with any use which the holder of the easement desired to make of it during the same period.

EASEMENT.—MERE NONUSER FOR ANY LENGTH OF TIME does not destroy or extinguish an easement, unless it is so conducted on the part of the
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owner of the servient estate as to be adverse to it, or in defiance of the easement, and the nonuser must be the result of it, or the nonuse must originate in, or be accompanied by, some unequivocal acts of the owner inconsistent with the continued existence of the easement, and showing an intent on his part to abandon it, and the owner of the servient estate must have relied upon, or acted upon, such manifest intention, to abandon the right, so that it would work harm to him if the easement was thereafter asserted.

ACTION for the diversion of a watercourse. The court directed a verdict for the plaintiff, submitting to the jury the question of damages only. The defendant appealed.

C. H. Joyce and H. A. Harmon, for the defendant.

J. C. Baker, for the plaintiff.

288 **START, J.** The plaintiff and defendant own water privileges on opposite sides of a small stream in the town of Clarendon. These privileges were formerly owned and used by William Brown, from whom both parties derive their title. When both privileges were owned and used by William Brown the water was diverted by a dam, and used to supply mills on the defendant's side of the stream; and the water that was not thus diverted flowed in the channel until it reached land now owned by the plaintiff, and was there diverted by another dam, and used to supply mills on the plaintiff's side of the stream. William Brown died in 1830, and his estate was divided among his heirs. The plaintiff's privilege has not been used since some time between 1870 and 1876. The defendant's privilege was not used from 1851 to 1877, when the defendant built mills and diverted the water to supply them, the same as William Brown had been accustomed to do, and discharged the spent water at a point below the point where a dam was formerly maintained at the plaintiff's privilege. It appeared that during the time the defendant's privilege was not used all of the water flowed in the channel past the plaintiff's privilege; and she claims that it is her right to have it flow as it did during this time.

The plaintiff's evidence tended to show that when the defendant's 289 privilege was formerly used the spent water was discharged above her dam, and that she and her grantors had the benefit of all the water. The defendant's evidence tended to show that the spent water was discharged below the dam during all the time his privilege was used by William Brown, his heirs, and their grantees, down to 1851, and that neither the plaintiff nor her grantors had any use

of the water that was diverted to supply mills on his side of the stream.

The plaintiff requested the court to direct the jury to return a verdict for her. The court complied with this request, and refused to submit any questions to the jury except the question of damages. In this there was error.

The defendant's evidence tended to show that during the time William Brown owned and occupied both privileges, the spent water from the mills on the defendant's side of the stream was discharged below the dam which fed the mills on the plaintiff's side of the stream. If the water was thus discharged during William Brown's ownership of both privileges, when the estate was severed and the different privileges passed to the respective heirs in severalty, the right to thus discharge the water continued, as a matter of legal right, in the respective heirs and their grantees, as an implied grant, the same as though such right had been set forth in the instrument by which the estate was severed, and the privileges set to the respective heirs: *Harwood v. Benton*, 32 Vt. 724; *Goodal v. Godfrey*, 53 Vt. 219; 38 Am. Rep. 671.

The defendant having succeeded to the title of the heirs to whom his privilege was set out, he has a right to discharge water at the same points where it was discharged during the time William Brown owned and used both privileges, unless that right is lost by reason of an adverse use by the plaintiff or his grantors, or by nonuse by the defendant and his grantors, for fifteen years. We think the court could not hold, as a matter of law, that the use of the water ²⁷⁰ by the plaintiff and her grantors was adverse, or that they had exercised any adverse rights.

When the mills on the defendant's side of the stream went to decay, the defendant and his grantors had no use for the water until new mills were erected in 1877; and for this reason, from 1851 to 1877, they did not draw water from the stream. Consequently, all the waters flowed through the channel into the pond on the plaintiff's side of the stream, and she and her grantors used for a time so much of it as was necessary to propel their machinery; but in so doing they were not in the exercise of an adverse right. They used the water because it flowed naturally along the channel and came into their pond. The plaintiff and her grantors have not deprived the defendant or his grantors of the use of the water. They have done nothing to indicate that their use of

the water was in any way adverse to the rights of the defendant and his grantors. They have used no more water than they did while the defendant's privilege was being used, and this quantity gradually diminished until 1876, when the plaintiff ceased to use it; and since that time her privilege has not been used. The plaintiff and her grantors have not erected buildings, or in any way improved their privilege, because of the nonuse of the water by the defendant and his grantors. They have done nothing that they could not have lawfully done if the defendant's privilege had been used from 1851 to 1877, the same as it was theretofore used by William Brown. They have done nothing that can be said to be the exercise of an adverse right. The mere use of the water by the plaintiff and her grantors, under the circumstances disclosed by the evidence, was not conclusive evidence of an adverse enjoyment of such use: *Arnold v. Stevens*, 24 Pick. 106; 35 Am. Dec. 305.

The court could not hold, as a matter of law, that the right to draw and discharge water at the defendant's privilege was lost by nonuse. The right, as we have seen, ²⁷¹ was created by grant, and could not be lost by mere nonuse. Mere nonuse, for any length of time, of an easement created by grant, will not destroy or extinguish it. In order to extinguish it by nonuse there must be some conduct on the part of the owner of the servient estate adverse to, and in defiance of, the easement, and the nonuse must be the result of it, and must continue for fifteen years; or, to produce this effect, the nonuse must originate in, or be accompanied by, some unequivocal acts of the owner, inconsistent with the continued existence of the easement, and showing an intention on his part to abandon it; and the owner of the servient estate must have relied or acted upon such manifest intention to abandon the right so that it would work harm to him if the easement was thereafter asserted. There was no evidence of such unequivocal acts on the part of the defendant or his grantors, and the court could not rightfully hold that the easement had been lost by abandonment.

The view we have taken of the evidence, and the law governing this case, leads us to the conclusion that the question of where William Brown discharged the spent water from the defendant's privilege was material, and should have been submitted to the jury. No question seems to have been made but that the defendant took water from the stream in

the same manner that William Brown was accustomed to take it; and, if the jury found that he discharged the spent water in the same place where William Brown discharged it, then the defendant was not guilty of diverting the water, unless the defendant or his grantors have released or conveyed the right, or the right has been lost in some of the ways indicated in this opinion.

Judgment reversed and cause remanded.

EASEMENTS—CONTINUANCE AFTER SEVERANCE OF OWNERSHIP.—Where the owner of an estate imposes upon one part an apparent and obvious servitude in favor of another, and at the time of the severance of ownership such servitude is in use, and is reasonably necessary for the fair enjoyment of the other, then, whether the severance is by voluntary alienation or by judicial proceedings, the use is continued by operation of the law: *Ellis v. Bassett*, 128 Ind. 118; 25 Am. St. Rep. 421, and note; *Geble v. Smith*, 146 Pa. St. 276; 28 Am. St. Rep. 796, and note; extended note to *Elliot v. Rhett*, 57 Am. Dec. 759.

EASEMENTS.—EXTINGUISHMENT OF BY NONUSER is the subject of the monographic note to *Orr v. O'Brien*, 14 Am. St. Rep. 278-282.

STATE v. PLANT.

[67 VERMONT, 454.]

CRIMINAL LAW.—UPON THE CHARGE OF KEEPING A HOUSE OF ILL-FAME, if the prosecution offers evidence of the keeping at different places within the same town of different houses of ill-fame, it should be compelled to elect upon which offense it would go, and it is error to receive under one count evidence of these different offenses.

CRIMINAL LAW.—A HOUSE OF ILL-FAME is one resorted to for the purpose of prostitution or lewdness. It is not necessary to warrant a conviction that the house had the reputation of being a house of ill-fame, if it is one in fact.

EVIDENCE—REPUTATION.—IN A PROSECUTION FOR KEEPING A HOUSE OF ILL-FAME, evidence of common reputation is not admissible, and its reception warrants a reversal of a judgment of conviction.

PRACTICE.—THE RECEPTION OF IRRELEVANT EVIDENCE is a sufficient ground for reversal if it might have prejudiced the excepting party on the issue involved.

INDICTMENT for keeping a house of ill-fame. Verdict and judgment of guilty.

Dunnett & Nelson, for the respondent.

Henry C. Bates, state's attorney, for the state.

456 **ROWELL, J.** The prisoner is informed against in one count for keeping a certain house of ill-fame at St. Johns-

bury on such a day, and on divers other days and times between that day and the day of the filing of the information.

On trial the state first introduced evidence to prove the keeping of such a house in a certain building on a certain street in the village of St. Johnsbury, within the time alleged. It was then allowed to introduce evidence to prove the keeping, by the prisoner, of two other such houses on a certain other street in said village at different times before the time alleged, and the keeping of one of them again after the keeping of the one first mentioned, within the time alleged, and to use such evidence as further and substantive ground for conviction, on the theory that the crime is cumulative to an extent to warrant that.

Now, the gist of this crime is the keeping of the house, and, although the crime may have continuance by the repetition of the conduct that gives character to the house, yet that continuity may be broken, so that separate and distinct offenses will be committed; and it is thus broken when the business is given up at one place and resumed at another and a different place, for then the keeping of the former house is completed and ended, and, as the keeping is the gist of the crime, the crime itself is equally completed and ended, and the resumption of the business at the other place is a separate and distinct keeping, and so a separate and distinct crime, and there are as many crimes as there are separate and distinct keepings of separate and distinct houses, and for the purposes of this case, we will say at separate and distinct, though successive, times. There is nothing in the nature of the offense opposed to this view which is supported by *State v. Lee*, 80 Iowa, 75, 20 Am. St. Rep. 401, which was an indictment in one count for keeping a house of ill-fame. During the trial, the prisoner asked that the state be compelled to elect whether it would proceed on the theory ⁴⁵⁷ that the house of ill-fame was located in the first story of the building occupied by the prisoner, or the second story; but it was held that all the rooms were properly treated as constituting but one building, and that therefore the court properly refused to compel the state to elect.

A house of ill-fame is a nuisance at common law, for it holds out allurements to a miscellaneous and common bawdry, corrupting to the public morals; and nuisances, though successive and alike in kind, are distinct in offense. A man erects a nuisance on a public street, and continues it there

for a time. He commits an offense. He abates that nuisance, and straightway erects another like it on another street. He commits another offense.

But it is said that *State v. Nixon*, 18 Vt. 70, 46 Am. Dec. 135, is opposed to the view we take. That was an indictment in one count for keeping a house of ill-fame at Burlington on such a day, and on divers other days and times between that day, and the day of taking the inquisition. On motion in arrest it was objected that the indictment was insufficient, for that the local situation of the house was not stated, nor even sufficiently alleged to be in any town or county. The court said that the offense is local, and must be described as committed in a particular town, and that the state is confined in its proof to that town, and cannot prove an offense anywhere in the county, and that a more particular description of the house was not required. This decided the point; but the court went on to say that a conviction on the indictment would be a bar to any other prosecution for keeping a similar house in the same town during the time alleged. No reason is given for this, but it seems to indicate that the court thought that the keeping of a similar house in the same town during the time alleged would be but part and parcel of the offense for which conviction was had. If this is what the court meant, we do not agree with it, for the reasons we have given.

⁴⁵⁸ As there was but one count in the information in the case at bar, there could be a conviction of only one offense; and, as the state's testimony tended to show several offenses, it should have been put to elect for which it would go, and it was error to allow it to go for all as one offense.

The statute makes penal the keeping of "a house of ill-fame, resorted to for the purpose of prostitution or lewdness." In some of the states similar statutes are construed to require proof that the house had an ill-fame in order to convict. That construction has prevailed to some extent in this state at nisi prius, but we regard it as illogical and unsound. It amounts to saying that, however bad the house is in point of fact, it is no offense under the statute to keep it if it has not an ill-fame. This is keeping clean the outside of the house, while the inside is full of prostitution and lewdness. Certain ancient sects did like things, and a woe was pronounced upon them for it by the highest authority. The words "ill-fame" are used in the statute to give name and character to

the house, and do not refer to its reputation. Both at common law and in common parlance the words "house of ill-fame" mean a house resorted to for the purpose of prostitution; and hence to say of one that he keeps a house of ill-fame, without more, is to charge the exact offense punished by the statute, and is actionable per se, and an innuendo that an accusation of the crime of keeping a house of ill-fame was thereby meant is sufficient, without using the remaining words of the statute: *Posnett v. Marble*, 62 Vt. 481; 22 Am. St. Rep. 126. The gist of the offense is the keeping of the house, irrespective of its fame. The statute aims at the fact, not the fame; at the substance, not the shadow.

It follows, therefore, ill-fame of the house not being an element of the offense, that it was not only unnecessary to prove it, but that evidence of it was irrelevant to any issue involved, for all the cases hold that the character of the ~~the~~ house cannot be shown by proof of its reputation; for that purpose the testimony is mere hearsay.

It is unnecessary to refer at length to the authorities on this question. We think the weight of judicial opinion sustains the view we take. A pretty full discussion of the subject will be found in *Henson v. State*, 62 Md. 231, 50 Am. Rep. 204, and note, and in *State v. Lee*, 80 Iowa, 75, 20 Am. St. Rep. 401.

But it is said that if it was not necessary to prove ill-fame, and evidence of it was irrelevant, the prisoner was not harmed by it, for that its only effect was to impose an unnecessary burden on the state, which helped rather than harmed the prisoner. Although irrelevancy alone is not cause for reversal, but the testimony must have been such that it might prejudice the excepting party on an issue involved (*Boutelle v. Fire Ins. Co.*, 51 Vt. 4, 31 Am. Rep. 666), and although, presumably, the court tried to confine this testimony to the question of reputation, yet it is so often true that reputation is, to the common mind at least, indicative that the fact is as reputed to be, that we cannot say the prisoner was not harmed by the testimony. Indeed, we think it more likely that she was harmed than that she was not. It certainly is not clear that she was not, as it must be in order to make the error nonreversible.

A woman, called as a witness by the state, testified to having seen a man on the bed with the prisoner in her house. On cross-examination, after having testified to the condition

of the bed, and that they were on it and dressed, she was asked what they were doing, and replied, "Ask them." She was again asked, and replied: "I am not obliged to tell." She was again asked, whereupon the court said it saw no occasion for pressing inquiry further in that direction, and prohibited it. Although cross-examination is a right, yet the court may control the exercise of it to any extent that does not infringe the right itself. This ⁴⁶⁰ control is often exercised, and never more properly than in prohibiting details that may be offensive, when intimation and suggestion will convey the meaning of the witness just as well. Whether in this case the meaning of the witness had been sufficiently conveyed, and her credibility sufficiently tested when the cross-examination was stopped, is difficult to tell. Some of us think they had not been, and that the right of cross-examination was infringed; while others think we cannot say that, because the trial court saw the witness and noted the attendant circumstances, and so could judge better than we can when the examination had gone far enough to accomplish its legitimate ends.

There is no need of considering the other points of exception, as the questions raised are largely eliminated by the holding on the second point considered, and the remainder do not inhere in the case at all, and can scarcely again arise.

Exceptions sustained, judgment reversed, verdict set aside, and cause remanded for a new trial.

HOUSE OF ILL-FAME—WHAT IS.—To constitute a house of ill-fame, it must be resorted to more than once for the purpose of prostitution and lewdness by others than the proprietor, though it need not be used habitually, or any considerable length of time for such purpose: *State v. Lee*, 80 Iowa, 75; 20 Am. St. Rep. 401, and note. To prove the charge of keeping a bawdy-house or house of ill-fame, it must be shown that it was a common resort of people of both sexes for the purpose of prostitution, and proof of acts of illicit intercourse on the part of the occupants, without proof that it was kept for the convenience of people who visited it to indulge in lewdness, will not sustain the charge: *State v. Webber*, 107 N. C. 962; 22 Am. St. Rep. 920, and note.

HOUSE OF ILL-FAME—EVIDENCE—GENERAL REPUTATION.—The character of a house as being one of ill-fame cannot be shown by general reputation: *Kenyon v. People*, 26 N. Y. 203; 84 Am. Dec. 177; *Henson v. State*, 62 Md. 231; 50 Am. Rep. 204, and extended note; *Handy v. State*, 63 Miss. 207; 56 Am. Rep. 803. The contrary doctrine is maintained in *Harkey v. State*, 33 Tex. Cr. Rep. 100; 47 Am. St. Rep. 19.

BAILEY v. BAILEY.

[67 VERMONT, 494.]

EQUITY AND PROBATE JURISDICTION. — Though the settlement of estates of decedents is committed to probate courts by statute, equity has jurisdiction whenever its aid is required and the powers of the probate courts are not sufficient to deal with the question at issue.

TRUSTEES AND GUARDIANS DE SON TORT. — If two or more persons assume the control or management of the estate of an insane person, and receive its income and profits, they make themselves trustees by construction, or guardians de son tort. As such, a court of equity has jurisdiction to compel them to account.

TRUSTEE—ESTOPPEL. — If ONE VOLUNTARILY ASSUMES THE SITUATION OF A TRUSTEE, it does not lie in his mouth to disclaim that position when called to account for moneys received thereby.

THE RIGHT TO ELECT TO TREAT A PERSON EITHER AS A TRUSTEE OR TRESPASSER exists in favor of one whose estate such person has sought to control and manage.

GUARDIANS DE SON TORT—JURISDICTION OF EQUITY. — A probate court has no power to cite before it persons who have been acting as trustees by construction, or as guardians de son tort, for the purpose of settling their accounts. Therefore a court of equity may exercise such jurisdiction.

BILL of equity, which the chancellor dismissed with costs, and the complainants appealed.

R. M. Harvey, for the orators.

John H. Watson and Smith & Sloan, for the defendants.

495 TAFT, J. The question in this case is raised by demurrer to the bill. The orators are sons of Joseph Bailey, deceased, by his first wife. The defendant Judith is the widow of Joseph and the mother of his son Hale G., the other defendant. The estate of Joseph is in process of settlement; the defendant Judith is administratrix. Hale G. presented a demand against the estate of Joseph to the commissioners appointed to adjust claims against it, which was allowed, and an appeal taken, in the name of the administratrix, by one of the orators, which appeal is now pending in the county court. The orators allege that the intestate was insane for many years prior to his death in 1890, that he was incapable of transacting business, that the two defendants took and had the management and disposal of his property and the income of his property as though it was their own, and refused to allow the said Joseph to have any control or management of it; that the said Joseph had a large claim for the care and support of Mrs. Grow, the mother of Judith, that this claim

was settled privately by the defendants, and the amount received by them never accounted for. They further allege that the defendants have always acted together in the management, control, and disposal of the moneys, lands, and income belonging to the estate of said Joseph, and that each acted with the knowledge and agreement of the ⁴⁹⁶ other, and without any authority whatever, except what, if any, their relationship to him gave them, and entirely without any contract.

The prayer of the bill is that the defendants be ordered to account for all moneys and other property, including the income of the farm, and the amount of which they received upon the claim for the support of Mrs. Grow, and to pay over all that may be due from them to said estate. It is claimed in the answer that the bill is multifarious; the question is not argued in the brief, but, if insisted upon by the defendants, the point is not well taken. The orators are alike interested in all the matters and things set forth in the bill, and the claim is made against both defendants. The proceeding is not to compel an accounting by Judith's mother, in respect to her support, but it is an attempt to compel the defendants to account for whatever they have received from the property of Joseph, the income and profits of his real and personal estate, including what they received from the mother of Judith upon said claim against her. The bill is not multifarious.

It is argued, and this is the real question in the case, that the orators have a complete and ample remedy at law, and that the matters in controversy can be adjudicated in the probate court. The settlement of estates, under our statutes, is vested in that court, but equity has jurisdiction whenever its aid is required and the powers of the probate court are inadequate to deal with the question at issue. The proceedings cannot be sustained upon the ground of discovery, for, under the Revised Laws, page 2157, any person who is charged with having any property of an estate, or concealing it, may be cited before the probate court and examined in reference to it. It is argued that any claim against Hale G. may be presented in setoff to his claim in the proceeding now pending in the appellate court, and that the administratrix may be charged in the settlement of her account with all proper matters in ⁴⁹⁷ favor of the estate against her, for which she is liable to account as administratrix. Under the

allegations in the bill, the matter in controversy is a claim in favor of the estate against the two defendants jointly. To determine whether the probate court can adequately deal with this question we must refer to the nature of the claim which is made by the bill. It is therein alleged that Joseph Bailey was insane, incapable of doing any business, and was in the care, custody, and control of the defendants. They intruded upon his estate, assumed control and management of it without any contract, and have had possession of the same for more than twenty years without accounting for any of the rents, income, profits, or property. These are substantially the facts alleged in the bill and admitted by the demurrer; upon these facts, we must hold that the defendants made themselves trustees by construction, or guardians de son tort; it is immaterial which term is used in designating their character, for the terms in this respect are synonymous.

There is a class of cases in which it frequently happens that courts of equity adjudge a trust has arisen from the contracts and dealings of parties, although a trust was not within the contemplation of either party, and when there was no fraud, actual nor constructive; in which respect chancery proceeds in a manner and upon principles entirely unknown to courts of law; the parties are called trustees by construction; for instances of this character, see 1 Perry on Trusts, chapter 7. Among such instances, it has been held that persons may become trustees by intermeddling with, and assuming the management of, property, without authority; they are held to be trustees de son tort, in the same manner that persons who deal with a deceased person's estate without authority are executors de son tort. If one enters upon the lands of an individual and takes the rents, manages and carries on the property, he may be charged as a guardian, trustee, or bailiff, and so may one who takes personal ⁴⁹⁸ property. The case of *Wyllie v. Ellice*, 6 Hare, 505, is a case of such holding and the reasoning quite applicable to this. The defendant Ellice was charged as trustee, having unlawfully and without authority entered upon the plaintiff's estate and held the same, receiving the rents and profits during the plaintiff's infancy, and it was held he became thereby accountable to the plaintiff as "bailiff, guardian, or trustee." The phrase "bailiff, guardian, or trustee," as used, was criticised, but Wygram, V. C., observed that, as he understood

them, they were synonymous expressions, but whether that was so or not, they were sufficient to charge the defendant as trustee.

Holding the defendant accountable as trustee is but the application of the familiar principle that if a person, by mistake or otherwise, assumes the character of trustee, guardian, executor, or administrator, and acts as such, when the office does not belong to him, he thereby becomes such official de son tort, and can be called to account, by the beneficiaries, for the assets received under color of the trust. "If one voluntarily assumes the situation of trustee, it does not lie in his mouth to disclaim that position": *Proprietors v. Post*, 31 Conn. 240; and there is a class of similar cases, in jurisdictions in which the executor is not entitled to the rents of the real property, in which it has been held that rents received by an executor, as such, are not regarded as assets, but are held in trust for the heir or devisee: *McCoy v. Scott*, 2 Rawle, 222; 19 Am. Dec. 640; *Adams v. Adams*, 4 Watts, 160; *Schwartz's Estate*, 14 Pa. St. 42. In *Le Fort v. Delafield*, 3 Edw. Ch. 32, the court said as to an intermeddler, who in that case was an executor, that he might be considered either as a wrongdoer or as a bailiff. A person who assumes the character of a trustee incurs the responsibility of one: *Rackham v. Siddal*, 1 Macn. & G. 607; *Life Assn. of Scotland v. Siddal*, 3 De Gex, F. & J. 58. In *Bennett v. Austin*, 81 N. Y. 308, it was held that a person who was, in law, a wrongdoer, and ⁴⁹⁹ who, without authority, assumed the management of property in which others were beneficially interested, became in equity a trustee by construction, and, during the continuance of such management, was subject to the same rules and remedies as other constructive trustees. It has been held that in such cases the wrongdoer could not avoid liability as a trustee by showing that he was not, in fact, such: *Wilson v. Moore*, 1 Mylne & K. 127.

Analagous in principle is the well-established doctrine that "if a man intrudes upon the estate of an infant, and takes the profits thereof, he will be treated as a guardian, and held responsible therefor to the infant in a suit in equity": 2 Fonblanque's Equity, bk. 2, pt. 2, c. 2, sec. 1, and note f; *Bennett v. Whitehead*, 2 P. Wms. 644; *Morgan v. Morgan*, 1 Atk. 489; *Dormer v. Fortesque*, 3 Atk. 124; *Goodhue v. Barnwell*, Rice Eq. 198; *Drury v. Conner*, 1 Har. & G. 220; *Chaney v. Smallwood*, 1 Gill, 367.

In many of these cases the question arose whether the intermeddlers should be treated as trespassers or as trustees, etc., by construction. In such cases the doctrine seems to be as stated in *Wyllie v. Ellice*, 6 Hare, 505, in which it is said that the plaintiff might treat Ellice as a trespasser or sue him as a bailiff, guardian, or trustee. He might elect to treat him as either; that if Ellice had entered upon the plaintiff's property unlawfully, and without authority, he could treat him as a trespasser or call him to an account in equity. That if he did the latter, he must join as defendants all who acted with him as bailiffs, guardians, or trustees; that equity would require that all parties jointly liable with the defendant should be made accountable with him.

It is well to bear this in mind, for it is urged by the defendants here that the remedy of the orators is in two separate proceedings, one against one defendant and the other against the other.

Joseph Bailey was insane, and his position was similar to ~~see~~ that of an infant, and the same rule should be applied to his case as to that of an infant.

The only legitimate way of dealing with his property, in the condition in which he then was, was by the appointment of a guardian, who could legally take control of the property and manage it. The defendants constituted themselves his trustees, guardians, etc., and stood in a similar relation to the deceased as a guardian who, after his time of guardianship expires, continues, without right, to hold, control, and manage his ward's property, stands to the ward. Now, although the probate court has exclusive jurisdiction of guardians' accounts, it has been held in such cases that the ward may maintain the common-law action of account against the guardian, and that the guardian, by his act, makes "himself bailiff of the ward's property for the time which he continues thus to hold it, and liable to account for the same in the common-law action," and that, if the ward chose, he could compel the guardian to account to him in the common-law action, for the time after the guardianship ceased, and also could bring into the same adjustment the guardian's account which accrued during the time of the guardianship: *Field v. Torrey*, 7 Vt. 372; *Harris v. Harris*, 44 Vt. 320.

We think the powers of the probate court are not adequate to the settlement of such a controversy as is shown by the bill. It has no power to cite before it any persons who have

been acting as trustees by construction or officials *de son tort*, and to settle their accounts. It settles the accounts of such officials as are appointed by the court itself, and not the controversies that arise when one has intermeddled with the estate of an infant, insane person, or a trust. The aid of the court of equity may well be invoked in this proceeding. In this case, for the reasons stated, the orators have the right to have the controversies settled in one proceeding instead of compelling them to proceed in the probate court and in the appellate court, in proceedings against the two defendants ^{separately}, and it is doubtful if the probate court have power to settle and adjust the equitable claims set forth in the pleadings, for the probate courts are given power to hear and determine, in equity, those matters only relating to the trusts mentioned in the Revised Laws, chapter 119, and those named therein do not include such as are created by the intermeddling of volunteers. The matter of trusts is peculiarly within the jurisdiction of equity. That a suit at law cannot be maintained in this matter must be apparent to every one, as the suit must be brought in the name of the administratrix against herself and another.

Treating Hale G. Bailey as a guardian or trustee *de son tort*, and that the probate court could properly settle his account as such, the claim against him—if several—cannot be pleaded in setoff to the claim presented by him against Joseph Bailey's estate, for commissioners do not have the necessary powers to dispose properly of the various questions that may naturally arise in the adjudication of a deceased guardian's account: *Waterman v. Wright*, 36 Vt. 164. And the same difficulty arises when such an account is presented in setoff to a claim pending before commissioners in favor of a guardian against the estate of a deceased ward. A probate court never settles the account of an official *de son tort*. There is, therefore, no remedy against Hale G. Bailey in the probate court.

Decree reversed, demurrer overruled, bill adjudged sufficient, and cause remanded.

ROWELL, J., dissents. _____

EQUITY JURISDICTION OVER PROBATE MATTERS.—A court of chancery may take jurisdiction of the settlement of an estate, when there are peculiar circumstances of embarrassment to its administration, and when the assuming of jurisdiction would prevent great delay, expense, or inconvenience,

and thus conclude, by one action and decree, a protracted litigation: *Deek v. Gerke*, 12 Cal. 433; 73 Am. Dec. 555, and monographic note fully discussing the subject. Chancery will not assume jurisdiction over the administration of estates, unless the affairs of the estate are so involved that the administrator cannot safely proceed without the direction of a court of equity: *McNeill v. McNeill*, 36 Ala. 109; 76 Am. Dec. 320, and note; to the same effect, see *People v. Wayne Circuit Court*, 11 Mich. 393; 83 Am. Dec. 754.

GUARDIAN AND WARD—ACCOUNTING.—One assuming to be the guardian of an infant whose property has been sold by order of court, and receiving and receipting for the proceeds of the sale as such, though he was not in fact a guardian, becomes a voluntary trustee, and must account for the funds so received: *Houscal v. Gibbs*, 1 Bail. Eq. 482; 23 Am. Dec. 186. A mere stranger or wrongdoer who takes possession of an infant's property may, in equity, be considered as the guardian of the infant and liable to account as such: *Van Epps v. Van Deusen*, 4 Paige, 64; 25 Am. Dec. 516; *Davis v. Harkness*, 1 Gilm. 173; 41 Am. Dec. 184, and note.

TRUSTS—ESTOPPEL OF TRUSTEE.—When a trustee has entered upon the execution of the trust, he cannot afterward free himself of its discharge by a denial of its existence, and without the consent of the cestui que trust, unless by order of court: *Carter v. Gibson*, 29 Neb. 324; 26 Am. St. Rep. 381. A trustee who accepts cannot renounce: *Ross v. Barclay*, 18 Pa. St. 179; 55 Am. Dec. 616, and note. A trustee cannot relinquish the trust of his own accord: *Shepherd v. McEvers*, 4 Johns. Ch. 136; 8 Am. Dec. 561.

STATE v. SPEYER.

[67 VERMONT, 502.]

HEALTH LAWS.—The power of the legislature to prevent the introduction and spread of infectious or contagious diseases cannot be questioned. All property in the state is held subject to the reasonable supervision of legislative authority, to the extent necessary to the reasonable preservation of the public health.

HEALTH LAWS—JUDICIAL CONTROL OVER.—While the necessity and propriety of particular regulations are primarily of legislative determination, their character, whether reasonable, impartial, and consistent with state policy, is a question for the court.

HEALTH LAWS VOID WHEN UNREASONABLE.—Though a state board of health is, by statute, vested with authority to promulgate and enforce such regulations for the better preservation of the public health as it shall judge necessary, a regulation imposed by it that no pigpens shall be built or maintained within one hundred feet of any well or spring of water used for drinking purposes, nor within one hundred feet of any street or inhabited house, is unreasonable, and, therefore, void. It reaches beyond the scope of necessary protection and prevention into the domain of restraint of lawful business and use of property.

PROSECUTION for keeping a pigpen within one hundred feet of an inhabited dwelling. Verdict of guilty. There was no evidence of the existence of any infectious or contagious

diseases, or that the pigpen was maintained in a manner likely to produce such disease.

Button & Button, for the respondent.

F. L. Fish, state's attorney, for the state.

⁵⁰⁴ **START, J.** The information charges that the respondent kept and maintained a pigpen within one hundred feet of an inhabited dwelling-house, in violation of a regulation made by the state board of health. To this information the respondent demurred. The demurrer was overruled, information adjudged sufficient, and the respondent ordered to plead over, to which the respondent excepted.

No. 93, section 6 of the acts of 1886, as amended by No. 82, section 11 of the acts of 1892, provides that the state board of health shall have authority to promulgate and enforce such regulations for the better preservation of the public health in contagious and epidemic diseases, and regarding the causes which tend to their development and spread, as they shall judge necessary; and any person or persons or corporation neglecting or refusing, after having been duly notified in writing, to comply with the requirements of such regulations shall, upon conviction thereof, pay to the treasurer of the state a fine of not less than twenty-five dollars nor more than one hundred dollars. Acting under the authority conferred by these enactments, the board of health promulgated a regulation that no pigpen should be built or maintained within one hundred feet of any well or spring of water used for drinking purposes, nor within one hundred feet of any street or inhabited house.

The power of the legislature to prevent the introduction and spread of infectious and contagious diseases cannot be questioned. All property in the state is, undoubtedly, held subject to the reasonable supervision of legislative authority, to an extent necessary to the reasonable preservation of the public health. While the necessity and propriety of particular regulations are primarily of legislative determination, their character, whether reasonable, impartial, and consistent with the state policy, is a question for the court: *Tiedeman's Limitations of Police Power*, 13, 197; *Parker and Worthington's Public Health and Safety*, 68; *Dillon on Municipal Corporations*, ⁵⁰⁵ secs. 319, 325, 329; *Mugler v. Kanoar*, 123 U. S. 623; *Minnesota v. Barber*, 136 U. S. 313. By the enactment in question, the legislature attempted to confer upon

the state board of health power to promulgate and enforce reasonable regulations in respect to contagious and epidemic diseases and causes which tend to their development and spread. If the board of health, in promulgating the regulation in question, were in the reasonable exercise of the power attempted to be conferred upon them, all pigpens built or maintained within one hundred feet of any well or spring of water used for drinking purposes, or within one hundred feet of any street or inhabited house, must be regarded as infected with contagious or epidemic diseases, or causes which tend to their development and spread; or, under such circumstances, it must be inferred that there are reasonable grounds for apprehending that they are thus infected, or are such causes.

A regulation so general and far-reaching, affecting business and the use of property, cannot be held to be reasonable or justifiable, unless there are reasonable grounds for a belief that the necessary protection of the public health requires it. The regulation in question cannot be held to be reasonable or justifiable because some few individuals in the state maintain a pigpen in such a manner as to endanger public health. To justify promulgating such a regulation, there must be reasonable grounds for apprehending that all pigpens affected by it are, or may be, a menace to the public health. It cannot be said that all pigpens situated within one hundred feet of a well or spring of water used for drinking purposes, or within one hundred feet of a street or inhabited house, endanger public health, or that there are reasonable grounds for apprehending that they do. They may or may not thus endanger the public health. Very much depends upon the manner of construction, the way they are kept and occupied, the means for keeping them ^{see} clean, the location and surroundings, the character and slope of the land, their nearness to or remoteness from thickly settled communities, and the existence or nonexistence of diseases and causes of diseases. A pigpen may be a menace to public health when situated in a city or village, and perfectly harmless when situated upon a farm; and the fact that a pigpen situated in a city or village is a nuisance and endangers public health and ought to be abated furnishes no reasonable ground for abating a pigpen upon a farm, which is not a nuisance, and in no way affects the public health. The regulation, if valid, had the effect to abate and cause to be removed every pigpen

within the prohibited limit. It deprived every owner of land, within the limit, of its use for purposes that, under proper conditions, are harmless and legitimate. By it, the citizen living miles from neighbors and from epidemic diseases and causes which tend to their development and spread, and whose possessions do not extend beyond the prohibited limit, is unreasonably and unjustly deprived of his right to build and maintain a pigpen and engage in a business which has ever been regarded, when conducted under proper conditions, as legitimate.

The regulation is intended to have force and effect throughout the entire state. It affects alike those piggens which are, as a matter of fact, maintained in such a manner as to be offensive, and those which are maintained with every possible degree of cleanliness; it affects alike those situated upon farms and those situated in thickly settled communities; and it affects all piggens within the prohibited limit, without reference to the existence or nonexistence of epidemic or contagious diseases, and the causes which tend to their development and spread in any particular locality. It is intended to affect alike a business which is so conducted as not to be a nuisance, or in any way endangering public health, or furnish reasonable grounds to apprehend that it ⁵⁰⁷ will do so, and business which is so conducted as to be a nuisance and furnish reasonable grounds for a belief that it will endanger public health, if continued. It reaches beyond the scope of necessary protection and prevention into the domain of restraint of lawful business and use of property. It is founded on fear and apprehension of a remote possible danger to the public health, and not upon its existence, or upon reasonable grounds to apprehend that any considerable portion of the piggens affected by it endangers or will endanger public health. It is an unreasonable and unjust interference with a legitimate and recognized business pursuit and use of property, without reference to its location and the manner in which it is conducted, or the existence or nonexistence of epidemic or contagious diseases or causes which tend to their development and spread in any particular locality. It is too broad and sweeping to be upheld by any necessity of protecting the public health, and we cannot regard it as a reasonable and legitimate exercise of the power attempted to be conferred by the enactments in question.

Judgment reversed; demurrer sustained; information adjudged insufficient and quashed; respondent discharged.

Taft, J., concurs in the result. The keeping of pigs, not pigpens, is the evil. The board had no authority to prohibit the building of a pigpen. —

HEALTH LAWS.—The power to pass health laws and quarantine regulations, and the validity and reasonableness of the same, is the subject of the extended notes to *Hurst v. Warner*, 47 Am. St. Rep. 536; *Train v. Boston Disinfecting Co.*, 59 Am. Rep. 116; and *Markham v. Brown*, 92 Am. Dec. 76.

CLEMMONS v. DANFORTH.

[67 VERMONT, 617.]

SLANDER—JUDICIAL PROCEEDINGS.—If words spoken by a litigant during the course of a judicial proceeding are neither pertinent nor material to the subject under investigation, and are actionable, they are not within his privilege, and he is answerable therefor. He may, however, show that he spoke the words in good faith, with probable grounds to believe, and an honest belief, that they were true and were pertinent and material to the subject matter under investigation.

SLANDER—JUDICIAL PROCEEDINGS.—If a person interested in resisting a claim preferred by a physician against an estate appears before a commissioner having jurisdiction to investigate such claim, and, in addition to denying the claim, asserts that it is not the first time that the claimant made up an account—that claimant had made up a claim for forty or fifty dollars when he had not made a visit, which had been paid—these remarks, not being pertinent to the subject of inquiry, are not privileged.

ACTION for slander. Verdict and judgment for the defendant; the plaintiff appealed.

Batchelder & Bates and O. M. Barber, for the plaintiff.

Waterman, Martin & Hitt, for the defendant.

618 Ross, C. J. The plaintiff is a practicing physician. He presented a claim against his father in law's estate for professional services rendered to the intestate and his wife. The defendant is an heir to the estate and interested to have defeated the allowance of unjust claims against it. The action is slander. The declaration charges, and the plaintiff's testimony tended to establish, that at the second meeting of the commissioners for the allowance of claims against the estate, upon the presentation by the plaintiff of an itemized account of his claim, the defendant, in the presence of

the commissioners, his counsel, and other persons, and before he was sworn as a witness, said: "I swear all these charges of Dr. Clemmons, except his ten visits to mother, are false and fraudulent. This is n't the first time he has made up an account, either. He made up one against me of between forty and fifty dollars for which he had n't made a visit, and I paid it, and I can prove it."

The defendant did not justify by pleading the truth of the words charged, but denied having spoken them. His testimony tended to show that he did not speak the words charged; that what he did speak was after he was sworn⁶¹⁹ and while he was a witness; and that if he said anything before he was called as a witness it was only that the plaintiff's account was unjust and fictitious, except the ten visits to his mother, and that he stated this in good faith, believing it to be true, for the protection of his interest and in discharge of his duty. In this state of the pleadings and tendency of the testimony, the plaintiff presented to the court several requests to charge. The second one only need be considered. That reads:

"If the words, spoken before the defendant was sworn as a witness, were substantially as charged in the declaration, and were spoken touching the plaintiff in his profession and business, they are actionable in themselves, and the verdict should be for the plaintiff."

This request is addressed to the facts as the plaintiff's evidence tended to establish them to be. If it embodies the law applicable to such a state of facts, it was the duty of the court to comply with it. It assumes that the occasion did not privilege, absolutely nor qualifiedly, what the defendant said relative to the plaintiff's having fabricated and collected charges for professional visits against him; or that, if this was in a sense privileged, on the pleadings and evidence, the plaintiff was entitled to a verdict. The court did not comply with this request, except so far as to tell the jury that the words would be actionable unless privileged. It properly submitted to the jury to find what words were spoken on the occasion, and whether they were spoken before or after the defendant became a witness. It, in substance, told the jury that if they found that the defendant said before he was a witness all which the plaintiff claimed, and if they found it was more than was necessary to secure a proper contest of the plaintiff's bill, yet, as the occasion was in a sense privileged, the plain-

tiff could not recover for such excess, unless he established it was spoken maliciously. The plaintiff duly excepted to the refusal to comply with the request, and to this portion of the charge. The plaintiff's ²²⁰ counsel concedes that the presentation of the plaintiff's claim to the commissioners was the commencement of a judicial proceeding, in which the defendant was a party in interest, and that the occasion gave him a qualified privilege in what he said, before he was a witness, in reference to the character of the claim presented; and that the plaintiff could not recover for the speaking of this portion of the words charged, unless he showed that the defendant took advantage of the occasion, maliciously, to characterize the charges—except those for ten visits to the mother—to be false and fraudulent, for the purpose of slandering the plaintiff, not believing what he said to be true. He further contends that if the defendant on that occasion went further and made the charge that the plaintiff had made up and presented against the defendant a false and fraudulent account and collected it, the charge was not, in a sense, privileged, because not pertinent nor material to the defense of the claim presented by the plaintiff; was actionable because injurious to the plaintiff in his profession and business, and because plainly a charge of having obtained money under false pretenses; was, under the pleadings, conceded to be false, and therefore conclusively malicious. He further contends that, if the occasion could make this charge in a sense privileged, such qualified privilege could arise only when it was made to appear that the defendant made the charge in good faith, believing it to be true, and pertinent to a defense of the claim presented by the plaintiff. On either of these contentions, he claims his second request should have been complied with. These contentions bring for consideration the circumstances and occasion under which an actionable slander is privileged, either absolutely or qualifiedly.

In respect to privilege, a party and his counsel, or attorney, stand alike. The counsel, or attorney, is the agent of the party, acting and speaking for him. At the common law, ²²¹ judges, parties, jurors, counsel, and witnesses were privileged absolutely for anything spoken or published "in a course of justice": 4 Bacon's Abridgments, *499. In the earlier cases in England, counsel and the party and witnesses were not absolutely privileged for everything they might say in a judicial proceeding. But it was confined to what the party

and his counsel might say, or do, in the conduct of the case, or what the witness might answer with reference to the inquiries put to him, and some of the cases intimate that their sayings and answers must be confined to what is pertinent or material to the matter under investigation. But the later decisions show a tendency, from public policy, to make this privilege absolute for everything which a party, his counsel, or a witness may say or do in the case: *Odgers on Slander and Libel*, *189-194; *Seaman v. Netherclift*, 1 C. P. Div. 540; 2 C. P. Div. 53. The privilege of a party and of counsel in respect to what they say and do in judicial proceedings came early before this court in *Torrey v. Field*, 10 Vt. 353. The case was important, fully argued, and carefully considered. The action charged that the defendant had, in a bill in chancery, under the order of the chancellor, published a libel on the plaintiff. It is there said:

"This privilege, or immunity, for words spoken, extends equally to parliamentary proceedings, proceedings in the state legislatures, and in Congress; to parties, witnesses, jurors, judges, and counsel in courts of justice; in short, to any one who, in the course of the discharge of public duty, or in pursuit of private rights, is compelled to participate in the administration of justice or in legislation. . . . While, on the one hand, the party ought not to be required, in the course of judicial proceedings, to see to it that every allegation which he might deem for his interest to put upon the record, or which, in the ordinary course of such proceedings, it might seem necessary to publish, should, in the event of the suit, prove religiously true, it is evident, on the other hand, that no more ought he to be permitted, under the guise and form of judicial proceedings, to publish scandal and the basest slander without having any interest or occasion ⁶²² to make such publication, except the gratification of personal malice. No person ought, in the course of judicial proceedings, even to publish that which he has no reason to believe, and does not in fact believe, and has no occasion to publish, except for secondary purposes. . . . If he publishes more than is warranted by the ordinary forms of process and pleading, or on an occasion not requiring it, he cannot claim the protection of a suitor in court."

Again, it is said: "It does seem to be an admitted principle of the law of libel and slander that no action lies for anything said or written or published, in the ordinary course of

judicial proceedings, and which comes within the ordinary scope of the forms and process therein, however groundless or malicious the suit may be, even if the process of the court is sought as a mere cloak of malice or slander. . . . If the truth of the words is relied upon in justification, it must be specially pleaded, but the defendant is not compelled to plead specially any matter which shows that the words were not spoken maliciously, but on a justifiable occasion, or that they were spoken by counsel, in the course of the discharge of his duty to his client, and were pertinent to the matter in question; or in giving the character of a servant, or where the defendant had an interest in the question, and spoke the words in the reasonable and necessary pursuit and defense of that interest."

The defendant had filed several pleas in bar, setting forth and relying upon the publication under the order of the chancellor. The plaintiff had demurred to the pleas generally and specially. Speaking in regard to the order of pleading and the burden of proof, the court said:

"If the defendant did publish more than he was warranted in doing by the order, he is liable for the excess, if that contained scandal of a libelous character and was published with a malicious intent to defame the plaintiff and expose her to public disgrace, ridicule, and contempt. But the excess should have been specially replied by the plaintiff, and would then stand as the basis of her claim for damages, and the question of the defendant's intent in the publication of the excess must be referred to the jury. For it is not to be tolerated, if the party shall in good faith publish more than ~~623~~ is strictly warranted by the chancellor's order, that he should be liable to an action on that account. But if he publish more, and the excess is libelous, he is *prima facie* liable, and it is incumbent on him to show that he was not actuated by any malicious intent in that portion of the publication. And the jury are not to infer that he was not actuated by malice, unless upon proof of some other motive."

This is clearly a holding that if the publication was in excess of the order, and was libelous, the plaintiff was entitled to recover, unless the defendant should show that he was not actuated by malice in publishing such excess.

In *Mower v. Watson*, 11 Vt. 536, 34 Am. Dec. 704, the question of the privilege of counsel and party came again under consideration. The principles announced in *Torrey v. Field*,

10 Vt. 353, were approved. After citing and remarking upon several cases, the court sums up by saying:

"From the foregoing cases the true ground of the privilege is readily deduced. *Prima facie*, the party or his counsel is privileged for everything spoken in court. If any one considers himself aggrieved, in order to sustain an action of slander he must show that the words spoken were not pertinent to the matter then in progress, and that they were spoken maliciously and with a view to defame. So that if the words spoken were pertinent to the matter in hand the party and counsel may claim full immunity from an action of slander, however malicious might have been his motive in speaking them. So, too, if the words were not pertinent to the matter in issue, yet if the party spoke them *bona fide*, believing them to be pertinent, no action of slander lies."

Torrey v. Field, 10 Vt. 353, is referred to as stating the rule more fully. Hence, what is here said is not to be taken as changing the burden of proof as laid down in that case. These decisions have been frequently recognized as correctly setting forth the principles governing this class of cases by this court, and by other courts of last resort: *Nott v. Stoddard*, 38 Vt. 25; 88 Am. Dec. 633; *Dunham v. Powers*, 42 Vt. 1. In the last case a distinction is made between the privilege of a juror or witness, who acts as a part of the court, compulsorily, ^{and} under oath, and the privilege of counsel who is acting for the protection of private interests; holding that the former are absolutely privileged for anything said in the ordinary course of proceeding or *bona fide*, while the latter is "only *prima facie* privileged for what he may say in the course of the proceeding and in which he participates." But, speaking in the name and on behalf of his party, the privilege of counsel is the privilege of his party. This distinction between the privilege of a judge, juror, or witness, and the privilege of a party and his counsel for words spoken or published in the course of judicial proceedings, or for the assertion of private rights in such proceedings, is generally recognized by courts of last resort in this country. It is therein generally held that if it appears that the words spoken or published, or the assertion made, were spoken, published, and made in the ordinary course of proceedings in a tribunal which has jurisdiction of the subject matter, with power to redress the complaint, and, if nothing further appears, the words of the party interested therein, and of his counsel, are *prima facie*

privileged. But when it is made to appear that the words spoken or published are neither pertinent nor material to the subject matter under investigation, and are actionable, this prima facie privilege is removed. Many courts hold that only the truth of the words can be shown in defense. Other courts, and this in *Torrey v. Field*, 10 Vt. 353, hold that the party or his counsel may show that he spoke the words in good faith, with probable grounds to believe, and on an honest belief, that they were true, and were pertinent or material to the subject matter under investigation, and in the assertion of the rights of the party therein. The latter courts hold that such further circumstances and conditions accompanying the speaking of actionable words on such an occasion, establish the good faith of the party or his counsel in using them and rebut malice. This, we think, is the result of the decisions of courts of final resort ⁶³⁵ in this country, and in harmony with the decisions of this court: *Gilbert v. People*, 1 Denio, 41; 43 Am. Dec. 646, and note; *Stackpole v. Hennen*, 6 Mart., N. S., 481; 17 Am. Dec. 187, and note; *Hastings v. Lusk*, 22 Wend. 410; 34 Am. Dec. 330, and note; *Bodwell v. Osgood*, 3 Pick. 379; 15 Am. Dec. 228, and note; *Terwilliger v. Wands*, 17 N. Y. 54; 72 Am. Dec. 420, and note; *Shadden v. McElwee*, 86 Tenn. 146; 6 Am. St. Rep. 821, and note; *McAllister v. Detroit Free Press Co.*, 76 Mich. 338; 15 Am. St. Rep. 318, and note; *White v. Nicholls*, 3 How. 266; *Hoar v. Wood*, 3 Met. 193; *Brow v. Hathaway*, 13 Allen, 239; *Rice v. Coolidge*, 121 Mass. 393; 23 Am. Rep. 279; *Hamilton v. Eno*, 81 N. Y. 116; *Commonwealth v. Wardwell*, 136 Mass. 164; *Barr v. Moore*, 87 Pa. St. 385; 30 Am. Rep. 367; *Upton v. Home*, 24 Or. 420; 41 Am. St. Rep. 863; *McLaughlin v. Cowley*, 127 Mass. 316; 131 Mass. 70.

The last two cases, and especially *McLaughlin v. Cowley*, are instructive in determining when and how far matters arising in judicial proceedings are conditionally privileged. In *McLaughlin v. Cowley* the defendant was an attorney, and was employed to bring an action against a party for falsely representing the plaintiff to be a trustworthy person, which representations had been acted upon and resulted to the damage of the party employing him. In his complaint, after setting forth the representations, and that they were false, and known to be so to the party who made them, he proceeded to say that the party further knew that the plaintiff "had caused to be put to death, immediately after its birth,

an illegitimate child born to him by" a person named. The plaintiff at the time had a wife living, so that the language inserted, in substance, charged him with having committed the crimes of adultery and murder. In his answer to the plaintiff's complaint the defendant denied specifically that he made the charge in the manner complained of, and averred that if he did, the same was true and not libelous. On the trial he offered to testify that he believed the charge to be true, and offered to testify as to the information on which he made it, and that he was instructed to make it by his client. It was held that the charge was grossly libelous and actionable, was not privileged, because not pertinent nor material to the subject matter of the complaint, and could be justified only by showing its truth.

On the facts embodied in the request, if found established, what the defendant said on that occasion may be considered in two views: 1. As spoken to his counsel in protection of his interest in his father's estate, and to defeat the allowance of an unjust claim; 2. As spoken to the other heirs who had a like interest in the estate. In either view the occasion furnished only a qualified privilege. The cases falling under this kind of privilege, Mr. Odger, in his work on Slander and Libel, groups under three heads, the second of which is: "Where the defendant has an interest in the subject matter of the communication, and the person to whom he communicates it has a corresponding interest."

As applicable to the three groups, he says (Odgers on Slander and Libel, *197): "But it must be remembered that although the occasion may be privileged, it is not every communication made on such occasion that is privileged. It is not enough to have an interest or duty in making a communication; the interest or duty must be shown to exist in making the communication complained of": Per Dowse, B., 6 L. R. Ir. 269.

A communication which goes beyond the occasion "exceeds the privilege."

Again (star page 229), he says, under the heading of "Statements necessary to protect defendant's private interests":

"Any communication made by the defendant is privileged which a due regard to his own interest renders necessary. He is entitled to protect himself. But in such cases it must clearly appear not merely that some such communication was necessary, but that he was compelled to employ the very

words complained of. If he could have done all that his ⁶²⁷ duty or interest demanded without libeling or slandering the plaintiff, the words are not privileged. Thus, it is very seldom necessary in self-defense to impute evil motives to others, or to charge your adversary with dishonesty or fraud. . . . So, too, in cases where some such communication is necessary and proper in the protection of the defendant's interests, the privilege may be lost if the extent of its publication be excessive."

Again, on same subject (star page 245): "So, too, in making a communication which is only privileged by reason of its being made to a person interested in the subject matter thereof, the defendant must be careful not to branch out into extraneous matter with which such person is unconcerned. The privilege only extends to that portion of the communication in respect to which the parties have a common interest or duty."

Cases are cited in the illustrations supporting these propositions. Apply these principles to the facts embodied in this request. The only subject matter for the consideration of the commissioners, the defendant's counsel, and the other heirs, was the claim of the plaintiff for professional services. The only interest which he or the other heirs had was to defeat the allowance of that portion of it which they thought unjust. For this purpose he might, if he had reasonable grounds, characterize a portion of the claim as false and fraudulent, and be protected by the occasion. But when he proceeded to say: "This is n't the first time he has made up an account, either. He made one up against me of between forty and fifty dollars, for which he had n't made a visit, and I paid it, and I can prove it," he stated what had no relation to the claim presented by the plaintiff; what the other heirs had no interest in; what was between himself and the plaintiff personally; what he claimed to have personal knowledge of. He made a charge, wholly disconnected with the claim presented by the plaintiff, and with his own interest and the interest of the other heirs therein—a charge which was actionable, which he does not claim to be true, nor that he had ⁶²⁸ reasonable grounds to believe to be true, either by his testimony or his pleadings. Under the circumstances, the occasion did not privilege nor protect him in making the charge. If it should be contended that, being interested to defeat the unjust portion of the plaintiff's claim, he made this

charge that the plaintiff had made and collected charges against him for which he had rendered no services to his counsel and to the other heirs, to induce them to join in defending against the unjust portion of the plaintiff's claim, the contention cannot be maintained. On the pleadings and on his own evidence the defendant does not claim that this part of the charge was true, nor does he claim that he had reasonable grounds to believe, and that he did honestly believe, it to be true and pertinent to a defense of the claimed unjust charges of the plaintiff. A party is neither absolutely nor conditionally privileged to utter to his counsel, and to those jointly interested with him in defending a particular matter, and to others not so interested, a false and actionable slander of the other party to the matter in controversy, not in any way pertinent nor material to the matter in controversy, to induce those jointly interested and his counsel to join him in defending the matter in controversy. He has no interest nor duty to make such a charge. It will be wholly unavailing and injurious to himself and to those jointly interested. If he succeeds in securing the aid of the others jointly interested, it will lead him and them into unsuccessful litigation, so far as the same is dependent upon the charge. His failure either to justify the charge as true, or to show that he had reasonable grounds to believe, and that he did honestly believe, it to be true and pertinent, negatives that he made it in good faith. Privilege arises from interest and duty. It does not arise out of an occasion in which no interest nor duty to make the slanderous utterance is shown to exist. This request should have been complied with, inasmuch as on the pleadings and on ^{the} facts which the testimony tended to establish, as the case was left at the close of the testimony, the occasion did not privilege the utterance of the charge, even under the decisions which allow malice to be negatived by showing that the defendant made the charge in good faith, on reasonable grounds, and in the honest belief that they were true and pertinent. The request was not faulty in that it contained also a charge spoken on the same occasion which, on the evidence, was conditionally privileged; for, if the defendant spoke on the occasion all that was embraced in the request, the plaintiff would be entitled to recover for the excess which was not privileged. It is not to be presumed that there was evidence in the case tending to establish that the defendant

had reasonable grounds to believe, and did honestly believe, that this part of the claimed utterance, if made, was true and pertinent to the plaintiff's claim then under consideration. When the exceptions purport to state the tendency of the testimony on a point excepted to, it will be presumed that it states its whole tendency, inasmuch as the statement is made for the purpose of showing the point and scope of the exception: *Armstrong v. Colby*, 47 Vt. 359. Limited as it was by the charge, the testimony excepted to was properly received.

Judgment reversed and cause remanded.

SLANDER—JUDICIAL PROCEEDINGS.—An action will not lie against a witness for slanderous words uttered by him in giving his testimony, though false, prompted by malice, and not necessary to answer the question asked him: *Hunsel v. Vonelf*, 69 Md. 179; 9 Am. St. Rep. 413, and extended note. For a further discussion of this subject see the extended notes to *M'Millan v. Birch*, 2 Am. Dec. 431; *Shadden v. McEwee*, 6 Am. St. Rep. 325; and the note to *Gudger v. Penland*, 23 Am. St. Rep. 75.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

SUTTON v. SNOHOMISH.

[11 WASHINGTON, 24.]

MUNICIPAL CORPORATIONS.—LIABILITY OF CITIES FOR INJURIES SUSTAINED BY INDIVIDUALS from the use of defective streets is a question of law, which can be properly raised only by demurrer, and not by motion for a nonsuit.

MUNICIPAL CORPORATIONS — LIABILITY FOR DEFECTIVE STREETS.—The duty to keep streets in repair is a ministerial duty devolving upon the municipality, for a breach of which an action lies in favor of a party injured by reason of a neglect of such duty.

MUNICIPAL CORPORATIONS—LIABILITY FOR DEFECTIVE STREETS.—If a city has exclusive control of its streets, with power to raise money for their construction and repair, a duty arises to the public to keep its streets in a reasonably safe condition for use in the ordinary modes of travel, and it is liable to respond in damages to those injured by a neglect to perform such duty.

MUNICIPAL CORPORATIONS—LIABILITY FOR DEFECTIVE STREETS—PRESENTATION OF DEMAND.—A claim for damages for injury arising from defective streets need not be presented to the city council prior to suit, within the meaning of a statute providing that all demands against a city must be presented to and audited by the city council.

MUNICIPAL CORPORATIONS—LIABILITY FOR DEFECTIVE STREETS — NOTICE. If a dangerous hole or defect in a street has existed for such length of time that the city authorities, by the exercise of ordinary diligence, would have discovered it in time to prevent an accident, the city cannot escape liability therefor for want of actual notice. In such case it is deemed to have constructive notice, which is sufficient without proof of actual notice.

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—NEGLIGENCE.—Failure on the part of city authorities to discover and remedy a dangerous defect in a public street, within a reasonable time, is negligence on the part of the city.

MUNICIPAL CORPORATIONS—PERMIT TO EXCAVATE STREET—NOTICE.—The fact that a city has granted a permit to make a dangerous excavation in a street is notice to the city authorities that the work is in progress, and charges them with the duty of seeing that it is properly conducted, so as to prevent accidents to third persons rightfully upon the street.

MUNICIPAL CORPORATIONS—LIABILITY FOR DEFECTIVE STREETS—NOTICE—NEGLIGENCE.—Whether want of notice of the removal of a guard or barrier around a dangerous excavation in a street is such as to exempt the city from liability for injury to a traveler depends upon whether a sufficient protection was provided in the first instance, as well as the contributory negligence of the traveler, and these questions are for the jury to decide from the evidence.

EVIDENCE—IRREGULARITY IN TAKING.—If plaintiff is unable to attend court, the fact that his evidence is taken at his residence, in the presence of the judge, jury, and counsel for the respective parties, though irregular, is not prejudicial error.

EVIDENCE—THE OPINION OF A WITNESS as to whether a party was badly injured by a fall is admissible in evidence, especially when the effect of the accident is fully shown by other evidence without objection.

DAMAGES—VERDICT, WHEN NOT EXCESSIVE.—A verdict not influenced by improper motives, passion, or prejudice, and awarding such damages as are only a just compensation for the injuries sustained, cannot be disturbed on appeal, on the ground that it is excessive.

L. H. Coon and Coleman & Hart, for the appellant.

Andrews & Morris, for the respondent.

²⁵ **ANDERS, J.** Avenue B is a street running north and south in the city of Snohomish (a municipal corporation of the third class), and is intersected at right angles by First street, which is the principal thoroughfare of the city. About 7 o'clock in the evening of December 10, 1892, the respondent, while walking north on the sidewalk on the east side of the avenue, fell into an excavation, whereby he sustained serious personal injuries. This excavation was on the west side of a brick building fronting on First street and extending north on the east line of avenue B, and extended about three feet into the sidewalk for a distance of thirty-five feet north and south. The respondent, claiming that the city negligently left this excavation open and unguarded ²⁶ and without light or signal to indicate danger, brought this action to recover damages for the injuries so sustained. The city answered, and admitted that it was a municipal corporation, and that avenue B was one of its streets.

It denied all other allegations of the complaint, and, as an affirmative defense, averred that at the place where the excavation was made, Wells & Davis, contractors, were erecting a two-story brick building for J. Otten, the owner of the abut-

ting property, and if any excavation was made in said street it was made by said contractors, their servants, or employees, without the consent or knowledge of the city, and that the defendant had no notice that any such excavation was made, or left unguarded; and that if the plaintiff sustained any injury it was caused solely by his own negligence, and not by the negligence of the defendant. A verdict for thirteen thousand six hundred and twenty-five dollars was returned by the jury against the city, and a judgment was subsequently entered in accordance therewith. At the close of the plaintiff's evidence the defendant moved for a nonsuit, on the ground that the plaintiff had not made a sufficient case for the jury. The motion was denied, and the defendant excepted, and this ruling of the court is assigned as error.

It is urged on behalf of the appellant that the motion for nonsuit should have been granted for the following reasons:

"1. Nonliability of the defendant; 2. Failure of the plaintiff to present his claim and demand payment thereof before beginning this action; 3. It does not appear that the defendant had notice of the defect in the highway complained of; and 4. That it appears from plaintiff's case that he was guilty of contributory negligence."

As to the liability of the city of Snohomish for injuries ²⁷ sustained by individuals by reason of defective streets, it may not be improper here to observe that the question is not properly raised by the motion for a nonsuit. It is a pure question of law, and such questions are properly raised by demurrer. But, inasmuch as no objection is made to its consideration upon the motion, we will consider it as presented and discussed in the able briefs of counsel.

It is urged by counsel for the appellant that the damages claimed in this action are for neglect of governmental duty, and for that reason, as well as for the further reason that there is no express statute in this state making cities of the third class liable for damages resulting from failure to keep their streets in repair, this action cannot be maintained. It must be conceded that there is no legislative enactment declaring these cities liable for such negligence as is alleged in the complaint in this action; and it may also be conceded that the appellant city cannot legally be made to respond in damages for negligence in the discharge of purely governmental duties. But it does not necessarily follow from these

propositions that the city is exempt from liability in the present case.

In the first place, we are of the opinion that the laying out, repairing, and controlling of streets by a chartered municipal corporation does not call forth the exercise of strictly governmental functions. In the performance of such duties, however imposed, the municipality acts primarily for the benefit of the inhabitants of the particular locality. In preserving the peace, caring for the poor, preventing the destruction of property by fire, and preserving the public health, it assumes duties which are said to be in their nature solely governmental (Jones on Negligence of Municipal Corporations, c. 4), and for the nonexercise, ²⁸ or negligent exercise, of which the corporation is not generally liable to individual citizens. But the duty to keep streets in repair is a municipal or ministerial duty, for a breach of which an action will lie in favor of a party injured thereby: *Denver v. Dunsmore*, 7 Col. 328.

In the second place, we think that where, as here, a city has exclusive control and management of its streets, with power to raise money for their construction and repair, a duty (when not expressly imposed by charter) arises to the public from the character of the powers granted to keep its streets in a reasonably safe condition for use in the ordinary modes of travel, and that it is liable to respond in damages to those injured by a neglect to perform such duty. There is undoubtedly a want of harmony among the decisions of the courts upon this question, but we believe the decided weight of authority, as well as sound reason, is in favor of the view above expressed: *Denver v. Dunsmore*, 7 Col. 328; Shearman and Redfield on Negligence, 4th ed., sec. 289; 2 Dillon on Municipal Corporations, 4th ed., sec. 1017; Elliott on Roads and Streets, 446; Jones on Negligence of Municipal Corporations, 88; Cooley on Torts, 2d ed., 746; *Weightman v. Washington*, 1 Black, 39; *Barnes v. District of Columbia*, 91 U. S. 540; *District of Columbia v. Woodbury*, 136 U. S. 450.

But this question is not a new one in this state. It was before the territorial supreme court in *Hutchinson v. Olympia*, 2 Wash. Ter. 314, and was there decided adversely to the contention of the appellant, and was referred to approvingly in *Morgan v. Morley*, 1 Wash. 464.

The statute provides (Gen. Stats., sec. 638) that "all demands against such city shall be presented to and audited by the city council, in accordance with ²⁹ such regulations

as they may by ordinance prescribe; and upon the allowance of any such demand, the mayor shall draw a warrant upon the treasurer for the same, which warrant shall be countersigned by the clerk, and shall specify for what purpose the same is drawn, and out of what fund it is to be paid."

A presentation of the claim sued upon to the city council was not alleged or proved in this instance, but we think it was not such a demand as was contemplated by the legislature in enacting the section of the statute above quoted. The demands there spoken of are those arising out of the ordinary transactions of the city, and which may be examined and compared with the vouchers and "audited," and not those resulting from violations of municipal duties. This construction has virtually been given to statutes even more mandatory in terms than ours by the highest courts of several of the states: See *Kelley v. Madison*, 43 Wis. 638; 28 Am. Rep. 576; *Bradley v. Eau Claire*, 56 Wis. 168; *Jung v. Stevens Point*, 74 Wis. 547; *Lay v. Adrian*, 75 Mich. 488; *Warren v. Davis*, 43 Ohio St. 447; *Sheridan v. Salem*, 14 Or. 328; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459.

We readily agree with the learned counsel for the appellant in the assertion that the city cannot be held guilty of negligence if it had no notice of the existence of the excavation in question. But we are unable to say that no notice had been shown by the plaintiff when he closed his case. It is not necessary in such cases that actual notice be shown. Constructive notice is sufficient. If this dangerous hole, which, according to the statement in appellant's brief, was but eleven feet and five inches from the north line of First street, was in existence for such a length of time that the city's authorities, by the exercise of ordinary vigilance, would have discovered it in time to prevent the accident, the city cannot escape liability for want of notice. Under such circumstances the law imputes notice. Failure to discover and remedy a dangerous defect in a public street, within a reasonable time, is itself negligence. There was evidence tending to prove that this excavation was made some two months before the respondent fell into it, and that the mayor of the city, and at least one of the members of the council, were very frequently in close proximity to it before the accident occurred. Whether the street commissioner ever saw it or not is not disclosed by the evidence, but if he did not he was certainly remiss in the discharge of his official duty. We think the

court committed no error in refusing to withdraw the question of notice from the consideration of the jury. Moreover, it conclusively appears, from the evidence adduced by the defendant, that the city council gave permission to Mr. Ottem to remove the sidewalks on First street and avenue B, and to make this excavation for a basement of a building which he was about to erect. This permit must have been given as early as July, 1892, for it appears that the contract for excavating the basement was let during that month. The fact that a permit was granted was notice to the authorities that the work was in progress, and they were then charged with the duty of seeing that it was properly conducted: *District of Columbia v. Woodbury*, 136 U. S. 450; *Cleveland v. St. Paul*, 18 Minn. 279. See, also, *Prentiss v. Boston*, 112 Mass. 43; *Deering on Negligence*, sec. 174.

And it was incumbent upon them to see that the excavation was so guarded as to protect travelers upon the street from being injured by it. That such was the duty of the city is not disputed, but it is earnestly ³¹ insisted that the evidence fails to establish negligence in that regard, for the reason that it is shown that the excavation was always guarded against accidents, and that the barrier which was usually kept across the sidewalk in front of it was not removed by any of the city authorities, or with their knowledge or consent, and was in its usual place as late as 3 o'clock in the afternoon of the day on which the respondent was injured. The argument is, that so short a time elapsed between the removal of the safeguard and the happening of the accident that constructive notice of the dangerous condition of the sidewalk at the time of the accident cannot be imputed to the city. But whether want of notice or knowledge of the removal would exempt the city from liability, under the circumstances of this case, depends entirely upon whether or not, in the first instance, a sufficient protection was provided to guard travelers upon the sidewalk against accident. It is not pretended that the city itself ever put up any railing or other safeguard around this excavation, and, for aught that appears in the record, it never even required the person at whose instance it was dug to do so. It appears, however, that the owner of the adjoining property, or those who erected the building thereon, did place a loose plank or joist across the sidewalk at or near the south end of the excavation. The end of this plank next to the building and excavation rested

upon a lime barrel, and the other end was supported by a board which was fastened to a post near the outer edge of the walk. If that was an adequate protection, under the then existing circumstances, the city is not liable for any injuries resulting from its removal by some unauthorized person and occurring before it could, by the exercise of reasonable diligence, discover its displacement. But ³³ whether this board, which was without any permanent or substantial fastening whatever, and was liable to be thrown down at any moment by the mere carelessness or thoughtlessness of persons passing along the sidewalk, was, at any time, a sufficient protection to the public, was a question for the jury to decide. And they decided that it was not, and we think their conclusion was amply justified by the facts before them: See *Jackson v. Schmidt*, 14 La. Ann. 806, and *District of Columbia v. Woodbury*, 136 U. S. 450.

Neither do we think that the court erred in submitting the question of contributory negligence on the part of the plaintiff to the jury. The evidence discloses that, at the time of the accident, there were a couple of boards extending from the side of the building, at a point near the middle of the excavation, diagonally across the sidewalk in a southwesterly direction, constituting what the witnesses denominated a "sheer guard." These boards were nailed to a post at their southwestern extremity, but it does not exactly appear how they were supported at the end next to the building. They were about two and one-half feet above the sidewalk. This "sheer" left about one-half of the length of the excavation entirely unprotected. The respondent, as he says, did not see it until he almost got against it, as it was then quite dark. When he discovered it he stepped around to the right and fell into the excavation, which he did not see, and of which he had no knowledge. He knew that a large excavation was dug for the purpose of a basement, and had several times seen the building while in course of construction; but that was the extent of his knowledge of the situation. Whether there was sufficient light upon the street to have enabled him to see where he ³³ was going, was a controverted question, but it is conceded that the area way itself was not lighted at all.

The appellant claims that the fact that the respondent did not retrace his steps and leave the sidewalk when he saw the fence before him, is conclusive evidence of negligence on

his part. But we do not think so. Whether an ordinarily prudent and cautious man would, under similar circumstances, have turned to the right or to the left, was a question for the jury, and not the court, to determine.

The respondent was not able to go to the courthouse at the time of the trial, and his testimony was taken at his residence in presence of the judge, jury, and counsel for the respective parties; and the appellant now claims that the proceeding was contrary to law, and that the judgment ought to be reversed on account thereof. The proceeding was, no doubt, irregular, but it does not appear that it was objected to at the time, nor can we see that the appellant was in anywise injured or prejudiced thereby. Error without injury is not a sufficient ground of reversal.

It is objected that the court committed error in giving certain instructions to the jury, and also in refusing to give certain instructions requested by appellant. The instructions given are voluminous, and a careful examination of them satisfies us that the law governing the case was fairly presented to the jury. Taken together, they are as favorable to the appellant as the facts and the law would warrant.

The appellant also claims that the court erred in permitting a witness to give his opinion as to whether the respondent was badly hurt by his fall, but we think the objection is untenable. And, besides, the effect of the accident upon the respondent was fully shown by other evidence, to which no objection was interposed. ²⁴ In our opinion, appellant was not prejudiced by any ruling of the court in admitting or excluding testimony.

Lastly, it is contended that the verdict (thirteen thousand six hundred and twenty-five dollars) is excessive, and, for that reason, should be set aside and a new trial ordered. The code (Code Proc., sec. 400) provides that a new trial may be granted for excessive damages, appearing to have been given under the influence of passion or prejudice. But, in this instance, we perceive nothing indicating in the slightest degree that the jury were influenced by any improper motive whatever in assessing plaintiff's damages. Nor are we able to say that the damages awarded are more than a just compensation for the injuries sustained by the respondent. That those injuries were of a very serious character will appear from the following clear and concise statement contained in the brief of counsel for the appellant: "He received a scalp

wound, and an injury to the small of the back, and probably a resultant injury to the kidneys. The lower extremities are partially paralyzed, and it is only by the use of crutches he is able to walk about the house. He suffers much pain, sleeps but little, and will never be able to do work as a turner and millwright, or any other kind of labor, and will probably not live longer than a year. Prior to this injury he was a healthy man." In view of these facts, we are not disposed to disturb the verdict on the ground of excessive damages.

We find no substantial error in the record, and the judgment is therefore affirmed.

DUNBAR and SCOTT, JJ., concur.

HOYT, C. J., dissents.

IN THE CASE of *Saylor v. Montesano*, 11 Wash. 323, it was shown that Mary A. Saylor was driving up to the sidewalk of one of the principal streets of the city of Montesano, for the purpose of taking a person into her carriage, and, while so doing, her horse stepped upon one end of a plank, which, together with other sticks and rubbish, was lying in the street. The plank flew up, striking and penetrating the body of the horse, causing its death some time thereafter. The plaintiff presented her claim for damages to, and it was thereafter rejected by, the city council, and she then sued the city for the value of the horse and money expended in attempting to cure it, basing the action on the negligence of the city in permitting the plank causing the injury to be and remain in the street. After a demurrer to the complaint had been overruled, the city answered by way of general denial, setting up affirmatively that the street in question was in safe condition as to persons exercising reasonable care, that such plank in the street did not constitute a defect, nor an obstruction therein, and, if there, was placed there without the notice, authority, or knowledge of the city, and so remained. On the trial there was a verdict and judgment for the plaintiff, and the defendant appealed.

It was sought to be maintained on appeal that the action at bar could not be maintained, and that the demurrer to the complaint should have been sustained. The supreme court, in passing upon this question, said:

"This question was presented for our determination in the recent case of *Sutton v. Snohomish* (ante, p. 847), and we there came to a conclusion at variance with the position here attempted to be maintained by the appellant. In the decision in that case we adhered to the doctrine announced by our territorial supreme court in *Hutchinson v. Olympia*, 2 Wash. Ter. 314, and by the supreme court of the United States in *Barnes v. District of Columbia*, 91 U. S. 540, and in other cases—in fact, as we think, by the majority of the courts of the states outside of New England—and it is not necessary to here reiterate what was there said.

"Judge Dillon, after an exhaustive review of the authorities upon this subject, expresses the conclusion reached by him as follows:

"But where the duty to repair is not specifically enjoined, and an action for the damages caused by defective streets is not expressly given, still, both the duty and the liability, if there be nothing in the charter or in legislation

of the state to negative the inference, have often, and in our judgment properly, been deduced from the intrinsic nature of the special powers conferred upon the corporation to open, grade, improve, and exclusively control public streets within their limits, and from the means which, by taxation and local assessments, or both, the law places at its disposal to enable it to discharge this duty'; 2 Dillon on Municipal Corporations, sec. 1018.

"The motion for a nonsuit was, in our judgment, properly denied. The grounds of the motion, exclusive of those which were included in the demurrer were: 1. That upon the pleadings the defendant was entitled to recover; and 2. That the plaintiff failed to make a case for the jury.

"In respect to the first proposition, it is claimed that the respondent based her cause of action upon the alleged negligent act of the street commissioner in putting the alleged obstruction in the street; and it is insisted that in no event is the city liable for the negligence of such officer.

"We think, however, that the city is liable for the negligent acts of its street commissioner done in the discharge of his official duties, but, whether it is or not, it certainly is liable for its own neglect of duty. An examination of the pleadings discloses that the respondent not only alleged that the street commissioner placed the planks or sticks in the street, but that they were negligently allowed to remain there by the city for several days prior to the accident, and that the city had, or should have had, notice that they were in the street at the time of the accident. We cannot, therefore, say that the cause of action was based upon the negligence of the street commissioner any more than it was upon that of the city itself, and consequently we are unable to concede that the city should recover upon the pleadings.

"In regard to the second proposition, we are of the opinion that the position of the appellant is not tenable. Appellant claims that it was not proved that the city had notice, either actual or constructive, but, as we construe the evidence, it proves actual notice. Notice to the street commissioner, upon whom was imposed the duty of keeping the streets in proper condition, was notice to the city. And the street commissioner himself testifies that, two or three days before the accident in question occurred, he took several pieces of broken planks or sticks from the sewer under the sidewalk, and put them together near the sidewalk at about the place where the plaintiff's horse was injured. It is true he said he did not remember the particular piece which caused the injury, but he did not say that it was not one of those he took from the sewer, and it does not appear that there were any such sticks elsewhere on the street in that vicinity at the time of the accident, or before. He further testified as follows: 'It was muddy. I was waiting for better weather to come, as I did not always take them away unless there was enough to pay to hire a team. When any trash stopped the sewer up, I generally piled it up beside the walk until there was enough at different places to pay.' From this language it appears that the street commissioner not only had notice that this 'trash' was in the street, but that he did not deem it proper for him to permit it to remain there, as he was intending to remove it at some convenient time, or when it would 'pay' to do so. That the public had a right to have that street kept at all times in a reasonably safe condition for travel in the ordinary modes, regardless of the convenience or inconvenience of the street commissioner, seems to have been entirely forgotten until it was too late to prevent the injury complained of.

"It is also claimed that the evidence shows want of due care on the part of the respondent, but that was one of the questions presented to, and determined by, the jury. All that was required of the respondent was the exercise of ordinary care, and the fact that, while driving upon the street, she failed to discover these sticks until her horse stepped upon them would not of itself, as matter of law, constitute negligence. The city had improved the street and left it open to the public throughout its entire width. It was graveled from the center outward for the greater part of the distance to the sidewalk, and was comparatively level, and its surface was in proper condition for usual travel, 'from sidewalk to sidewalk. Under these circumstances it was the duty of the city to keep the whole of it in a safe condition for passage: Elliott on Roads and Streets, 455; Jones on Negligence of Municipal Corporations, 147.

"It is likewise claimed by the learned counsel for the appellant that this collection of broken planks and sticks did not constitute a defect or obstruction in the street, and was not dangerous to travel, as it was lying on a portion of the street not usually traveled, and which it was not the duty of the city to keep in repair, and free from obstructions and defects. That this particular portion of the street was not in a safe condition was demonstrated by what actually happened thereon. Respondent not only had a right to drive over any portion of the street, but a right to expect that all portions of it were in a safe condition for ordinary use.

"Whether a particular thing constitutes a defect or obstruction, or is dangerous to travel, does not depend altogether upon its size. Small objects, as well as large ones, may render a street unsafe, and hence cities have frequently been held liable for injuries caused by loose cobblestones. In *Hazard v. Council Bluffs*, 87 Iowa, 51, the defendant city was made to respond in damages for injuries to a horse, caused by stepping upon a brickbat which was in a pile of rubbish on the street.

"Ordinarily, the question of whether a street is in proper repair and safe for ordinary travel is a question of fact, to be determined by the jury, and, when so determined, their finding will not be disturbed, unless absolutely unsupported by the evidence."

MUNICIPAL CORPORATIONS—LIABILITY FOR DEFECTIVE STREETS.—A city, bound by its charter to keep its streets in repair, is liable for an injury occasioned by its neglect to do so: *Erie v. Schwingle*, 22 Pa. St. 384; 60 Am. Dec. 87, and note; *O'Neill v. New Orleans*, 30 La. Ann. 220; 31 Am. Rep. 221; *Farquar v. Roseburg*, 18 Or. 271; 17 Am. St. Rep. 732, and extended note; *Maus v. Springfield*, 101 Mo. 613; 20 Am. St. Rep. 634. It is the duty of a city to keep its streets in such condition that persons using them properly and prudently can do so without injury to themselves: *Town of Knightstown v. Musgrove*, 116 Ind. 121; 9 Am. St. Rep. 827, and note; *City of Anderson v. East*, 117 Ind. 126; 10 Am. St. Rep. 35, and note. See, also, the notes to *Whitfield v. Meridian*, 14 Am. St. Rep. 598; *Welter v. St. Paul*, 12 Am. St. Rep. 753; *Fort Worth v. Crawford*, 15 Am. St. Rep. 847, and *Pettengill v. Yonkers*, 15 Am. St. Rep. 446.

MUNICIPAL CORPORATIONS—DEFECTS IN STREETS—NOTICE.—A municipal corporation must be deemed to have knowledge of the dangerous condition of a street, when it had been in such condition two months before an accident: *Pettengill v. Yonkers*, 116 N. Y. 558; 15 Am. St. Rep. 442, and note; to the same effect see *Whitfield v. Meridian*, 66 Miss. 570; 14 Am. St. Rep. 596, and note with the cases collected.

MUNICIPAL CORPORATIONS — EXCAVATIONS IN STREETS—LIABILITY FOR INJURY CAUSED BY.—A municipal corporation is liable to a person who, without fault, falls into an excavation made in a public street by a contractor with the city, who has neglected to provide proper guards and lights for the protection of persons passing the place: *Storrs v. Utica*, 17 N. Y. 104; 72 Am. Dec. 437, and note; *Lloyd v. Mayor*, 5 N. Y. 369; 55 Am. Dec. 347, and note; *Oliver v. Worcester*, 102 Mass. 489; 3 Am. Rep. 485; *contra*, *James v. San Francisco*, 6 Cal. 528; 65 Am. Dec. 526, and note; *City of Erie v. Caulkins*, 85 Pa. St. 247; 27 Am. Rep. 642, and extended note. A city leaving unguarded at night, without danger signals, an excavation extending upon or near a crosswalk, is guilty of gross negligence: *City of Olathe v. Mizee*, 48 Kan. 435; 30 Am. St. Rep. 308, and note. See, also, the notes to *Creed v. Hartmann*, 86 Am. Dec. 347, and *Sparhawk v. City of Salem*, 79 Am. Dec. 702.

WITNESSES — ADMISSIBILITY OF OPINIONS OF NONEXPERTS.—One who was in attendance on an injured person and saw his apparent condition may, although not an expert, give testimony as to the extent of the injured person's suffering: Extended note to *Alabama etc. R. R. Co. v. Frazier*, 30 Am. St. Rep. 38.

DAMAGES—EXCESSIVE VERDICT—SETTING ASIDE.—When a verdict for damages is for so large an amount that it can be reasonably accounted for as the result of an improper sympathy or unreasonable prejudice, it will be set aside as excessive: *Louisville etc. R. R. Co. v. Minogue*, 90 Ky. 369; 29 Am. St. Rep. 378, and note; *Western Union Tel. Co. v. Houghton*, 82 Tex. 561; 27 Am. St. Rep. 918.

DECKER v. SCHULZE.

[11 WASHINGTON, 47.]

VENDOR AND VENDEE — CONTRACT FOR SALE OF LAND — RESCISSION.—A complaint by a vendee simply alleging that the vendor was not seised in fee or possessed of the right to sell and convey the land in dispute, does not state a sufficient defect of title to enable the vendee to sustain an action to rescind the contract of conveyance on the ground of failure of title.

VENDOR AND VENDEE — EXECUTED CONTRACT FOR SALE OF LAND—RESCISSION—FAILURE OF TITLE.—If a contract for the sale of land has been executed, a court of equity has no jurisdiction to rescind it on the ground of a defect in or failure of title to part of the land, in the absence of fraud or material misrepresentation or concealment on the part of the vendor.

A. H. Kenyon and Jones, Voorhees & Stephens, for the appellants.

W. A. Huncke, for the respondents.

⁴⁸ GORDON, J. The complaint in this action shows in substance: 1. That on November 17, 1890, the respondents sold to appellant Kate Decker two adjoining tracts of land

in Spokane for five thousand five hundred dollars, giving their deed, containing a covenant, that they were owners in fee, and with covenants of general warranty, and receiving from appellant Kate Decker part payment of the purchase price in cash, and appellant's mortgage on said land to secure the remainder; 2. That thereafter appellants made payments on said remainder, the last one on December 18, 1891, and that they paid the taxes on said land regularly for three years; 3. That the respondents were not "seised in fee or possessed of the right to sell and convey the last-described portion of said property [being a strip lying at the north end of the entire premises] in manner and form as aforesaid"; 4. That the remainder of the premises without the strip was useless for appellants' purposes; 5. That prior to bringing suit, appellants tendered deed of said land to respondents, which would have placed them in statu quo, and demanded back the purchase money paid; all of which was refused by the respondents.

Appellants ask for a rescission of the sale, for the return of the purchase money paid, and for a vendee's ⁴⁰ lien on said land to secure said purchase money. The complaint is very voluminous, and to set it out in full would occupy too much space. The foregoing statement is sufficient, however, to give a proper understanding of it. Respondents interposed a general demurrer, which was sustained by the lower court, and appellants electing to stand on their complaint, judgment of dismissal was entered, and from such order and judgment this appeal is prosecuted.

Appellants, for a reversal of the judgment, rely upon the cases of *Sears v. Stinson*, 3 Wash. 615, and *Moody v. Spokane etc. Street Ry. Co.*, 5 Wash. 699.

In *Sears v. Stinson*, 3 Wash. 615, the land was sold, and a deed with full covenants given. The purchaser paid the purchase price, and the title failed to a strip. The purchaser in that case brought his action for damages on the breach of the covenant for seisin, strictly an action at law; while in the case at bar the appellants brought this action to rescind the sale, purely an action in equity. In *Sears v. Stinson*, 3 Wash. 615, the question for determination was whether an action for damages was the proper action, while, in the case at bar, the question is whether equity will rescind on the facts stated.

This court, in the *Sears* case, held that an action at law for damages on the breach of covenant was properly maintain-

able, and was not called upon to decide any other question in the case; and the language of the court: "There is no doubt but that the plaintiff would be entitled to the equitable relief of a rescission of the contract, if he desire it," found on page 616, was merely an unguarded expression not at all necessary to the decision of the case, and mere obiter dictum. The court, moreover, on page 617, states forcibly the doctrine upon which the case was decided, viz.:

50 "But in this case the contract, so far as it can be enforced, is already performed, and there is nothing to give a court of equity jurisdiction. Damages for the balance is all that is left."

The case of *Moody v. Spokane etc. Street Ry. Co.*, 5 Wash. 699, is also wholly inapplicable to the case at bar, both upon the facts and the principle involved. In that case the respondent brought suit upon a contract which he himself had not performed. The court said:

"If the respondent had not performed his part of the contract . . . he could not commence this action. On the other hand, the appellant would have the right to rescind the contract."

The opinion in that case further proceeds as follows: "It is not the ordinary case of a breach of a covenant in a deed, where the remedy would be a suit on the warranty, but the respective contracts here are dependent upon each other."

We are entirely satisfied with the result reached by this court in each of those cases, but are unable to conclude that either of them is authority in support of appellant's contention here.

The sole allegation of defect or failure of title is alleged in the complaint, paragraph 9, to be that "they [the grantors] were not seised in fee, or possessed of the right to sell and convey the last described portion of said property, in manner and form as aforesaid." This is, at most, equivalent merely to a statement that their interest in the granted premises was less than a fee simple estate, and cannot be held to be equivalent to an allegation that they had no estate or interest in the premises. We think this is wholly insufficient to constitute good pleading at law or in equity. There are two descriptions in the deed. As to one tract, no question of title is raised; as to the other, it is, in effect, ⁵¹ said that the grantors had not a fee simple estate, and, without stating how far their actual estate or interest falls short, and without any

statement as to the true condition of the title, from which relief could be afforded at law or in equity, appellants, after a lapse of nearly four years, ask a court of equity to rescind the contract.

"It is a dangerous and delicate operation for a court to pass upon a title which nobody is asserting and no one disputing": *Key v. Jennings*, 66 Mo. 356.

For this reason alone, if no other existed, we would be disposed to affirm the judgment.

Assuming the fact to be, however, that title to one of the tracts conveyed has wholly failed, and that it was the design of the pleader to so allege, a very interesting question is presented, concerning which Chief Justice Sharkey, in *Parham v. Randolph*, 4 How. (Miss.) 435, 35 Am. Dec. 403, says: "The extent to which courts of chancery will go in giving relief to the vendee of land by preventing the collection of the purchase money, and rescinding the contract, is a question which is much embarrassed by conflicting adjudications. It has been often litigated, but the numerous decisions seem to have increased rather than diminished the doubts."

Appellants, by their complaint, invoke the equity powers of the court to procure a rescission. Respondents concede that appellants have a right of action, but insist that it must be at law for damages. Here let us remark that a court of equity is not an appropriate tribunal for the trial of title to land. As is said by Chancellor Kent in *Abbott v. Allen*, 2 Johns. Ch. 519, 7 Am. Dec. 554:

"This court may, perhaps, try title to land when it arises incidentally; but it is understood not to be within its province, when the case depends upon a simple legal title, and is brought up directly by the bill. The ⁵² power is only to be exercised in difficult and complicated cases, affording peculiar grounds for equitable interference. . . . The plaintiff has the means of bringing the legal title to a test, whenever he pleases, by an action at law on his covenant of seisin."

The complaint in this action nowhere alleges any fraud, concealment, or misrepresentation on the part of the respondents concerning the title to the premises conveyed, unless fraud is to be inferred from their covenant of ownership, coupled with failure of title to a portion of the premises conveyed. It is nowhere charged that they had knowledge of any fact affecting the title which was concealed from appel-

lants, nor is it asserted that the respondents are either insolvent or nonresidents of this state. It concedes that at all times since the deed was given, the appellants have been in possession of the premises, and have paid taxes thereon for years, and neither alleges eviction nor that they are threatened with suit on the part of any one holding or claiming an older or superior title thereto. And if, as has been sometimes asserted, a covenant in a deed that the grantor is the "owner in fee" differs from the covenants of quiet possession, warranty of title and the like, and that a breach occurs at once if ownership in fee does not in fact exist, and that the vendee is not required to await eviction before maintaining his action, we are nevertheless unable to conclude that equity has any jurisdiction to afford the relief here prayed. It is fundamental that equity will not interfere where the law affords a plain, adequate, and complete remedy.

"The remedy must be plain, for if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate, for if it falls short of what the party is entitled to, that founds a jurisdiction in ^{as} equity. And it must be complete, that is, it must attain its full end at law. It must reach the whole mischief, and secure the whole right of the party": Mitford's Chancery Pleading, 6th Am. ed., 2, note.

"Covenants for title, like all other covenants, are, of course, mere contracts. . . . For a breach of contract, the common law provided a single remedy, a recompense in damages": Rawle on Covenants for Title, sec. 354.

Here is a contract which has been fully executed; nothing remains to be performed; the consideration has been paid, the conveyance executed, and full covenants have been given and accepted. There is no suggestion of insolvency or non-residency, or that the plaintiff's remedy at law would not be adequate. Hence, we do not find any good reason for interference by a court of equity.

It seems to us that much of the apparent conflict that is found in the adjudicated cases on this subject is due to a failure to observe the distinction which obtains between the rules applicable to a contract still executory and one actually executed.

"The distinctions between the rules which govern the relation of vendor and purchaser before and after the execution of the deed—while the contract is still executory, and after it is executed—are broad and familiar. Although the gen-

eral principles of the contract of sale of real estate, both in this country and in England, exact less of a vendor than the rules of the civil law demand, yet, while the contract is still executory, they recognize and enforce the right of the purchaser to a title clear of defects and encumbrances, and this right does not depend upon the terms of the contract, but is given by the law; and is not, except in particular cases, affected by the nature and extent of the covenants for title which the purchaser is to receive": *Rawle on Covenants for Title*, sec. 319.

54 "Generally speaking, a purchaser after a conveyance has no remedy, except upon the covenants he has obtained, although evicted for wanted of title; and however fatal the defect of title may be, if there is no fraudulent concealment on the part of the seller, the purchaser's only remedy is under the covenants": 1 *Sugden on Vendors*, 383; *Rawlins v. Timberlake*, 6 T. B. Mon. 225; *James v. McKernon*, 6 Johns. 543; *Bumpus v. Platner*, 1 Johns. Ch. 213.

And Lord Campbell, in *Wilde v. Gibson*, 1 Clark & F., N. S., 605, says of this distinction: "If there be, in any way whatever, misrepresentation or concealment, which is material to the purchaser, a court of equity will not compel him to complete the purchase; but where the conveyance has been executed, I apprehend that a court of equity will set aside the conveyance only on the ground of actual fraud."

In *Thompson v. Jackson*, 3 Rand. 504, 15 Am. Dec. 721, Justice Carr says: "Executory contracts for real property, and some other subjects, offer to the party the alternative of either suing at law for damages, or asking the aid of equity to obtain the specific thing. . . . Very different is the question where a party asks the court to rescind a contract, especially an executed contract. In the first case, the court merely decides which of two remedies a party shall pursue. In the second, it annihilates a solemn contract, rendered still more imposing by the fact that the parties have carried it into execution. . . . The vendor has parted with the title and possession of his land, and has taken his money, bonds, or other equivalent. The vendee has entered into possession, . . . and, for security of his title, has taken a deed with such covenants and warranty as his contract called for. To undo all this is a strong-handed measure, and none but a clear and strong case will justify it. Accordingly, we find it laid down in all the equity books that the court is in the 55 daily

habit of refusing the specific execution of contracts; which, at the same time, it just as promptly refuses to rescind. . . . When the application is to rescind an executed contract for land, the English books lay it down as a general rule (admitting of but few exceptions), that to justify such decree, fraud must appear; and this fraud must be distinctly put in issue by the pleadings. If the charge be a mere failure of consideration, arising from the sale of the defective legal title, unmingled with fraud or mala fides of any kind, it is generally laid down that the vendee will be left to the covenants and warranty in his deed."

"Where a contract for the sale of land has been executed by the giving of a conveyance, the court of chancery will not rescind the contract upon the ground of a mere defect of title, where there has been no fraud on the part of the vendor, but will leave the purchaser to his remedy upon the covenants in his deed": *Woodruff v. Bunce*, 9 Paige, 443; 38 Am. Dec. 559,

In *Denston v. Morris*, 2 Edw. Ch. 37, it is said: "It is a well-settled rule of this court, that a grantee to whom possession has been delivered, under covenants of title and warranty, can have no relief in equity against his grantor for a return of the purchase money or security on account of defect or failure of title; because he has taken care to secure himself by covenants, and, if evicted, can have an adequate remedy at law. . . . But, if fraud is shown, either in making the contract of sale or in executing it, and whether there be covenants inserted in the deed to secure the title or not, the purchaser, in case of eviction or disturbance of his possession, or whenever it is ascertained that the title is defective, may come into this court to be relieved from his purchase, or to obtain indemnity against the consequences of the fraud. Imposition and fraud upon the purchaser, by any willful misrepresentation or concealment, take the case out of the general rule, and entitle him to be redressed in equity, in addition to and beyond the covenants in the deed."

⁵⁶ And in *Wiley v. Fitzpatrick*, 3 J. J. Marsh, 582, it is said: "The remedy which a court of law can afford in such cases, unless some extraneous circumstances intervene to prevent it, is fully adequate to all the demands of justice; and that is a sufficient reason why a court of chancery will not interpose. A purchaser of land who has paid part of the purchase money, and given a bond and mortgage for the residue, and is in undisturbed possession, will not be relieved

against the payment of the bond, or proceedings on the mortgage, on the mere ground of a defect of title, there being no allegation of fraud in the sale, nor any eviction; but must seek his remedy at law upon the covenants in his deed. If the purchaser was imposed on by any intentional misrepresentation or concealment, he may have redress [in equity] in addition to and beyond his covenants": *Abbott v. Allen*, 2 Johns. Ch. 519; 7 Am. Dec. 554.

"It is requisite that the charge of fraud should be made a distinct ground of allegation by the party in pleading, otherwise it is not to be deemed an issue, and cannot affect the contract in question": *Gouverneur v. Elmendorf*, 5 Johns. Ch. 79.

In that case Chancellor Kent says: "A vendor, selling in good faith, is not responsible for the goodness of his title beyond the extent of the covenants in his deed."

In *Patton v. Taylor*, 7 How. 159, the supreme court of the United States, speaking through Mr. Justice Nelson, say: "A purchaser, in the undisturbed possession of the land, will not be relieved against the payment of the purchase money on the mere ground of defect of title, there being no fraud or misrepresentation; and that, in such a case, he must seek his remedy at law on the covenants in his deed."

⁵⁷ In *Simpson v. Hawkins*, 1 Dana, 303, it is said that: "A contract for the sale of land, unaffected by fraud, cannot be rescinded in chancery after it has been carried into effect by a conveyance. . . . If the grantee in possession loses part of the land, he may recover, on the warranty, damages commensurate with the loss; but it is not cause for rescinding the whole contract. . . . I regard it (says Judge Underwood in that case) as immaterial whether the vendors had any title at all. If they conveyed with warranty, and put the vendee in possession, I hold that there can be no rescission of the contract where there has been no fraud, no eviction, and no assertion of an adverse claim." This case is cited approvingly by the supreme court of the United States in *Putton v. Taylor*, 7 How. 159.

"Where a conveyance of land has been made by a deed executed with covenants of warranty, and a note has been received in consideration of the conveyance, a partial failure of title will not constitute a defense to the note, but the remedy of the party must be by suit on the covenants of his deed": *Chase v. Weston*, 12 N. H. 413.

In *Knapp v. Lee*, 3 Pick. 452, it is said to be in dispute in Massachusetts, whether a total failure of covenants of warranty of land would constitute a defense to a note, but no doubt exists that a partial failure of title is not permissible as a defense. In Maine it has been held that the total failure of title constitutes no defense to a note given for consideration money: *Lloyd v. Jewell*, 1 Greenl. 352; 10 Am. Dec. 73; *Jenness v. Parker*, 24 Me. 289.

In the case of *English v. Thomasson*, 82 Ky. 281, the court say: "It has been repeatedly held by this court that, in the absence of fraud, or insolvency, or nonresidency of the vendor, that a vendee in the peaceable possession of the granted premises by virtue of a conveyance containing ^{ss} a covenant of general warranty is not entitled to a rescission of the contract when sued for the purchase money, although the vendor may, at the time of the sale, have represented his title as perfect, when, in fact, it was not; and that in such a case the vendee must pay the money, and rely upon the covenant of warranty in case of an eviction. . . . A mere mistake, or error of opinion, as to the validity of his title would not constitute a fraud. The warranty, which the appellant chose to accept, was designed to protect him against such a misrepresentation, and is effective for that purpose; and he must await an eviction, if it ever occur, and then look to his remedy at law upon the covenant in his deed."

We have already suggested in this opinion that a covenant on the part of a grantor that he is the "owner in fee" of premises conveyed, when, in fact, his title fails or is defective, might give an immediate right of action to his grantee, and, unlike covenants of quiet possession, warranty of title, and the like, the grantee would not be obliged to await eviction, but for a breach in either case, in the absence of strong equitable considerations not disclosed by the bill in this case, we hold that his remedy is at law for the damages sustained.

In *Edwards v. McLeay*, 10 Coop. 308, 2 Swanst. 287, the bill charged, and the court found the fact to be, that the vendor knew and concealed a fact material to the validity of his title, and that the defect could not have been ascertained from the abstract. A rescission was decreed, the learned master of the rolls holding that if the vendor knows and conceals a fact material to the validity of his title, of which fact the vendee is ignorant, relief (in equity) is to be afforded to the purchaser. This case has been often cited in support of a view of the law

contrary to that we have taken, but it will be observed that the facts there charged and ⁵⁹ found differ very materially from those alleged in this bill. It was there asserted that the vendor knew at the time of the sale that a large portion of the granted premises was claimed by the parish as a public common. This fact he concealed from the purchaser, and the abstract did not disclose it. The court granted a rescission, holding that the vendor's silence concerning it, when he knew of the assertion of such adverse claim, constituted such fraud as warranted the interposition of equity. And Lord Eldon, in affirming the judgment of the master of the rolls, upon appeal, said:

"That if one party makes a representation which he knows to be false, but the falsehood of which the other party has no means of knowing, this court will rescind the contract": *Edwards v. McLeay*, 2 Swanst. 302.

It will be observed that the chancellor, in affirming, placed it upon the assumption that the seller knew the representation to be false.

There are cases wherein the jurisdiction of equity has been asserted upon facts similar to those alleged in the complaint in this case. Among the leading cases so holding is *Parham v. Randolph*, 4 How. (Miss.) 435, 35 Am. Dec. 403, in which the learned chief justice of Mississippi, in support of the position there taken, quotes Chancellor Kent as follows: "The good sense and equity of the law on this subject is, that if the defect of title, whether of lands or chattels, be so great as to render the thing sold unfit for the use intended, and not within the inducement to the purchaser, the purchaser ought not to be held to the contract, but be at liberty to rescind it altogether": 2 Kent's Commentaries, 475.

An examination of the entire section, and particularly that part immediately preceding the language ⁶⁰ above quoted, makes it manifest, however, that the learned chancellor was there referring to contracts that are executory merely. The views of that distinguished jurist, upon the questions involved in the determination of this case, are, to our better satisfaction, found in the cases of *Abbott v. Allen*, 2 Johns. Ch. 519, 7 Am. Dec. 554, and *Gouverneur v. Elmendorf*, 5 Johns. Ch. 79. And it seems to us that the reference by the learned judge in *Parham v. Randolph*, 4 How. (Miss.) 435, 35 Am. Dec. 403, to the case of *Greenleaf v. Cook*, 2 Wheat. 13, is equally unfortunate. Defendant in that case, in an action

on a promissory note given for the purchase price of real property, set up by way of defense a prior outstanding mortgage and a decree of foreclosure, of which mortgage it was shown that he had no knowledge at the time of purchase. Upon these facts, the court, speaking through Chief Justice Marshall, say: "The note was given with full knowledge of the case. Acquainted with the extent of the encumbrance, and its probable consequences, the defendant consents to receive the title which the plaintiff was able to make, and, on receiving it, executes his note for the purchase money. To the payment of the note given under such circumstances, the existence of the encumbrance can certainly furnish no legal objection." This was the sole question determined in that case. *Woods v. North*, 6 Humph. 309, 44 Am. Dec. 312, is another case frequently cited in support of the contrary doctrine. The court there say: "In this deed there is a covenant of seisin in which the defendant asserts that he has a right to sell and convey this land. Here is an express misrepresentation."

In that case the sole representation of title was confined to that expressed in the covenant contained in the deed. There being a superior outstanding title, a ⁶¹ rescission was decreed. We think the misrepresentation which will entitle a party to rescind an executed contract must be something more than the statement of the vendor of what he innocently, and in good faith, believes to be true, without knowledge or notice of any fact affecting his title, and especially where the vendor is not insolvent or a nonresident, and where the vendee has exacted and accepted full covenants.

In a note found on page 639 of his work on Covenants for Title, Mr. Rawle says of this case of *Woods v. North*, 6 Humph. 309, 44 Am. Dec. 312, that, "It is believed that there is no well-considered class of cases which give such an interpretation to a covenant."

Nor will equity take jurisdiction in this case on the ground of mutual mistake, although there is some authority for the assertion of such jurisdiction. In the case of *Leal v. Terbush*, 52 Mich. 100, the plaintiff purchased of the defendant a parcel of land which had belonged to defendant's husband, and to which she had no title excepting a life estate under the will, and a deed was given by her with the usual covenants. The court held that the vendee could not rescind on the ground of mistake as to the vendor's title, as the mistake

did not go to the entire consideration; the vendee, supposing the vendor had title in fee, simply accepted of a mere life estate. In the opinion, Judge Cooley says:

"He [plaintiff] appears to have provided against the contingencies of her title falling short of the complete fee by requiring of her covenants for his protection. . . . It is certain that the parties took into consideration possible defects in the title, and bargained in respect to them. . . . The conveyance purports to be in fee, and the assurances, we must suppose, are to him, his heirs and assigns. The plaintiff has, therefore, received value for the money paid; and if not to ^{the} the full extent of the payment, the deficiency is uncertain, and dependent on contingencies, and does not go to the entire consideration. If this contract can be rescinded on the ground of mistake of fact, then every purchase of land, the title to which proves in any respect defective, must be subject to rescission also, unless the parties have expressly bargained with mutual knowledge that defects existed. If this were the law, covenants would be of little importance."

We deem it unnecessary to multiply authorities in support of this position. The complaint in this action does not allege that the respondents, knowingly conveyed what they did not own, or that they concealed any fact affecting the title which was within their knowledge, and which they were bound to disclose; and while it is true that the "arm of equity is long and powerful," it is also true, as is tersely said by Lord Nottingham, that the "chancery mends no man's bargain." Willful misrepresentation or concealment is nowhere charged, nor can it be ascertained in what respect, or to what extent, the title conveyed by the respondents has failed. They may, for aught that appears to the contrary, well have conceived that they were "seised in fee" of the premises, and have acted in good faith in executing the conveyance, and if, in so doing, they have erred in estimating their estate, and the damages flowing from such error are susceptible of definite ascertainment, and the respondents solvent and residents of the state, what occasion is there for the interposition of equity?

There are many expressions to be found in the reported cases and in text-books that are seemingly antagonistic to the conclusion we have reached in disposing of this case. Of many of them, however, it may be said that they at most are merely "loose dicta without any fullness of illustration,"

and want that ⁶³ precision which is requisite to give much force to them.

The judgment appealed from is affirmed.

HOYT, C. J., and ANDERS, SCOTT, and DUNBAR, JJ., concur.

VENDOR AND PURCHASER—RESCISSON BY PURCHASER—DEFECTS IN TITLE. A purchaser of land who has accepted the title, and is in undisturbed possession, cannot, unless fraud or mistake is shown, sustain an action for rescission, or claim an abatement of price on the mere ground that there is an outstanding paramount title in another, by which the purchaser may at some time be defeated: *Munro v. Long*, 35 S. C. 354; 28 Am. St. Rep. 851, and note; but compare *Herman v. Somers*, 158 Pa. St. 424, 38 Am. St. Rep. 851, and note.

KREMER v. WALTON.

[11 WASHINGTON, 120.]

MECHANICS' LIENS—BUILDING ON LEASED LAND.—If a lessee causes a building to be erected on leased premises, under an agreement between himself and the lessor that the former is to pay for the building, and the latter is to pay him therefor by allowing him to retain rents, the interest of both the lessor and lessee is subject to mechanics' liens growing out of the erection of the building.

F. H. Rudkin, Jones & Newman, and McKinnon & Murans, for the appellants.

Whitson & Parker and D. H. Carey, for the respondents.

¹²⁰ HOYT, C. J. This action was brought to foreclose the liens of certain mechanics and materialmen who had performed labor and furnished material in the erection of a certain brick building upon property which, at the time, belonged to J. M. Ashton. The work was done and materials furnished at the instance of one O. W. Johnson. His relations to the property and to Ashton, the owner, were evidenced by certain correspondence by mail and telegraph which had been had between him and said Ashton.

In his testimony upon the trial said Ashton made it appear that he had no knowledge of the fact that said Johnson had entered upon the erection of the building until after the labor and materials for which the liens were claimed had been furnished. Such testimony is conclusive, so far as the understanding of said Ashton was concerned, but can have little weight in determining ¹²¹ the contract relations be-

tween him and said Johnson, for the reason that such relations must be determined by the construction of the correspondence above referred to, regardless of what may have been the intention of the owner. From such correspondence we are forced to the conclusion that said Johnson, and those dealing with him, had a right to assume that said Ashton had consented to the erection of the building by said Johnson, in pursuance of the terms of a letter written by said Ashton to said Johnson, which was in substantially the following form:

"DEAR SIR: Referring to our conversation here of this date, I am willing to make you a lease of my lot adjoining the premises now occupied by you at North Yakima upon the following terms and conditions: You to construct thereon, under my supervision and subject to my approval, a one-story brick building conformable to the ordinances of said city; and, in addition thereto, the side nearest the depot to be at least twenty inches in thickness, the rear wall to be at least twelve inches and the front wall to be at least twenty inches, said front wall to be built of or faced with pressed brick of first-class quality, so as to give the same a first-class and finished appearance, it being understood that the northeast wall, or that farthest away from the depot, shall be arranged by a party wall contract between myself and the owner of the building you are now occupying. This contract shall be so as to give me the right to insert joist into said wall, and to make me owner of one-half of his wall for the entire height, so that in the event of my wanting to add an additional story (which is the object of having the twenty-inch wall at the side and front of the building hereby contemplated) I will have the benefit by this party wall contract of the wall of his second story when putting up the second story upon the building above mentioned. I would want the work to be first-class in every particular and well finished, but am willing that you should arrange the doors and windows ¹²³ at front and rear in such a way as to be of the utmost convenience to yourself. It is understood in this arrangement that the building which is to be constructed shall not exceed in value the sum of \$1,500.00 when fully finished, ready for your fixtures and furnishings. I am further willing that the cost of this building, when paid by you, shall be repaid by me to you by applying your rental against the cost of the same upon the following basis,

to wit: The rental to be \$25.00 per month, payable in advance, during the first year, at the end of that time we to agree upon a proper rental for the following year; and in the event of a disagreement, each to select a man; and in the event of their disagreement, the two so selected to select a third, the decision of any two of the men selected to be binding upon us; their decision, in the case of our disagreement as aforesaid, to fix the next or second year, at the end of which time we are to fix the rental for the third year and so on for the fourth year, our being unable to agree, the rental to be fixed by disinterested parties to be selected as above mentioned. It is understood that you are to ascertain the cost of the building contemplated, and let me know without delay; also, time within which same can be completed, after which we are to enter into a permanent agreement and lease on the line above indicated. This letter to be ineffectual until such cost, etc., is arranged.

"Yours very truly,

J. M. ASHTON."

Hence, it is to such letter that we must look in determining the status existing between said Ashton and said Johnson; and it is a matter of no significance whether it be considered as in itself amounting to a lease of the premises, or as a contract for a lease, since the rights of a lien claimant would be the same whether the property had been actually leased upon certain conditions, or had been taken possession of by virtue of a contract for a lease with like conditions. In either case the relation of landlord and tenant would exist. It follows from these facts and from the decisions of ¹²³ this court that, if the building was to be erected by the lessee himself, his interest as such lessee would be all that could be subjected to liens for work and materials furnished for said building: See *Miles v. Gordon*, 8 Wash. 442.

On the other hand, if, by the terms of the lease, the building was to be erected and paid for by the lessor, he would be the one who was erecting, even although the lessee was to have the direction and control of the erection. In our opinion, the terms and conditions of the lease were such that it must be held that the building was to be erected by the lessor.

It is true that, by its terms, the building was to be erected and paid for by the lessee in the first instance; but the lessor was to repay to the lessee the cost thereof; and, for this reason, it must be held that he assumed the same responsibility that

he would if he had let a contract to a stranger for the erection of the building, under conditions which required him to fully pay the cost thereof, before having the right to demand any payment from the owner. The fact that the whole building was to be erected and paid for, before any payments should be made by the owner, would have no effect upon liens for labor and material furnished to the contractor. The responsibility of the owner would be the same as under an ordinary contract which provided for payment by the owner to the contractor from time to time as the work progressed.

It follows that if the terms of the contract between the lessor and the lessee had been that the lessee should erect the building, and upon its erection should be entitled to demand and receive of the lessor the cost of such erection, the interest of the lessor would be subject to liens growing out of the erection of the building; and the fact that, under the terms of ¹³⁴ this agreement, the money was to be paid by the lessor by the retention of rents by the lessee, would not change the rights of the parties. Under the terms of the agreement the cost of the building was to fall upon the lessor to the same extent, in the end, as it would have done had he been called upon to pay the entire cost of such erection when the building was finished.

Under our construction of this contract of lease, it included an agreement between the lessor and lessee that the latter should erect for the former the building in question, and that for that reason the interest of the lessor, as well as that of the lessee, was subject to liens growing out of its erection. This seems to be the reasonable construction of the language of the agreement, and also consists with authority: See *Otis v. Dodd*, 90 N. Y. 336.

The judgment will be reversed, and the cause remanded with instructions to enter a decree subjecting the property to the liens, and ordering a sale thereof to satisfy the same.

ANDERS, DUNBAR, and GORDON, JJ., concur.

SCOTT, J., dissents.

MECHANIC'S LIEN—BUILDING ON LEASED PREMISES.—A materialman's lien for making, altering, or repairing a building, under a contract made with the lessee of the premises extends to the leasehold interest only: *Williams v. Vanderbilt*, 145 Ill. 238; 36 Am. St. Rep. 486, and note. See, also, the extended notes to *Loonie v. Hogan*, 61 Am. Dec. 697, and *Lyon v. McGuffey*, 45 Am. Dec. 678.

WHITMAN v. MAST.

[11 WASHINGTON, 318.]

ASSIGNMENT FOR BENEFIT OF CREDITORS—EFFECT OF FOREIGN—WHEN VOLUNTARY.—An assignment made by a debt or upon his own motion, for the benefit of his creditors, under the statute providing that an insolvent may make an assignment for the equal benefit of all of his creditors, is voluntary, and transfers his entire personal property wherever situate.

ASSIGNMENT FOR BENEFIT OF CREDITORS—WHEN VOLUNTARY.—Whether an assignment for the benefit of creditors is voluntary or involuntary, must be decided from a consideration of the manner in which the transfer is made, and not what may be prescribed by statute as to the manner in which the property is to be disposed of by the assignee after the assignment.

ASSIGNMENT FOR BENEFIT OF CREDITORS—FOREIGN ASSIGNMENT.—RECEIVERS APPOINTED IN ONE STATE, upon the removal of an assignee appointed therein under a voluntary assignment for the benefit of creditors made in that state, may maintain an action in relation to personal property of the assigned estate situate in another state, which the assignee could have there maintained, and may be substituted therefor in such action.

Jones & Newman, for the appellants.

Whitson & Parker, for the respondents.

320 SCOTT, J. On the 17th of September, 1893, the Mast, Buford & Burwell Company, a corporation organized 321 and existing under the laws of the state of Minnesota, made a general assignment of all its property wherever situate for the benefit of its creditors, and appointed Victor Robertson, of St. Paul, Minnesota, assignee. E. E. Kelso, a resident of this state, was indebted to said corporation in a large amount upon account. The respondent, Charles E. Whitman, is a citizen of the state of Missouri. On December 12, 1893, respondent recovered a judgment against said corporation in the superior court for Yakima county, this state, and, on the twenty-sixth day of February, 1894, caused a writ of garnishment to be served upon the said E. E. Kelso, who answered, setting up the prior assignment of the account to said assignee, and denying his indebtedness to said corporation. April 11, 1894, said assignee filed his complaint in intervention in said garnishment proceedings, claiming said indebtedness under said assignment. On the — day of December, 1894, upon motion, William Dawson, Jr., and Albert B. Ovitt, receivers, were substituted as plaintiffs in the complaint in intervention in place of said assignee.

Respondent interposed a general demurrer to the complaint in intervention, and a motion for judgment upon the answer of the garnishee, both of which were sustained by the court, and appellants electing to stand upon the answer of the garnishee and the complaint, the court granted judgment against the garnishee, to all of which rulings the appellants excepted, and from which they now prosecute this appeal.

The main point in controversy is as to whether or not this was a voluntary assignment. It is asserted that the lower court was of the opinion that it was an involuntary one, and it is conceded by appellants that, if the court was right in its view of this question, the judgment should be affirmed. It is also conceded by ³²³ both sides that the decisions of the supreme court of Minnesota upon said question should be recognized as binding here. It is contended by appellants that such assignment is a voluntary one, on the ground that it is only made at the option of the debtor; while the respondent contends that it is involuntary, on the ground that when once the proceedings are set in motion the statute steps in and regulates the entire matter to its determination, and the debtor has no further control thereover in any manner.

The assignment was made under chapter 148 of the General Laws of Minnesota (Sess. Laws 1881, p. 193, and the amendatory thereof, found in Sess. Laws 1889, c. 30, p. 78). The title of that act is as follows: "An act to prevent debtors from giving preference to creditors, and to secure the equal distribution of property of debtors among their creditors, and for the release of debts against debtors."

The provisions of these acts are that when any debtor shall become insolvent, or garnishment shall have been made against him, or the property of any debtor shall have been levied upon by virtue of an attachment, execution, or legal process issued against him for the collection of money, he may make an assignment for the equal benefit of all his creditors, who are required to file releases of their demands against the debtor; and such assignment discharges the attachment garnishment or other levy upon his property, with certain exceptions therein provided.

The assignment must be filed in the office of the clerk of the district court. An attempt to make an assignment under this act, whereby one creditor shall obtain preference over another, is punishable as a misdemeanor. The debtor himself may be restrained from leaving the state, and may be required to appear

³²³ and make full disclosure as to the disposition of property, or in relation to any other matter pertaining to the insolvent estate. Any security given within four months prior to the assignment, with a view to giving preference to any creditor upon a pre-existing debt, shall be void as to all persons or creditors receiving the same who shall have reasonable cause to believe that such debtor was insolvent. In case of the death of the assignee or receiver, the court may appoint another to fill the vacancy, and the court may, for proper cause, remove such assignee and appoint another in his stead, and the court shall order such removal upon a two-thirds vote of the creditors. No creditor shall receive any benefit under the provisions of the act, or any payment of any share of the proceeds of the debtor's estate, unless he shall have filed a release of his claim, and thereupon the judge shall enter an order discharging such debtor from any claims of creditors who filed such releases. The assignee or receiver shall, within ten days after his appointment, publish a notice; and all creditors claiming the benefit of the act shall file their releases with the said assignee or receiver within twenty days after the publication thereof. The court directs the distribution of the estate, and has control of the assignee or receiver, as the case may be, until settlement, and the act reads, section 1: "Which assignment shall be made in accordance with, and be governed by, the laws of the state of Minnesota."

From all of which it is argued that the assignment was a statutory one under an insolvency law, and was in effect involuntary. And respondent contends that the supreme court of that state, notably in the case of *Jenks v. Ludden*, 34 Minn. 482, has so ³²⁴ construed it. In that case the court uses this language: "Now, our insolvent law and the statute of Wisconsin regarding assignments for the benefit of creditors are essentially different. Our act of 1881 is, as we have repeatedly held, a bankrupt act, the assignee being in effect an officer of the court, and the assigned property being in custodia legis, and administered by the court or under its direction."

The supreme court of Wisconsin, in considering this act in *McClure v. Campbell*, 71 Wis. 350, 5 Am. St. Rep. 220, held in accordance with the views of the respondent here as to the effect of *Jenks v. Ludden*, 34 Minn. 482. We are of the opinion, however, that the case of *Jenks v. Ludden*, 34 Minn. 482, will not bear the construction contended for, viz., that such assignments are involuntary, and, that the supreme court of

Minnesota, by its later decisions, does not so recognize it. It is true the supreme court of Minnesota has termed this a "bankrupt" law, but an examination of the decisions shows that this term is used in a very broad sense, and not in its strict technical meaning. They say of the first section that it provides for "voluntary bankruptcy," and that it "authorizes voluntary assignments and insolvency proceedings." *May v. Walker*, 35 Minn. 194, is a later case than *Jenks v. Ludden*, 34 Minn. 482, and, in this case, the view above stated is clearly recognized. The court says this was a case of assignment of partnership property only, "the assignment in this case was evidently intended to be a voluntary one under our insolvent act: Laws 1881, c. 148. The only voluntary assignment there authorized is of all the debtor's property and estate not exempt by law." The case of *Jenks v. Ludden*, 34 Minn. 482, is not at variance with the foregoing. In this case the attachment ^{was} made in Wisconsin on real estate, and was made prior to the assignment, and the court says: "We are utterly unable to perceive upon what principle the courts of this state can, or ought to, interfere, and deprive him of the benefit of his lien which he had acquired, prior to the assignment, upon the debtor's real estate in Wisconsin. We find no precedent for any such a thing. Even in England, whose courts hold very firmly that an assignment under a bankrupt or insolvent law has a universal application, and passes all personal property of the insolvent in foreign countries, and that all attachments made thereon after such assignment are invalid, we find no case where they have ever attempted to enjoin a creditor from availing himself of his attachment upon real property situated abroad, whether levied before or after the assignment; and, in the case of personal property situated abroad, we find no case where they have denied to a creditor the benefit of his attachment levied prior to the assignment."

In *Covey v. Cutler*, 55 Minn. 18, the supreme court of Minnesota clearly recognizes the voluntary character of these assignments, and says that nothing was said in *Jenks v. Ludden*, 34 Minn. 482, in conflict therewith. The case of *Covey v. Cutler*, 55 Minn. 18, though brief, is directly applicable, and, it seems to us, decisive of the question that such assignments are regarded in Minnesota as voluntary ones, having the effect of transferring the entire personal property of the debtor wherever situate. If we were not to recognize this

construction as binding in this controversy, and were to consider the question independently, we would arrive at the same conclusion, and follow the doctrine announced. The act in question has many features in common with our own insolvent law, but we said nothing contrary to the foregoing in the case of *Hamilton Brown Shoe Co. v. Adams*, 5 Wash. 833, cited by respondent.

³²⁶ The assignment itself shows that it was made by the debtor upon his own motion. It is not an assignment by operation of law, but is the voluntary act of the assignor. The principal distinction between a voluntary assignment and an involuntary assignment in bankruptcy is in its inception. In the one case the assignor's property is placed in the hands of a third party by his own act, and with his consent; in the other, it is placed in the hands of a third party by operation of law, and without his act and against his consent. The subsequent control by the court under statutory regulations does not destroy this distinction. Whether or not an assignment is a voluntary conveyance by the assignor must be decided from a consideration of the manner in which the transfer of the property is made, and not what may be prescribed by the statute as to the manner in which the property is to be disposed of by the assignee after assignment.

In Story on Conflict of Laws, eighth edition, section 411, it is said: "There is a marked distinction between a voluntary conveyance of property by the owner, and a conveyance by mere operation of law in cases of bankruptcy in invitum. Laws cannot force the will, nor compel any man to make a conveyance. In place of a voluntary conveyance of the owner, all that the legislature of a country can do, when justice requires it, is to assume the disposition of his property in invitum. But a statutable conveyance, made under the authority of any legislature, cannot operate upon any property except that which is within its own territory. This makes a solid distinction between a voluntary conveyance of the owner, and an involuntary legal conveyance by the mere authority of law. The former has no relation to place; the latter, on the contrary, has the strictest relation to place. . . . It is therefore admitted that a voluntary assignment by a party, according ³²⁷ to the law of his domicile, will pass his personal estate, whatever may be its locality, abroad as well as at home. But it by no means follows that the same rule should govern in cases of assignments by operation

of law." This is undoubtedly sustained by the weight of authority.

It is further contended by the respondent that, even though Robertson could have maintained this action on the theory of a voluntary assignment, the receivers could not do it, as they derived their authority solely by the appointment of the court in Minnesota. Robertson was removed pending his petition in intervention, and, upon application to the lower court, the receivers were substituted in said proceeding, to which the respondent objected. The title to the property was vested in Robertson by virtue of the assignment: *Donohue v. Ladd*, 81 Minn. 244. The law provided that the assignee might be removed and receivers appointed. This was a part of the assignment proceedings, and the insolvents, in effect, assented thereto when they made the assignment, and the receivers must be held to have succeeded to all the rights of the original assignee, and therefore could maintain the action.

Reversed.

HOYT, C. J., and ANDERS and GORDON, JJ., concur.

DUNBAR, J., dissents. —

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—EFFECT OF FOREIGN, WHEN VOLUNTARY.—A voluntary assignment in insolvency for the benefit of creditors, if valid where made, is valid everywhere, unless repugnant to the law of the place where the property of the insolvent is situated, and detrimental to the rights of domestic creditors in the latter jurisdiction: *Hayden v. Yale*, 45 La. Ann. 362; 40 Am. St. Rep. 232, and note.

RECEIVERS—RIGHT TO MAINTAIN ACTION IN ANOTHER STATE.—The rule that a foreign receiver is not allowed to maintain suit against assets of an insolvent debtor, as against a resident creditor, has no application to a receiver appointed by the courts of one state, under its laws, in a suit brought by a nonresident creditor: *Holbrook v. Ford*, 153 Ill. 633; 46 Am. St. Rep. 917. This question is fully discussed in the extended notes to *Straughan v. Halkwood*, 8 Am. St. Rep. 49, and *Alley v. Caspart*, 6 Am. St. Rep. 185.

DENNIS v. KASS.

[11 WASHINGTON, 353.]

EXEMPTIONS—RIGHT OF PARTNER TO.—A partner in possession of the firm property during the pendency of a suit to dissolve the partnership is entitled to an exemption out of the partnership property, as against an execution upon a judgment against him for his individual debt, provided the partnership debts are paid.

W. E. Humphrey, for the appellant.

Steele & Gephart, for the respondents.

³⁵³ **HOYT, C. J.** Respondent Terry King was a constable in the city of Seattle. The other respondents were judgment creditors of the appellant. They caused an ³⁵⁴ execution to issue upon their judgment, and placed it in the hands of King for service. He levied the same upon the interest of the appellant in certain personal property. This property, or a portion thereof, was claimed by appellant under the exemption laws, and proper and timely steps were taken to protect his rights under such laws. No part of the property was set off to him, and his interest in all the property was sold, and bid in by the judgment creditors. This action was brought to recover damages for the alleged wrongful action of the constable under the execution. The facts relating to the property levied upon were as follows: The appellant and one Wales had been partners in the restaurant business, and the partnership of which they were members was the owner of the property in question. The partner, Wales, long prior to the levy upon the property, had been enjoined from conducting the restaurant business, either with his partner, the appellant, or on his own account. He had also brought an action to have the partnership dissolved, and in such action had sought the appointment of a receiver to take possession of the property of the partnership. The appellant, by giving bond on appeal, had retained the possession of the property, and had conducted the restaurant business in his own name, and in so doing made use of the property which had belonged to the partnership. While he was so conducting the business, he had paid off all the partnership debts. Under these circumstances, it is claimed that he was entitled to have his exemptions set off to him out of said property when levied upon to satisfy a judgment against him.

Whether or not the interest of the appellant in this property was such that he could claim it as exempt is the im-

portant question to be decided; in fact, it is the only one suggested upon the oral argument, and the ³⁵⁵ only one suggested in the briefs of sufficient importance to require attention. Whether or not individual partners can claim exemptions out of partnership property is a question which has often received the attention of the courts. The adjudications in reference thereto cannot be harmonized, though, in our opinion, there is not so much difference in the decisions upon the subject as a superficial examination would lead one to suppose. An examination of the cases cited in the carefully prepared brief of the respondents will show that a critical examination must be made to determine the weight of authority upon the exact question here presented. A reference to the facts shows that the case at bar called for no investigation as to whether or not exemptions should be allowed the individual partners out of partnership property, when levied upon under a judgment against the partnership. Yet many of the cases cited are those in which the question was as to the right of the partnership, or its individual members, to exemptions when the execution was upon a judgment for a partnership debt.

These citations were, however, largely justified by the manner in which this subject has been treated by many of the text writers, and most of the courts. Not one out of five of the large number of cases which we have examined makes, or seeks to make, any distinction whatever between a judgment against the partnership and one against the individual partner claiming the exemption. Even when the question before the court was as to an exemption from execution against the individual partner, the reasoning and citation of authorities have in most of the cases shown that there was no discrimination between cases like the one at bar and those in which the execution was against the ³⁵⁶ partnership. That such discrimination is necessary to a correct determination of the question presented is clear. Partnership debts have a superior claim to partnership assets. Hence it may be reasonable to hold that the members of the partnership could claim no exemptions out of such assets against such debts; but it does not at all follow that the holding should be the same when the debt is that of the partner who seeks the exemption. The holding as to nonexemption, even against partnership debts, is not universal. Many courts of the highest standing have held that the individual partners

could claim exemptions out of the partnership property, when levied upon under a judgment against the partnership, and some have even held that the partnership itself could claim such exemptions: See *Skinner v. Shannon*, 44 Mich. 86; 38 Am. Rep. 232; *Waite v. Mathews*, 50 Mich. 393; *McCoy v. Brennan*, 61 Mich. 362; 1 Am. St. Rep. 589; *Stewart v. Brown*, 37 N. Y. 350; 93 Am. Dec. 578.

It must be conceded, however, that the decided weight of authority is to the effect that exemptions cannot be allowed in such cases. But it does not follow that any such weight of authority, or any weight at all, is against the proposition that exemptions ought to be allowed when the execution is against an individual member of the partnership. Our examination of the cases has led us to believe that a decided majority of the courts, which has made any distinction between a judgment against the partnership and one against the individual partner, has held that exemptions should be allowed when the judgment is against such individual partner: See *Evans v. Bryan*, 95 N. C. 174; 59 Am. Rep. 233; *Moyer v. Drummond*, 32 S. C. 165; 17 Am. St. Rep. 850; *Ex parte* ²⁵⁷ *Karish*, 32 S. C. 437; 17 Am. St. Rep. 865; *Blanchard v. Paschal*, 68 Ga. 32; 45 Am. Rep. 474; *Waples on Homesteads and Exemptions*, 909.

In these cases the property was that of a partnership, doing business at the time of the levy, and, if exemptions could be claimed under such circumstances, they could much better be claimed out of property situated as was that in the case at bar. The partnership which had owned this property was no longer doing business. And such conditions had been produced by the action of the partners as to work a dissolution of the partnership. All of the partnership debts had been paid, and the property was in the possession of the individual partner, who claimed the exemptions. Under these circumstances the reasoning of the courts which have held against such exemptions has no force. It is true the partnership affairs had not been adjusted, and for that reason the interest of each of the partners was, to a certain extent, uncertain, but there is no reason why the partner in whose possession the goods were found should not have been allowed to claim them as exempt, for the reason that some other person might have an interest therein, certain or uncertain. If such partner had an interest in the property, which could be levied upon under an execution against him alone, he had

such an interest as should entitle him to his exemptions out of it. The officer found him in possession of the property. He levied upon it because of the interest which he had, or was supposed to have, therein. Having done so, he could not rightfully refuse to set aside exemptions therefrom, because of the fact that some other person had, or might have, an interest in the property. The great weight of authority is in favor of the proposition that exemptions may be allowed out of property held with another as tenant in ³⁵⁸ common, and the same course of reasoning which establishes this proposition will sustain the allowance of exemptions out of partnership property, when levied upon under an execution against an individual partner. But it is not necessary, in this case, to resort to such a course of reasoning, since the facts show that the relation of the appellant to the property was substantially that of a tenant in common.

The cases which have held that partnership property could not be levied upon have founded their reasoning largely upon the inconvenience and uncertainty which would arise if such exemptions were allowed. Such courts say that the interest in the property is uncertain, that the partner who seeks his exemptions therefrom does not own it, and that for that reason it cannot be set aside as his property. A sufficient answer to this course of reasoning, when the execution is against one of the partners, is found in the fact that, so far as exemptions are concerned, it is of no concern to the officer whether or not the entire title to the property levied upon is vested in the judgment debtor. For the purpose of determining the amount which is exempt, it must be assumed that he owns the property, but the facts of such assumption, and of the setting aside of the property to him, will have no effect upon the title thereto.

Exemption statutes should receive a liberal construction, and the aim of courts should be to see that those entitled to the benefits thereof receive the same. To hold that one against whom an officer has an execution is entitled to have a certain amount of property, of which he has the entire title, exempted therefrom, and at the same time to hold that he could have no exemptions out of such property if he was not the sole owner, is to do violence to the evident intention of the ³⁵⁹ statute. The different text writers upon the subject, though most of them have fallen into the error of grouping cases of judgments against a partnership with those against

the individual members thereof, have come to the conclusion that, upon principle, exemptions should be allowed to the individual partner when the levy is under a judgment against him; and those of such writers who have carefully discriminated between cases of this kind, and those in which the judgments were against the partnership, have arrived at the conclusion that such doctrine is sustained by authority. The others seem to concede that the weight of authority is the other way, but we are not satisfied that such concession was the necessary result of the cases when critically examined.

Mr. Thompson, in his work on Homesteads and Exemptions, discusses this subject with ability, and, after citing the cases upon each side of the question, sums up his conclusions in section 216 by the statement that the courts which have held that exemptions could not be had out of partnership property, when levied upon under an execution against the individual partner, have done so in the face of the statutes, for the reason that the rule announced by them is more convenient of execution than would be one which allowed such exemptions.

The respondents cite the case of *Charleson v. McGraw*, 8 Wash. Ter. 344, to sustain their contention, but an examination of that case will show that it is not in point under the facts in this. In the opinion in that case, the learned judge who wrote it supposes a case similar to the one at bar, and says that in such a case exemptions could be allowed. Hence, so far as it is in point, it supports the rule for which appellant ^{see} contends, and which, under the circumstances of this case, we are compelled to sustain.

The judgment will be reversed and the cause remanded for a new trial.

SCOTT, DUNBAR, ANDERS, and GORDON, JJ., concur.

EXEMPTIONS—RIGHT OF PARTNER TO.—Partners cannot, during the existence of the partnership, claim an individual exemption in partnership property taken under legal process for partnership debts: *Aiken v. Steiner*, 98 Ala. 355; 39 Am. St. Rep. 53, and note. A partner is entitled to the chattel exemption allowed by the homestead law in partnership assets as against his individual creditors: *Moyer v. Drummond*, 32 S. C. 165; 17 Am. St. Rep. 850, and note.

PUGET SOUND DRESSED BEEF AND PACKING COMPANY v. JEFFS.

[11 WASHINGTON, 406.]

EXEMPTIONS.—**PROCEEDS OF INSURANCE** received by the insured for the destruction of exempt personal property are also exempt if the insured intends to invest them in property similar to that destroyed.

Murray & Christian, for the appellant.

R. W. Jamieson and C. P. Bennett, for the respondent.

⁴⁰⁷ **HOYT, C. J.** On December 1, 1893, the Puget Sound Dressed Beef & Packing Company recovered judgment against William J. Jeffs, James F. Myhan, and Harry M. Heath, copartners, doing business under the firm name of the Rainier Market. On March 10, 1894, the said Puget Sound Dressed Beef & Packing Company assigned said judgment to one C. E. Griffin, who thereafter caused a writ of garnishment to be issued against the Oakland Home Insurance Company, requiring it to answer as to its indebtedness to one of the judgment debtors, Harry M. Heath. Said insurance company answered, and admitted that a loss under one of its policies issued to said Heath had occurred, and that its liability therefor was in process of adjustment. Subsequently the court found that the insurance company was indebted to said Heath in the sum of six hundred and fifty dollars and fifty cents, and ordered that such sum be paid to the clerk of the court; which order was complied with by the garnishee. Thereupon the said Heath filed in the cause a petition, from which it appeared that he was a householder, and that the property which was covered by the policy upon which the liability of the insurance company arose was exempt from execution. It further appeared from such petition that it was the intention of the petitioner to use the moneys due upon the policy of insurance in the purchase of other goods of the same character as those destroyed, and the prayer thereof was that the moneys in the hands of the clerk of the court should be paid over to him, to be used for that purpose. To this petition, the respondent, C. E. Griffin, interposed a demurrer, on the ground that it did not state facts sufficient to warrant the making of the order prayed for, for the reason that the moneys ⁴⁰⁸ paid upon such policy of insurance were not exempt from execution. This demurrer was sustained by the court, and thereupon, on motion of said

C. E. Griffin, the court ordered that the money be applied upon his judgment. From this order said Harry M. Heath has appealed to this court, and, as reason for its reversal, alleges that the court committed error in sustaining the demurrer to the petition.

The respondent made no claim in the lower court that it did not sufficiently appear from the petition that the property destroyed was exempt from execution, nor does he make any such claim here. His contention there was, and the only one of sufficient importance to be noticed here is, that the money paid upon the insurance policy was not exempt from execution by reason of the fact that the property, the destruction of which gave rise to the liability, was so exempt. The claim on the part of appellant was, and is, that such money was exempt for a sufficient time to allow it to be invested in the purchase of property to replace that which had been destroyed.

The question presented by these opposite contentions is an important one. Its determination must depend upon the construction to be given our statute (Code Proc., sec. 486, subd. 3) relating to the exemption of personal property from sale on execution. If such statute is to be strictly construed, and exemptions thereunder confined to the articles specifically named therein, the contention of the respondent must be sustained, for the reason that nowhere in the statute is there any specific provision for the exemption of money paid on account of the loss by fire of exempt property. But if it is to receive such a liberal construction as to effect the evident object of the legislature in its enactment, it will well warrant the appellant's contention.

469 Which of these constructions should this statute receive? Statutes exempting real property from sale on execution have received a liberal construction by nearly all the courts of this country: See *Peverly v. Sayles*, 10 N. H. 356; *Deere v. Chapman*, 25 Ill. 610; 79 Am. Dec. 350; *Connaughton v. Sands*, 32 Wis. 387; *Campbell v. Adair*, 45 Miss. 170; *Kunts v. Kinney*, 33 Wis. 510; *Robinson v. Wiley*, 15 N. Y. 489; *Howe v. Adams*, 28 Vt. 541; *Moss v. Warner*, 10 Cal. 296; *Beven v. Hayden*, 13 Iowa, 122; *Montague v. Richardson*, 24 Conn. 338; 63 Am. Dec. 173.

And if statutes exempting real property should be so construed, there is no good reason why those exempting personal property should not receive a liberal construction. The only

reason given by those courts which have adopted a different rule of construction of such statutes when applied to personal property, is that at common law real property was not subject to sale on execution, and was only made subject to such sale by statutory provisions, so that statutes exempting it were not in derogation of the common law, and did not come within the rule of strict construction applied to statutes of that kind, while those exempting personal property were in derogation of such law, for the reason that thereunder such property was subject to such sale. At one time there might have been some reason for a distinction of this kind, for the reason suggested, but in modern times in this country such reason has ceased to have much force, and most of the courts now refuse to recognize it. And a very great majority of the courts of this country now liberally construe all exemption statutes without regard to the property to which they relate. Such courts say that such statutes are remedial, and should receive such a construction as to give effect to the intention of the legislature: See *Carpenter* ⁴⁷⁰ v. *Herrington*, 25 Wend. 370; 37 Am. Dec. 239; *Franklin v. Coffee*, 18 Tex. 413; 70 Am. Dec. 292; *Wassell v. Tunnah*, 25 Ark. 101; *Hawthorne v. Smith*, 3 Nev. 182; 93 Am. Dec. 397; *Gilman v. Williams*, 7 Wis. 329; 76 Am. Dec. 219; *Alword v. Lent*, 23 Mich. 369; *State v. Romer*, 44 Mo. 99; *Good v. Fogg*, 61 Ill. 449; 14 Am. Rep. 71; *Freeman v. Carpenter*, 10 Vt. 483; 33 Am. Dec. 210.

The courts of some of the states have not adopted this broad rule of liberal construction, but, in our opinion, reason, as well as the weight of authority, is with those that have. We shall, therefore, apply it in determining the rights of the parties to this appeal, and thereunder it is our duty to look for the object sought to be accomplished by the legislature and give it effect, even although the provisions of the statute are not as full and specific as they should have been.

What was the evident object of the legislature in providing that household furniture should be exempt from execution? There can be but one answer. It was that the family might have something which would enable them to maintain a home and live together therein. This object can only be subserved by sustaining the contention of the appellant. If the householder is to be protected in the use and enjoyment of his household furniture, he should be protected in taking such steps as will enable him to replace it if lost or de-

stroyed, and common prudence would require that he should make some provision which would enable him to replace it in case it was destroyed by fire, and the usual and economical provision in that regard is to procure a policy of insurance thereon; and, when such policy is procured and money paid on account of the destruction of the property, the object of the legislature can only be subserved by holding that such money ⁴⁷¹ takes the place of the property insured, and, until a reasonable time has elapsed for its being used in replacing the destroyed property, is exempt from execution the same as the property would have been.

We have not lost sight of the argument made by the respondent to the effect that the insurance money is not the proceeds of the property destroyed, but, instead thereof, is money paid upon a contract for an independent consideration, which consideration had no connection with the property. But this course of reasoning has no substantial force when brought in contact with the intention of the legislature, which is made to appear from a liberal construction of the language used in the statute upon the subject of exemptions. The object of the insurance, it is true, is not to protect the insured property. It is, however, to procure the means by which such property can be replaced if destroyed, and, for the purposes of the application of the exemption law, the money paid thereon should be held to bear the same relation to the property destroyed as would other property which might be obtained by way of direct exchange. The fact that the money paid for the insurance was not exempt from execution cannot affect the question. As well might it be claimed that because money not exempt from execution was used in repairing household furniture it would thereafter not be exempt.

The exact question here presented has not often come before the courts. From the carefully prepared briefs of counsel, and from such examination as we have been able to give the matter, we are of the opinion that the weight of authority thereon is with the contention of the appellant; especially is this true of the more recent cases upon the subject.

In the case of *Reynolds v. Haines*, 83 Iowa, 342, ⁴⁷² 32 Am. St. Rep. 311, this exact question was, after careful consideration, decided by the supreme court of Iowa as contended for by the appellant. That learned court cited a large number of cases in support of its conclusions, and only mentioned

one which held directly to the contrary. The statute of that state was substantially the same as ours, and the court concedes that if the object of its enactment could not be considered, and only the articles specifically mentioned therein held to be exempt, a contrary conclusion would have been compelled; but it is held that the object of the legislature was the controlling consideration, and that the statute should be read as though apt words had been used to express the intention of the legislature. In the case of *Cameron v. Fay*, 55 Tex. 62, the supreme court of that state, under a statute substantially like ours, sustained a claim for exemption under facts substantially the same as in the case at bar. The case of *Houghton v. Lee*, 50 Cal. 101, presented facts so nearly like these that the holding of that court, that moneys paid upon an insurance policy were exempt, may be said to be exactly in point upon the question here presented.

Other cases could be cited where this exact question has been decided in accordance with the contention of the appellant, and a few could be cited to sustain the contention of the respondent. We are best satisfied with the reasoning of those of the former class, and feel justified in following them. Beside the cases directly in point, there are a large number of cases the holding of which can only be sustained by the same course of reasoning which will sustain the contention of the appellant in the case at bar. Thus, in the case of *Crow v. Brown*, 81 Iowa, 344, 25 Am. St. Rep. 501, it was held that property purchased with pension money was ⁴⁷⁸ exempt by virtue of the provisions of the federal statute, which provided that such money should be wholly for the benefit of the pensioner. This decision was made after a careful consideration by that learned court, and the fact that there was a dissenting opinion by one of the judges cannot be said to detract from the authority of the case. On the contrary, the very fact that there was a division among the judges of the court would be likely to cause the case to be more carefully considered than it otherwise would have been. In the case of *Below v. Robbins*, 76 Wis. 600, 20 Am. St. Rep. 89, it was held by the supreme court of Wisconsin that a judgment for the wrongful conversion of exempt personal property was itself exempt, and it is evident that the course of reasoning which led to such a decision would fully sustain the contention of the appellant above referred to.

The cases which in principle cannot be distinguished from

the one at bar, and which are in line with the contention of the appellant, are very numerous. We shall cite only a few of them: See *Yates County Nat. Bank v. Carpenter*, 119 N. Y. 550; 16 Am. St. Rep. 855; *Bridgers v. Howell*, 27 S. C. 425; *Cone v. Lewis*, 64 Tex. 331; 53 Am. Rep. 767; *Broome v. Davis*, 87 Ga. 584.

In our opinion, the money paid upon the insurance policy was exempt from execution. The judgment will be reversed and the cause remanded, with instructions to overrule the demurrer to the petition.

ANDERS, GORDON, DUNBAR, and SCOTT, JJ., concur.

EXEMPTIONS—PROCEEDS OF INSURANCE.—When personal property exempt from execution is destroyed by fire, the proceeds of insurance upon such property is also exempt: *Reynolds v. Haines*, 83 Iowa, 342; 32 Am. St. Rep. 311, and note.

STATE v. BARR.

[11 WASHINGTON, 431.]

HOMICIDE—SPRING GUNS—QUESTION OF FACT.—The right and necessity of a person to defend his vacant dwelling-house from intrusion, during his absence, by means of spring guns or other engines calculated to destroy human life or inflict great bodily harm, and which have produced death, as well as the intention of the owner in setting such engines, are questions for the jury to determine under the facts of each particular case.

HOMICIDE—USE OF SPRING GUNS TO PREVENT BURGLARY.—An owner of a dwelling-house, vacant during his absence, has no absolute right in order to prevent a burglary to employ spring guns, or other means which might be expected to, and do, destroy the life of a human being. The employment of such means is evidence of a vindictive desire to take the life of whomsoever should interfere with the dwelling, rather than the prevention of a burglary thereto, and, if they result in death, justify a verdict of murder in the second degree against the person employing them.

HOMICIDE—INDICTMENT—SUFFICIENCY.—An indictment or information charging the accused with an intent to kill the deceased is sufficient, when supported by proof showing a general intent to kill, without an intent to kill any particular person.

EVIDENCE OF CHARACTER IN CRIMINAL CASES.—Evidence of good character on the part of the accused should be confined to a time not very remote from the date of the commission of the crime. It is not error to reject such evidence on the part of an adult defendant extending from his boyhood days to the time of the commission of the crime.

E. P. Dole, for the appellant.

Thomas G. Newman and C. W. Howard, for the state.

⁴⁸³ HORT, C. J. Defendant was convicted of the crime of murder in the second degree, and, from the judgment and sentence imposed, prosecutes this appeal. The circumstances connected with the homicide were substantially as follows:

Defendant, and one Walter Pixley, a boy of seventeen years of age, occupied a cabin together. The cabin belonged to the defendant, but the land upon which it was situated was the property of the Bellingham Bay Improvement Company. The cabin was a small building, about ten by fourteen feet in dimensions, constructed of boards one inch in thickness placed up and down and battened with shingles. There was one door and a single window. The lock on the door fitted so loosely that the door could be pushed open with little force without unlocking it. About December 8, 1893, defendant and Pixley went into the mountains for a hunting trip, intending to be gone most of the winter. On the morning they left, defendant placed a spring gun inside the cabin. It was loaded with a double charge of powder and shot, and in addition thereto a loaded Winchester rifle 45-90 cartridge was placed therein, on top of the shot and powder. It was aimed directly at the casing of the door, in such a way that a person of ordinary height standing in front of the door and placing his hand on the knob would, upon pushing the door open a few inches, receive the entire charge in his body. The window and door were then nailed up, the door being first locked with the insecure lock above referred to. The boards were placed up and down over the door, and fastened by nails driven through a one-inch board. Before the cabin was so fastened up, some of the best of its contents were removed to the house ⁴⁸⁴ of a neighbor, and those remaining were but of little value. On the day of the homicide, and the preceding day, deceased, with three companions, had made several trips to a construction camp a little further from the business part of Whatcom than this cabin, for the purpose of securing work upon a road in process of construction. On the morning of the day of the homicide they took their blankets and started for said camp, but, not having completed arrangements for getting work, they thought best not to carry their blankets all of the way, and left them in a tree or stump a short distance from this cabin. After arriving at the camp they found it would be necessary to return to town to find the man they wished to see. Having done so, they found this man, and completed arrangements

under which they were to go to work on the road. Thereafter two of them, deceased and one Nels Anderson, after purchasing a loaf of bread and some bologna sausage, upon which to make a supper, started to walk to camp. It was then dark, the road was rough and muddy, and it was raining. When they came near the cabin which they had passed before, and which was boarded up and apparently unoccupied, the deceased stated that he did not think anybody had lived in it for a long while; that he would see if they could not get in, and, if they could, they had better get their blankets and sleep there instead of going on to camp. In attempting to make an entrance through the door, secured as before stated, the spring gun was discharged, and the entire charge penetrated the casing of the door and passed entirely through the body of the deceased, killing him instantly.

There is some testimony as to statements made by the defendant tending to show what his intentions were in setting the spring gun. Such testimony is ⁴⁹⁵ more or less conflicting, and the determination of what was proved thereby was properly left to the jury; and to our minds it appears, from a fair preponderance of such testimony, that the statements made by the defendant were not such as would have been likely to have been made by one who had no other motive than to protect his cabin, and the property therein, by such means as could be made use of without wanton disregard for the lives of his fellowmen. But whether or not this was so is, in our opinion, immaterial in the determination of the questions presented on this appeal. There was also testimony tending to show that after the door had been nailed up, a placard bearing the word "danger" was posted on the outside of the boards nailed over the door. But whether or not this was so is also immaterial.

The principal contention of the defendant was that in setting the gun as above stated he only did what he had an absolute right to do, and he asked the court so to instruct the jury, and now assigns as error its refusal so to do, which assignment of error, if sustained, will result in the reversal of the judgment and sentence and the discharge of the defendant.

If the question as to what the defendant had a right to do, by way of providing for the defense of the cabin and property contained therein, were one of law unmixed with any question of fact, there might be force in this claim, but in our opinion

it is not. It is no doubt true that in the old English cases, and, perhaps, in some of the earlier cases in this country, this question was passed upon by the courts as one of law, but, in our opinion, in so deciding this question, such courts made a mistake which has led to most of the trouble connected with the proper determination of this and kindred questions. The relation of the English ⁴⁸⁶ cases to this question is so well stated by the learned judge who wrote the opinion in the case of *Aldrich v. Wright*, 53 N. H. 398, 16 Am. Rep. 339, that we quote therefrom: "On the subject of defending a man's property in his absence, by spring guns, mantraps, or other engines calculated to destroy human life or inflict grievous bodily harm, the English courts turned a question of fact into a question of law, and were not successful in their efforts to prescribe adequate rules for determining the reasonable necessity of such engines under the varying circumstances of different cases.

This error of the courts, and the trouble and uncertainty arising therefrom, resulted in the regulation of this matter in England by statute, the enactment of which was necessary and proper under the circumstances, but would have been unnecessary if the courts had treated this question as one of fact, and left it to the jury to decide, under proper instructions, in the light of the facts of each particular case. If the reasonable necessity of employing defensive machinery of all kinds had been left to the jury, as such a question of fact should have been, this judicial and legislative trouble would have been avoided, and the general principles of the common law would have been amply sufficient to protect the rights of all concerned. The result in England of holding this to be a question of law, instead of one of fact, furnishes a good reason for the courts of this country adopting a different rule. Those of several of the states have done so, while those of others have adhered to the rule laid down in England. By this decision we hope to place this court in a line with those of the former class, for the reasons above suggested, and for many others which might be given.

It is a universal principle that neither in defense of person nor property can one go further than is reasonably ⁴⁸⁷ necessary for that purpose, and this single principle, followed to a logical conclusion, will establish the proposition that whether or not that was done in a particular case was justified under the law must be a question of fact, or mixed

law and fact, and not a pure question of law. It follows that the contention of the defendant, that the court should have taken this question from the jury and decided it itself, cannot be sustained, and since, for that reason, it was properly submitted to the jury under what seems to us to have been proper instructions, we could content ourselves with what we have said as sufficient to require us to find against the above stated contention of the defendant; but, owing to the importance of the question, and the fact that it is claimed that there was some technical error connected with the instructions, we feel called upon to make some brief additional observations. It was the settled law in England that means which might reasonably be expected to cause death could not be made use of to prevent other crimes than those classed as felonies. But it was held that to prevent felonious crimes such means might be made use of, and this same distinction has been adopted by many of the courts of this country, but without any good reason existing therefor. The reason why the use of such means was allowed to prevent crimes of that kind in England was that they were there punishable by death. This being so, there was reason for the rule. If one was about to perpetrate a crime for which, under the law, his life would be forfeited, there was reason in holding that his life might be taken if necessary to prevent his committing it. But, in this country, few crimes subject the ones who have committed them to the death penalty, and it is only as to those which do that the reason of the rule has any force. What were ⁴⁸⁸ felonies at common law usually subject the offender here to comparatively light punishment, and, upon principle, it should be here held that one could only properly make use of means which might be expected to cause death to prevent the commission of a capital offense.

We are aware that courts of high standing have come to a contrary conclusion, and have held that such means might be made use of to prevent the commission of some felonies, especially to prevent the crime of burglary; but it seems to us that in so doing they have lost sight of the changed conditions of things in this country, and have adhered to the English rule when the reason therefor has no existence. The crime of burglary has been so much extended by the statutes of this state that, excepting in the case of burglary of a dwelling-house, when occupied by the owner or some member of his family, there is no reason why more extreme means

should be allowed for its prevention than to prevent other felonies. As to what may properly be done to prevent the burglary of a dwelling-house when occupied is another question. There it is not simply the damage to the property which may result from the burglary, or the sanctity connected with the property when so protected that it can only be reached by the commission of a burglary that is involved, but in addition thereto is the question of the risk to the lives of the inmates. It is common knowledge that burglaries under such circumstances often result in the death of some of the inmates of the dwelling upon which the burglary is committed, and, for that reason, it might well be held that a burglary of that kind could rightfully be prevented by such means as might result in death.

Applying the principles which will naturally arise ⁴⁸⁹ from the above suggestions to the conceded facts in the case at bar, it must result that not only was the defendant not entitled to the instruction asked for, but that, on the contrary, the court might have been justified in holding that the defendant did that which he had no right to do. The undisputed facts showed that there was no person in this cabin whose life could have been endangered by a burglary committed thereon; hence, if what we have said is correct, it might not be prevented by means which might be expected to destroy the life of a human being. That the means used were of that kind is evident, whether judged by what might reasonably have been expected to have been the result, or by the result itself.

It is not necessary, however, to go to the extent above suggested in order to sustain the ruling of the trial court. Even if it should be assumed that the defendant had a right to protect his cabin by setting a gun to defend the same, such right would still be subject to the universal rule that only such means as are reasonably necessary to prevent the crime should be made use of, and the undisputed facts abundantly warranted the jury in coming to the conclusion that more than the prevention of the burglary of the cabin was intended by the defendant in loading and setting the gun as he did. The extreme charge of both powder and shot, and the addition of such a terrible missile as an entire rifle cartridge, in a gun so placed that it would hit one but a few feet from the muzzle, furnished abundant reason for the jury to find that a vindictive desire to take the life of whomsoever should interfere with the cabin, rather than the prevention

of the commission of a crime therein was the object sought by the defendant.

Authorities might be given upon this proposition, ⁴⁰⁰ but on account of the confusion and want of harmony among the cases, growing in part at least out of the reasons above suggested, their citation would be of little use. In our opinion the court committed no error in refusing the instruction asked, for the reason that the question to be decided was one of fact, or mixed fact and law, and therefore for the jury; and for the further reason that, under the undisputed facts, any proper interpretation of the law applied thereto would have warranted the court in instructing the jury that the defendant had no right to protect his property by the means used.

Some other reasons for reversal have been urged in behalf of the defendant. If considered as founded upon each separate exception taken during the progress of the trial, as they seem to be by the manner of their statement in the brief of appellant, their examination would prolong this opinion into a treatise upon criminal law. We shall content ourselves with considering two propositions which cover most of the exceptions taken, and with a statement that we have carefully considered the others, and find, in regard thereto, that the rulings excepted to deprived the defendant of no substantial right.

The questions which it is necessary to briefly discuss are: 1. As to the sufficiency of the information; and 2. As to the proofs introduced and offered as to the character of the defendant. In the information the defendant is charged with having purposely killed the deceased, and since the proofs showed that he could have had no intention to kill any particular person, it is claimed that the information was insufficient, or, if sufficient, was not supported by the proofs. In our opinion the statement in the information as to the intent to kill the particular person would have been ⁴⁰¹ sufficient in an indictment at common law, and would have been supported by proof of having done an act with intent to kill another person than the deceased, which resulted in the death of the person whom it was charged he intended to kill. But it is contended that our statute, which requires the facts to be stated in the information controls, and that even although this information would have been good at common law, it was not good under our statute, for the reason that the facts

were not correctly stated therein. The information was proof against this attack for two reasons: 1. That the facts were substantially stated—the general intent to kill became special when the means made use of had taken effect on a particular person; and 2. Our statute as to informations, when invoked, must be taken as a whole, and when so taken an information is good thereunder against an attack of this kind unless it were possible that the defendant could in some manner have been misled thereby to his injury. And it is evident that this defendant could not have been so misled by the statement that he intended to kill the deceased, when the facts were that he had a general intent to kill, which resulted in the death of the deceased.

The other question above suggested arises upon the action of the court in refusing to allow a witness to testify as to the reputation of the defendant from his boyhood days to the time of the homicide. Upon this question the court allowed the defendant to introduce proof covering all the latter years of his life, and some that went further back. This being so, the rights of the defendant were not infringed, for, while it is true, as suggested by counsel for defendant, that even boyhood reputation might in some degree affect his probable action at the time of the homicide, a due consideration ⁴⁹⁹ of the rule that testimony must not be too remote, will justify the action of the court. If a defendant puts in evidence as to good character, it is competent for the prosecution to show bad character, and in order that this right of the prosecution may be made effective, it is necessary that the evidence on the part of the defendant should be confined to a time not too remote from the date of the commission of the crime. It would be impracticable for the prosecution in most cases to trace the life and habits of a defendant for more than a few years, and to allow him to go back to boyhood and put in proof which it would be out of the power of the prosecution to contradict, or in any manner rebut, however false it might be, would result in an advantage to the defendant which the rule in question never contemplated.

The case seems to have been tried carefully, and in such a manner as to protect every substantial right of the defendant. The judgment and sentence will be affirmed.

ANDERS, GORDON, DUNBAR, and SCOTT, JJ., concur.

HOMICIDE—INDICTMENT—ALLEGATION OF INTENT.—The intent or purpose to kill, at the time of the commission of the act, is essential to constitute the crime of murder as defined by the Nebraska Criminal Code, and this intent must be specifically and directly averred as a part of the description of the offense in an indictment for this crime: *Schaffer v. State*, 22 Neb. 557; 3 Am. St. Rep. 274, and note.

SPRING GUNS—SETTING ON ONE'S PREMISES—LIABILITY FOR.—The mere act of setting spring guns on one's premises for their protection is not unlawful in itself, but the person so doing may be responsible for injuries caused thereby to individuals, and may be indictable for the erection of a nuisance if the public are thereby subjected to danger: *State v. Moore*, 31 Conn. 479; 83 Am. Dec. 189, and especially note.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

RAY v. HIXON.

[90 WISCONSIN, 39.]

APPEAL, WAIVER OF RIGHT OF.—If an assignee for the benefit of creditors brings suit to set aside a mortgage made by his assignor, which results in a judgment against him, and thereafter, with the consent of the mortgagee and the advice of his counsel, sells the property, and pays over the proceeds to the mortgagees, and they thereupon discharge the mortgage, he thereby waives his right of appeal.

A JUDGMENT AGAINST A TRUSTEE BINDS THE CESTUI QUE TRUSTENT in the absence of fraud or bad faith. Therefore, creditors are bound by a judgment against an assignee for the benefit of creditors.

APPELLATE PROCEDURE.—WHERE THERE IS NO RIGHT OF APPEAL, there is no right to have a bill of exceptions settled.

ACTION by Ray, assignee, for the benefit of creditors of a partnership, consisting of McDonald Brothers, against Hixon and others to set aside certain mortgages and bills of sale made by the assignors, but not put on record until immediately preceding the assignment. On April 20, 1893, judgment was entered in favor of the defendants upon findings negating the allegation of fraud and collusion between the mortgagees and the assignors, and no exceptions were taken by the plaintiff. The defendants proved their claim against the estate of the assignors, and the assignee sold the mortgage property for much less than the amount of the mortgages, and paid over the proceeds to the mortgagees, and also paid them their share of a dividend out of the other assets of the assignor. In February, 1894, other creditors of the firm gave notice of a motion to have the judgment opened, and to require the plaintiff to present and have settled a bill of

exceptions, and supported their motion by affidavits which, in addition to showing their interests as creditors of the assignors, attempted to excuse their delay in not acting sooner. These affidavits were met with others tending to show that the moving parties had notice of the proceedings prior to the judgment, but had not taken any measures to assist in the prosecution of the suit. The trial court entered an order purporting to extend the time of the plaintiff to prepare and have settled a bill of exceptions, and to permit the moving parties to use the name of the plaintiff in prosecuting an appeal. From this order the defendants appealed.

George H. Gordon, and Winkler, Flanders, Smith, Bottum & Vilas, for the appellants.

Bunn & Hadley, for the respondent.

45 WINSLOW, J. It is clear that the action brought by the assignee to set aside the Hixon mortgages as fraudulent was brought by him in his trust capacity, representing all the creditors of McDonald Brothers: Sanborn and Berryman's Annotated Statutes, secs. 1693 b, 1702 a.

The judgment in that action was necessarily binding upon the assignee, subject only to his right to move for a new trial or to appeal. Under the advice of able counsel, and apparently in the exercise of entire good faith, he accepted the result, sold the mortgaged property (necessarily with the consent of the mortgagees), and paid over the proceeds of sale to the defendants, with the sanction and approval of the circuit court. It appears, also, that, upon such payment being made, the mortgagees satisfied and discharged the mortgages. Thus, the whole controversy was unquestionably settled; and it is clear that the arrangement was one by which both parties mutually agreed to settle the entire litigation, and waive the right to appeal. Such an agreement, fairly made, constitutes an effective waiver of the right of appeal: *Thornton v. Madison Woolen Mills*, 41 Wis. 265; *Elliott's Appellate Procedure*, sec. 148; *Sloans v. Anderson*, 57 Wis. 123, 129, and cases cited. Nothing is left for adjudication.

The assignee, therefore, had no right of appeal after he had made this settlement. In the absence of fraud or bad faith, whatever binds the trustee, in an action brought by him in his trust capacity, binds the *cestui que trustent* whom

he represents: *Richter v. Jerome*, 123 U. S. 233, 246; *Kerrison v. Stewart*, 93 U. S. 155-160; *Corcoran v. Chesapeake Canal Co.*, 94 U. S. 741, 745. No fraud or bad faith on the part of the trustee is shown in the present case. On the contrary, good faith affirmatively appears. Therefore, the creditors are bound by the judgment and the settlement thereof equally with their trustee.

There being no right of appeal, there was no right to settle ⁴⁶ a bill of exceptions, and an order attempting to grant such right is appealable: *Evans v. St. Paul etc. Ins. Co.*, 54 Wis. 522.

By the COURT. Order reversed, and action remanded with directions to deny the motion.

APPEAL—WAIVER.—The right of appeal is not waived by paying the judgment: *Hayes v. Nourse*, 107 N. Y. 577; 1 Am. St. Rep. 891, and note. The right of appeal from a judgment is not waived by its payment to prevent the sale of the judgment debtor's property under an execution issued for the enforcement of such judgment: *Green v. Hall*, 43 Neb. 275; 47 Am. St. Rep. 761.

JUDGMENTS AGAINST TRUSTEE, WHEN BIND CESTUI QUE TRUST.—The rights of a *cestui que trust* cannot be cut off by a decree in equity rendered in a proceeding to which he is not a party: *Collins v. Loftis*, 10 Leigh, 5; 34 Am. Dec. 719, and extended note.

GUINARD v. KNAPP-STOUT ETC. COMPANY.

[90 WISCONSIN, 123.]

JURY TRIAL—NEGLIGENCE, WHEN A QUESTION FOR THE JURY.—In an action for personal injuries, the questions whether defendant was guilty of negligence in providing unsafe machinery, or in failing to instruct the plaintiff of its dangerous character, and whether plaintiff on his part was guilty of contributory negligence, are for the jury.

JURY TRIAL—INSTRUCTIONS—DUTY OF COURT.—A judge who is asked to give, and does give, an instruction to the jury correctly stating the propositions of law applicable to the case, but who adds that they may use it as far as they find it applicable, commits error for which the losing litigant is entitled to a new trial. It is for the judge to determine whether an instruction is applicable, and he cannot submit its applicability to the jury.

NEGLIGENCE MUST BE THE PROXIMATE CAUSE OF AN INJURY to entitle the plaintiff to recover. An instruction to the jury that if they find from the evidence that the defendant was guilty of a lack of ordinary care, they should find for the plaintiff, is therefore erroneous, because it does not require them to find further that such want of care was the cause of the injury.

MASTER AND SERVANT—ASSUMPTION OF RISK.—A servant who has been employed in a dangerous position, or to work with unsafe appliances, who asks to be retained in such position, does not thereby represent himself as competent therefor, nor does he assume the risks thereof.

ACTION to recover for personal injuries suffered by the plaintiff, an adult employee in a sawmill of the defendant, while oiling a rapidly moving shaft. His coat sleeve was caught in a screw upon the shaft. He had worked for the defendant in previous years, but not in the same capacity. The testimony tended to prove that the light was poor, and that the plaintiff had never been instructed respecting the dangers of his position. Several special issues were submitted to the jury, all of which were found in favor of the plaintiff. The defendant appealed.

V. W. James, for the appellant.

John R. Mathews and C. T. Bundy, for the respondent.

127 WINSLOW, J. The vital questions which were presented by the pleadings and the evidence in this case were: 1. Whether the defendant was guilty of negligence which was the proximate cause of plaintiff's injury, either in providing unsafe machinery or in failing to instruct and warn the plaintiff of its dangerous character; 2. Whether the plaintiff himself was guilty of contributory negligence in not seeing and avoiding the revolving set-screw. Both of these questions were answered by the jury favorably to the plaintiff. We regard these questions as fairly questions for the jury, and not for the court; and it necessarily follows that if no errors were committed in the rulings on testimony or in the instructions to the jury, the judgment in this case cannot be disturbed. Examination of the charge, however, convinces us that there were errors in the instructions which necessitate reversal of the case.

The defendant requested the giving of the following instruction: "If you find that the plaintiff engaged with the defendant in the duty of oiling the machinery of its sawmill, without, at the time, fully understanding or comprehending the dangers incident to his business, yet if you find that between the time of his employment and the time he was injured he learned of these dangers, or in the course of his employment ought to have known of the liability to accident by being entangled in the machinery, as he was, it is

your duty to find that he assumed the risk of such injury as incident to his employment, and you cannot attribute the accident to the negligence of the defendant." The court read this instruction to the jury, and added: "Now, gentlemen, as a general proposition of law that is correct, and as ¹²⁸ far as you find it applicable you may use it." The defendant also asked the following instruction: "It is the duty of the plaintiff to look at the machinery about which he is employed to work, and to apprise himself of any danger afforded by the machinery itself, and which he could have discovered, or ought to have discovered, by a proper examination thereof, or by the use of his sight and other senses; and if he failed during the course of his employment, and while engaged in the risk of oiling the machinery, to apprise himself of the dangers which he ought to have seen, then the plaintiff was not in the exercise of ordinary care or prudence, and it is your duty to so find." This the court read to the jury, and added: "That you may consider as far as you find it applicable."

The instructions above quoted stated correct propositions of law and were applicable to the testimony in the case. The appellant was, therefore, entitled to have them given to the jury without modification. It is plainly the duty of the court, and not of the jury, to decide when a legal proposition is applicable to the evidence. To give the jury a legal proposition, and say to them: "You may use this as far as you find it applicable," comes very near being an abdication of the functions of the court. Under such an instruction the jury is given full license to decide that the proposition has no application to the case and disregard it entirely. The charge should contain only such propositions as are to be applied to the evidence in the case. The court says to the jury, in substance: "These are the propositions of law applicable to the evidence. Take them, apply them to the case, and return your verdict." Such being the proper functions of the court and the jury, it seems very plain that the court erred in leaving it to the jury to decide whether the instructions were applicable to the case. A similar remark was disapproved by this court in *Duthie v. Washburn*, 87 Wis. 231.

¹²⁹ It is said that the court subsequently cured the error by charging the jury to the effect that a man must use due diligence and use his senses, and if he fails to use such dili-

gence as a man of ordinary prudence would, and thereby suffers an injury, then he has not used ordinary care. But we cannot regard this as any fair equivalent of the propositions first above quoted.

The ninth question of the special verdict asks whether the plaintiff was injured by defendant's want of ordinary care, which caused the injury. In submitting this question to the jury the trial judge said: "If you find that there was a lack of ordinary care on the part of the defendant, you will answer this question accordingly. If you are not so satisfied, you will answer this question, 'No.' . . . If you are satisfied that it has been shown by a preponderance of the evidence that there was a want of ordinary care, your answer must be, 'Yes.' If you are not so satisfied, your answer to question 9 will be 'No.'" Nowhere in the charge do we find these expressions qualified. This seems to us to be clearly erroneous. The question asks whether there was a lack of ordinary care which caused the injury. The instruction says, in effect, that if there was lack of ordinary care it did cause the injury. This result does not follow. The jury must find not only the lack of care, but that it was the proximate cause of the injury: *Craven v. Smith*, 89 Wis. 119.

We are asked to hold that because the plaintiff, some time after he was employed as an oiler, applied to be retained in that capacity, he thereby represented himself as competent for the position and assumed all the risks. We cannot so hold. There is no evidence or finding that he was retained in his position on account of his request, or that the request had anything to do with the defendant's action in the premises.

By the COURT. Judgment reversed, and cause remanded for a new trial.

NEGLIGENCE—PROXIMATE CAUSE.—The proximate cause of an injury alone is considered: *Lackawanna etc. R. R. Co. v. Chenewith*, 52 Pa. St. 382; 91 Am. Dec. 168, and note. Persons who perpetrate torts are responsible only for the proximate consequences thereof: *Western Ry. v. Mutch*, 97 Ala. 194; 38 Am. St. Rep. 179; *Village of Cartersville v. Cook*, 16 Am. St. Rep. 252. See, also, the extended note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 815.

MASTER AND SERVANT—ASSUMPTION OF RISK.—A servant may contract to use defective machinery, and, where he knows of the defect and uses the machinery voluntarily, the law warrants the inference that he assumes the risks: *Rugon v. Toledo etc. Ry. Co.*, 97 Mich. 265; 37 Am. St. Rep. 336, and note with the cases collected. If a servant, knowing of a defect in the

machinery, materials, or premises furnished for his use, without complaint, or promise from the master to repair, continues to use them, he assumes the risk, and waives all claim against the master for injury therefrom: *Breckenridge Co. v. Hicks*, 94 Ky. 362; 42 Am. St. Rep. 361, and note.

PROMER v. MILWAUKEE, LAKE SHORE AND WESTERN RAILWAY COMPANY.

[90 WISCONSIN, 215.]

MASTER AND SERVANT.—AN EMPLOYEE DOES NOT ASSUME the risks of dangers which are known to, and can be avoided by, the exercise of reasonable care on the part of his employer.

MASTER AND SERVANT.—THE DELEGATION TO AN EMPLOYEE OR SERVANT of the duty of taking such measures as are within the power of the master to protect employees against dangers while at work cannot relieve the master from liability, if the employee to whom such duty is deputed does not exercise reasonable care in its discharge.

RAILWAY CORPORATIONS—NEGLIGENCE OF EMPLOYEES.—The pushing or driving of cars through a station yard, the engine being detached, and no light being kept on the front of such car, and without providing any signal of danger or giving any notice of its approach, is, as respects employees whose duties require them to be in such yard, negligence entitling them to recover of the corporation if injured without contributory negligence on their part.

MASTER AND SERVANT—NEGLIGENCE—VICE-PRINCIPAL.—If a railway car, while moving in the yard of the corporation, is cut loose from the engine and left in the charge of an employee, and he, while riding on it down the track, at night and in the dark, places himself on its rear instead of its front, with no signal or other means of warning upon or near its front, his negligence in this respect is a neglect of the duty which the corporation owed to its employees, and, therefore, any of them, if injured, may recover compensation therefor.

MASTER AND SERVANT.—THE RISK CONSEQUENT ON THE FAILURE OF A RAILWAY CORPORATION to adopt proper precautions for the safety of its employees while working in its yard at night, in the dark, from dangers to them resulting from a car being put in motion in such yard without any light or danger signal in front thereof, is not assumed by persons accepting and entering upon work in such yard, unless such dangers are open and obvious, or the plaintiff, in the exercise of ordinary care, ought to have observed and apprehended the damage likely to result.

NEGLIGENCE, WHEN A QUESTION FOR THE JURY.—The question of contributory negligence is for the jury, and when the evidence does not clearly and indisputably show such negligence and want of care on the part of the plaintiff so as to leave nothing to submit to the jury on the opposite theory, a nonsuit should not be granted.

ACTION to recover for personal injuries suffered by the plaintiff from being run over by a car in the yard of the defendant corporation, of which he was an employee. The

night when the injuries were received was very dark. The car, after being put in motion by a switch engine, was detached therefrom and left to run down the track in charge of a brakeman. He put no light or other warning signal in front of it, and the plaintiff, before knowing of its presence, was struck and run over by it. The trial court directed a nonsuit, and the plaintiff appealed.

Wigman & Martin, for the appellant.

Fish & Cary, for the respondent.

219 PINNEY, J. 1. There is, no doubt, a considerable degree of danger attending the service in which the plaintiff was engaged as one of the night repair force in the defendant's yard, where trains were frequently arriving and departing, and cars, singly or in number, were continually being shunted, or driven back or forth on the various tracks, or switched from one to another; and there can be no doubt but that the dangers which are unavoidable, in the exercise by the company of reasonable care and precaution in guarding its employees against such perils, are assumed by them in consenting 220 to accept employment under such circumstances. But the employee does not assume the risk of those dangers which are known by, and can be obviated or avoided by the exercise of reasonable care and caution on the part of, the company. The company is bound to take reasonable care and caution to protect those working in its yards from such dangers, and it would be liable for damages sustained by any employee in consequence of its neglect or failure to discharge its duty in that regard. The duty is one arising from the relation of master and servant, and the servant has a right to assume, until he has knowledge to the contrary, that the master has taken and will adopt such reasonable measures as are within his power to protect him against such dangers while engaged in his work. In whatever manner the company may choose to discharge its duty, it still continues, though it be delegated to one or more of its officers or servants, and it cannot, by reason of such delegation, claim exemption from liability for injuries occasioned by its non-performance. The master is required to furnish the servant with proper and suitable tools and instruments for his use, and a safe and proper place in which to perform his work, and while requiring the performance of work by a servant in a place which may be or has become dangerous, and such

danger may be foreseen and guarded against by the exercise of reasonable care and prudence on the part of the master, it is his duty to exercise such care and adopt such precautions as will protect the servant from avoidable danger; that is to say, such as may be avoided by the exercise of reasonable care and caution on the part of the master: *Bessex v. Chicago etc. Ry. Co.*, 45 Wis. 481, 482; *Kelleher v. Milwaukee etc. R. R. Co.*, 80 Wis. 584, 588; *Smith v. Chicago etc. Ry. Co.*, 42 Wis. 520; *Laning v. New York Cent. Ry. Co.*, 49 N. Y. 531, 532; 10 Am. Rep. 417; *Corcoran v. Holbrook*, 59 N. Y. 517; 17 Am. Rep. 369; *McGovern v. Central Vt. R. R. Co.*, 123 N. Y. 280, 287, 288; *Moore v. Wabash etc. R. R. Co.*, 85 Mo. 588.

291 The conditions and circumstances under which the plaintiff was required to perform his service in the yard, as well as its dangers, and what reasonable care and caution the company could and ought to have observed in shunting, kicking, or moving cars, particularly in the night-time, when the plaintiff had to perform his work, was, we must assume, well known to its foreman, Blake, who, it appears, was on the engine and in charge of its work, and directed the passenger coach to be kicked down the main track, by reason of which the plaintiff was injured. The evidence does not show how far the coach had been driven before it came upon the main track where the engine let go of the coach by the direction of Blake, about three hundred feet distant from where it struck the plaintiff. The evidence tends to show that it came on the main track somewhat from the south, and on a curve, and that the switch could not be seen from where the plaintiff had been working, and, although a man with a lantern was on the rear of the car, there was no one nor any light on the front of the car, and no locomotive was attached to it, to admonish employees of its comparatively noiseless approach and the danger that might ensue. The manner in which the car was thus left to run its course, as to employees in the yard, was, in a very considerable degree, attended by the perils and risk consequent upon making a running switch—a proceeding usually considered as a negligent act, and attended with great danger: *Ward v. Chicago etc. Ry. Co.*, 85 Wis. 601, and cases cited; and if made across a frequented street in the night-time, without providing any signal of danger or giving any notice of the approach of the rear section, is held to be negligence as a matter of law: *Delaware etc. R. R. Co. v. Converse*, 139 U. S. 469.

The evidence tends to show that, by the adoption of reasonable precautions within its power, the company could have given the plaintiff timely warning of the danger to which he was exposed, and thus guarded him against the ²²² injury he sustained, and that it failed to discharge its duty to him in this respect. The presence of a brakeman with a light on the front of a car, or of an engine attached to it, to give warning by sound as well as by light, and to regulate its speed or reverse its course, are among the expedients that might have been reasonably adopted. So far as we can discover, no such or similar measure was adopted, and the company, or its representative, the foreman, in driving the coach along the main track in the manner and under the circumstances stated, practically ignored the presence of the plaintiff and others of the night crew at work in the yard, and took no measure whatever to protect him against the dangers to which he was thus exposed.

We think, too, that there was sufficient evidence of the defendant's positive negligence to require the submission of the case to the jury, independent of its alleged neglect of duty. It appears the foreman directed an employee of the company, when the coach was kicked and cut off, to ride it down along the track, and it is said that this employee negligently discharged the duty devolved on him, by riding on the rear instead of the front of the car, and so that the injury may be said to have been the result of the negligence of a fellow-servant of the plaintiff, for which there can be no recovery. The act charged as negligent was, as we have said, the act of Blake, the foreman in the yard at the time, and acting, it would seem, as engineer; and if he was a fellow-servant of the plaintiff the defendant company would, notwithstanding, be liable, under the provisions of the statute (Sanborn and Berryman's Annotated Statutes, sec. 1816 a), for the consequences of his negligence. Evidently the riding of cars in the night-time by a brakeman or employee on the front end with a lantern may serve to signal the approach of the car or cars, and regulate or stay their course by means of the brake, and operates as a precaution calculated to prevent accident and injury to the workmen in the yard. It may properly ²²³ be considered as a reasonable precaution and measure of safety which it was the duty of the company to take for that purpose, and in that view the servant of the company riding the coach in the present case was charged by

the company, through its foreman, with the duty the company owed the plaintiff and others, its employees at work in the yard. He was the agent of the company for the performance of that duty, and his failure to properly perform it is to be imputed to the company, and its liability for nonperformance of its duty would still remain: *Smith v. Chicago etc. Ry. Co.*, 42 Wis. 526, and cases cited; *Laning v. New York Cent. R. R. Co.*, 49 N.Y. 521; 10 Am. Rep. 417; *Cadden v. American etc. Co.*, 88 Wis. 418, 419; *McGovern v. Central Vt. R. R. Co.*, 123 N. Y. 288.

We think it was a question of fact for the jury to determine from the evidence whether working at night by the plaintiff in the defendant's yard was attended with danger not fairly incident to his employment, and which could have been foreseen and guarded against by the defendant by the exercise of reasonable care and prudence, and whether the plaintiff's injury was caused by its neglect to adopt such reasonable precautions as were necessary to protect the plaintiff from such danger.

2. The risk consequent upon the failure of the company to properly discharge its duty to the plaintiff, as its employee, is not one of the ordinary risks incident to his employment, and the plaintiff did not assume the consequences of it by accepting and entering upon his work. But if the negligence of the company, or element of danger, though not incident to his employment, was open and obvious, or such that the servant, in the exercise of ordinary care, ought to have observed it and comprehended the danger likely to result, then he assumed the risk if he continued in the employment. There is no evidence tending to show that the plaintiff, by continuing in his employment, assumed the risk ²²⁴ of injury from the defendant's failure to properly perform any of its duties to him as its employee.

3. The testimony of the plaintiff and his companion, Van Alstine, is to the effect that they did not see the car nor hear anything indicating its approach, and tends to show that, from where they were at the time, they could not see up to the switch where it came upon the main track. The testimony on this subject is not entirely clear, but it wholly fails to show that anything was done to warn them or signal the approach of the coach. They started east toward the depot, their backs to the switch, and the plaintiff testifies that he was walking between the two tracks and not between the

rails of the main track, and Van Alstine's evidence tends to the same conclusion. The entire evidence on the subject is not so clear and decisive as to justify the court in withdrawing the question, whether the plaintiff's negligence contributed to his injury, from the jury. "The question of contributory negligence is eminently proper for a jury to determine, and when the evidence does not clearly and indisputably show such negligence or want of care on the part of the plaintiff, so as to leave nothing to submit to the jury on the opposite theory or position, a nonsuit should not be granted": *Houfe v. Fulton*, 29 Wis. 296; 9 Am. Rep. 568; *Besetz v. Chicago etc. Ry. Co.*, 45 Wis. 483; *Valin v. Milwaukee etc. R. R. Co.*, 82 Wis. 1, 6; 33 Am. St. Rep. 17, and cases cited.

For these reasons the nonsuit was improperly granted.

By the COURT. The judgment of the circuit court is reversed and the cause remanded for a new trial.

MASTER AND SERVANT—ASSUMPTION OF RISK—KNOWLEDGE OF MASTER. A laborer who does not know of an unusual and increased danger known to his employer does not assume the risk of an injury from such danger, and may recover from his employer: *Norfolk etc. R. R. Co. v. Ward*, 90 Va. 687; 44 Am. St. Rep. 945. A master is liable to a servant for injury caused by the master's negligence, when the defect causing such injury was known to the master, and not to the servant: *Bumell v. Laconia Mfg. Co.*, 48 Me. 113; 77 Am. Dec. 212, and extended note at page 223.

MASTER AND SERVANT—VICE-PRINCIPAL—MASTER'S LIABILITY FOR NEGLIGENCE OF.—If a servant of a railway corporation is intrusted with a duty that belongs to his principal as a primary duty, the negligence of such servant is negligence for which the principal is answerable to another servant injured thereby: *Chicago etc. R. R. Co. v. Kneirim*, 152 Ill. 458; 43 Am. St. Rep. 259, and note; *Cheaney v. Ocean Steamship Co.*, 92 Ga. 726; 44 Am. St. Rep. 113, and note.

RAILROADS ARE LIABLE TO THEIR SERVANTS FOR INJURIES RECEIVED IN CONSEQUENCE OF WANT OF REGULATIONS for their guidance in making flying switches, and in the shunting and kicking of its cars: *Reagan v. St. Louis etc. Ry. Co.*, 93 Mo. 348; 3 Am. St. Rep. 542, and note. It is the duty of a railroad to frame and promulgate such rules for the moving of its trains as will afford reasonable safety to operatives engaged in moving them, and, for a failure to do this, it is liable to an employee injured: *Lewis v. Seifert*, 116 Pa. St. 628; 2 Am. St. Rep. 631, and note; *Bushby v. New York etc. R. R. Co.*, 107 N. Y. 374; 1 Am. St. Rep. 844.

NEGLECTENCE, WHEN A QUESTION FOR THE JURY.—If there is reasonable doubt as to the facts or the inferences to be drawn from them, the question of negligence is solely for the jury to determine: *Vannatta v. Central R. R. Co.*, 164 Pa. St. 262; 35 Am. St. Rep. 823, and note; *Gibson v. City of Huntington*, 38 W. Va. 177; 45 Am. St. Rep. 853, and note.

GREENBERG v. WHITCOMB LUMBER COMPANY.

[30 WISCONSIN, 225.]

AN AGENT OR SERVANT IS RESPONSIBLE TO THIRD PERSONS for injuries occasioned by his misfeasance, but not for those occasioned by mere nonfeasance.

NONFEASANCE is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person may lawfully do; malfeasance is the doing of an act which a person ought not to do at all.

CORPORATION, AGENT, MISFEASANCE FOR WHICH ANSWERABLE.—An agent of a corporation charged with the duty of providing safe machines with which its employees were required to work, and who, knowing a machine to be defective and dangerous, put an employee to work therewith, is guilty of misfeasance, for which he is answerable to such employee, if injured thereby.

MASTER AND SERVANT MAY BE JOINED in one action to recover compensation for injuries suffered from the same act of negligence.

Mylrea, Marchetti & Bird, for the plaintiff.

Goodrick & Goodrick, for the defendants.

220 **NEWMAN, J.** The complaint states, in substance, that the defendant the Whitcomb Lumber Company is a corporation; that the defendant Parlan Semple was one of its officers and its general managing agent; that its business was the manufacturing of timber into firewood; that it operated, in this work, a machine which was defective and dangerous; that it knew the machine to be defective and dangerous; that the defect which rendered it dangerous was that the saw was defectively and insecurely fastened to its shaft; that the plaintiff was employed to work upon or with this machine; that he was inexperienced in such work and as to such machine, and did not know of the defect of the machine; that the defendants knew that he was so inexperienced and ignorant; that plaintiff received no instructions; that he was injured, without his fault, by reason of the defect of the machine. Fairly construed, this is the substance of the complaint. It was the duty of the defendant the Whitcomb Lumber 221 Company to furnish the plaintiff a safe machine to work with, and, knowing the defect of the machine, and that he was inexperienced, to instruct him of the dangers of the employment. Not to do this was negligence. The complaint states a cause of action against the defendant the Whitcomb Lumber Company.

Whether the complaint states a cause of action against the defendant Parlan Semple is more complex. He was the

agent or servant of the Whitcomb Lumber Company, charged with the oversight and management of its operations, and with the duty of providing a safe machine for the work in which the plaintiff was engaged. The principle is well settled that the agent or servant is responsible to third persons only for injuries which are occasioned by his misfeasance, and not for those occasioned by his mere nonfeasance. Some confusion has arisen in the cases from a failure to observe clearly the distinction between nonfeasance and misfeasance. These terms are very accurately defined, and their application to questions of negligence pointed out, by Judge Metcalf, in *Bell v. Josselyn*, 8 Gray, 309; 63 Am. Dec. 741. "Nonfeasance," says the learned judge, "is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; malfeasance is the doing of an act which a person ought not to do at all." The application of these definitions to the case at bar is not difficult. It was Semple's duty to have had this machine safe. His neglect to do so was nonfeasance. But that alone would not have harmed the plaintiff, if he had not set him to work upon it. To set him to work upon this defective and dangerous machine, knowing it to be dangerous, was doing improperly an act which one might lawfully do in a proper manner. It was misfeasance. Both elements, nonfeasance and misfeasance, entered into the act or fact which caused the plaintiff's damages. But the nonfeasance alone could not have produced it. The misfeasance was the efficient ²³² cause. For this, the defendant Semple is responsible to the plaintiff: Mechem on Agency, sec. 569, et seq; 14 Am. & Eng. Ency. of Law, 873, and cases cited in note 4; Wood on Master and Servant, 2d ed., 667; *Osborne v. Morgan*, 130 Mass. 102; 39 Am. Rep. 437.

The complaint states but a single cause of action. It is the same cause of action against both defendants, arising from the same acts of negligence—the master for the negligence of its servant; the servant for his own misfeasance. Both master and servant, being liable for the same acts of negligence, may be joined as defendants: Wood on Master and Servant, 2d ed., 667; *Wright v. Wilcox*, 19 Wend. 343; 32 Am. Dec. 507; *Phelps v. Wait*, 30 N. Y. 78.

By the COURT. The order appealed from by the Whitcomb Lumber Company is affirmed, and the order appealed from by the plaintiff is reversed.

Personal Liability of Officers of Corporations to Third Persons.

The purpose of this note is to consider the personal liability of officers and other agents of corporations to third persons. The liability of directors of corporations was the subject of the monographic note to *Hodges v. New England Screw Co.*, 53 Am. Dec. 637-651, but in that note attention was chiefly directed to their liability to the corporation itself. This liability will not receive any further attention here, nor shall we here consider those cases in which, though the liability is to the corporation, and primarily to be asserted in proceedings taken by it, yet, if the corporation refuses to act, redress may be had by one of the stockholders or creditors proceeding to assert for his own benefit, and for that of his fellow stockholders or creditors, a cause of action which it was the duty of the corporation to have asserted. Personal liability of agents to third persons has been treated in the note to *Baird v. Shipman*, 22 Am. St. Rep. 508-514, and the rules there stated will, in the main, be found applicable to officers and other agents of corporations.

Classification of Liability.—The liability of agents of corporations, like the liability of all other persons, may be either *ex contractu* or *ex delicto*. The former will be first considered. There is this very substantial difference in these two classes of liabilities: if the agent is liable upon a contract, it is generally because the corporation is not liable, while his liability for a tort committed by him while acting as agent, when it exists at all, is a liability for which the corporation is also answerable.

Liability of Corporation, when Excludes that of Agent.—If a contract has been entered into by an agent on behalf of a corporation, and is binding upon it, the liability of the corporation will exclude all liability upon the part of the agent, except indeed, when, in addition to acting as an agent, he has also acted upon behalf of himself, and has, by the terms of the contract, made both himself and his principal parties thereto. This was very clearly pointed out by Lord Cairns in the case of *Ferguson v. Wilson*, L. R. 2 Ch. App. 77, 89, in which directors were sought to be held liable upon a contract made by them on behalf of the corporation. He said: "This is a bill filed upon a contract. With whom has the contract been made? The bill alleges that the contract is made with, and binds, the company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent. Wherever an agent is liable, those directors would be liable; where the liability would attach to the principal, and to the principal only, the liability is the liability of the company. This being a contract alleged to be made by the company, I own that I have not been able to see how it can be maintained that an agent can be brought into this court, or into any other court, upon a proceeding which simply alleges that his principal has violated a contract which he has entered into. In that state of things, the principal, and not the agent, would be the person liable." Therefore, if the corporation draws a check against a bank until the amount of its credit there is overdrawn, this overdrawing, being the act of the corporation, though authorized by, or done with the assent of, its directors, does not create any personal obligation against them: *Beattie v. Ebury*, L. R. 7 H. L. 102. The rule is, without exception, so far as we are aware, that whenever an officer or other agent of a corporation contracts in its behalf and with proper authority, and the other contracting party knows that the agent is not acting for himself, but for his principal, the corporation, then the agent cannot be held personally answerable for any default

of the principal respecting the performance of the contract: *Hetfield v. Addicks*, 154 Pa. St. 1; *Imhoff v. House*, 36 Neb. 28.

Classification of Liability Ex contractu.—The liability ex contractu of persons who are, or who, at least, assume to be, officers or agents of corporations, arises, 1. Where there is no corporation, or, in other words, where he who has undertaken to act as an agent cannot show that he at the time had a principal; 2. Where, though the corporation existed, the contract made was ultra vires, and therefore cannot be deemed the contract of the corporation; 3. Where, though the corporation existed and the contract was not ultra vires, the agent had not been authorized to enter into it on behalf of the corporation; and 4. Where, though the agent might have bound the corporation by the contract in question, he did not execute it in such a form as to make it the contract of his principal.

Where there was no Corporation to be Bound.—When persons, as agents, assume to enter into a contract for and on behalf of an alleged corporation, and such corporation has not been formed, or, though formed, has not reached that stage of its existence when, by the laws of the state, it can be bound by the contract in question, it is obvious either that such agents must be bound, or the contract denied all effect, and this, too, when the party to it has parted with a valuable consideration because of it, and the denial to give effect to it must operate as a fraud upon him. As a general rule, where there is no principal, a person assuming to act as an agent may be dealt with as a principal: *Mechem on Agency*, sec. 557. The application of this rule to the law of corporations requires that persons assuming to act as agents of a corporation be held liable personally when there was no corporation to be bound, though, perhaps, their liability is not upon the contract itself, but for a breach of their implied representation that the corporation existed, and that they had authority to contract for it: *Hall v. Crandall*, 29 Cal. 567; 89 Am. Dec. 64. The authorities upon this subject speak a various language: *Note to Pittsburgh etc. Co. v. Spooner*, 17 Am. St. Rep. 162; *note to People v. Montecito etc. Co.*, 33 Am. St. Rep. 186; but perhaps it is possible to reconcile them, or the greater number of them. If there is no corporation either de jure or de facto, and the contract must either be treated as void, or enforced as the contract of the person who assumed to make it as an agent of the corporation, we think a decided majority of the courts will not treat it as void, but will enforce it as the personal obligation of the agent: *Doddleday v. Musket*, 4 Moore & P. 750; *Hurt v. Salisbury*, 55 Mo. 310; *Perry v. Rodman*, 16 Ind. 241; *Burns v. Beck etc. Co.*, 83 Ga. 471; *Shields v. Clifton Hill etc. Co.*, 94 Tenn. 123; 45 Am. St. Rep. 700; *Garnett v. Richardson*, 35 Ark. 144; *Bigelow v. Gregory*, 73 Ill. 197; *Coleman v. Coleman*, 78 Ind. 344; *Ferris v. Shaw*, 72 Mo. 446; *Kaiser v. Lawrence Savings Bank*, 56 Iowa, 104; 41 Am. Rep. 85; *Walton v. Oliver*, 49 Kau. 107; 33 Am. St. Rep. 355; *Farmers' etc. Co. v. Floyd*, 47 Ohio St. 525; 21 Am. St. Rep. 846. If, on the other hand, where there is an incomplete attempt to form a corporation, and, perhaps, even where no such attempt has been made, yet, if there is a corporation de facto, and the circumstances are such that if the association named as a corporation were to sue upon the contract, the other party would be estopped from denying the corporate existence or right to contract, he cannot, in suing upon the contract himself, disregard the corporate character, nor, by questioning the corporate existence, impose a personal liability upon an officer or agent, upon the ground that there was no corporation which he could represent: *Merchants' etc. Bank v. Stone*, 38 Mich. 779; *Blanchard v. Kaul*, 44 Cal. 440;

Snider etc. Co. v. Troy, 91 Ala. 224; 24 Am. St. Rep. 887; *Whitney v. Weyman*, 101 U. S. 392; *First Nat. Bank v. Almy*, 117 Mass. 476; *Fay v. Noble*, 7 Oush. 188; *Stout v. Zulach*, 48 N. J. L. 599; *Vanneman v. Young*, 52 N. J. L. 403; *Planters' etc. Bank v. Padgett*, 69 Ga. 159. This rule recognises a mutuality of obligation, and produces a mutuality of remedy. The association of individuals which had contracted, or been contracted with, as a corporation is, in effect, accorded and subjected to the same remedies as if it were a corporation de jure, and the other party to the contract is neither permitted to enforce a personal liability, when all the contracting parties anticipated a corporate liability, nor is he in any substantial sense deprived of the remedy which he understood attended the contract when he entered into it. Even in those states where a personal liability exists against one contracting as an agent of a corporation having no legal existence, he may doubtless be exonerated when it appears that both parties knew the whole facts respecting the existence and formation of the corporation, and the party contracting with it cannot be regarded as acting upon any expression or implied representation concerning it.

Ultra Vires Contracts.—Strictly speaking, we doubt whether an officer or agent of a corporation can ever be held personally liable on a contract on the ground that, being ultra vires, it does not bind the corporation, and must, in order to give it some effect, be treated as the contract of the agent. If, indeed, it be one in consideration of which moneys have been paid to him for his principal, and, before they are paid over to the latter, the other party discovers that the contract is void as against the corporation and demands the return of the moneys from the agent in whose possession they remain, and he refuses to comply with such demand, he is liable to an action for money had and received: *Jests v. York*, 10 Cush. 392. If there are any other instances in which an agent of the corporation is liable upon a contract because it is ultra vires, the liability must rest upon the ground that he has been guilty of misrepresentation respecting a matter of fact, and is therefore answerable for damages sustained by a party acting thereon to his prejudice. There are some English cases in which directors of corporations have been held liable for issuing obligations of the corporation after it had exhausted its authority to do so, or before such authority had been called into being: *Weeks v. Propert*, L. R. 8 Com. P. 427; *Richardson v. Williams*, L. R. 8 Q. B. 276. These decisions, if defensible at all, must be supported on the ground that the authority in question was not determinable as a mere matter of law, but dependent upon certain facts presumably within the knowledge of the directors, and not known to the party contracting with the corporation, and the existence of which the directors must, under the circumstances of the case, be regarded as having falsely affirmed. By no form of action can a director be held answerable for ultra vires acts or contracts in which he did not participate, and which by ordinary attention to his duty he might have prevented: *Cargill v. Bower*, L. R. 10 Ch. Div. 502. Whether a contract or act is ultra vires is usually a matter of law. At law, parties contracting with a corporation are conclusively presumed to be as well informed as are the officers and other agents thereof. Therefore, where there is no misrepresentation upon any matter of fact, officers and agents of a corporation cannot be made personally answerable because a contract which they have sought to enter into on behalf of the corporation is ultra vires: *Humphrey v. Jones*, 71 Mo. 62; *Eaglesfield v. Marquis of Londonderry*, L. R. 4 Ch. Div. 693. In such a case the other contracting party is charged with knowledge of the law, and therefore cannot maintain an

action for an implied misrepresentation respecting it, nor can he assume that because the corporation could not enter into the contract in question, its agents acted in their individual capacity, and for the purpose of binding themselves as principals, when the language of the contract does not permit of this interpretation: *Sandford v. McArthur*, 18 B. Mon. 411; *Abeles v. Cochran*, 22 Kan. 405; 31 Am. Rep. 194; *Frost etc. Co. v. Foster*, 76 Iowa, 535. Corporations often become liable on ultra vires contracts, as where they have been fully executed, or the corporation has otherwise received the benefit thereof, and has thereby estopped itself from interposing the plea of ultra vires. In such a case, as the corporation has become obligated upon the contract as effectually as if it had not been ultra vires in its inception, there is no ground upon which it can be deemed the personal contract of the agent making it on behalf of the corporation: *Linkauf v. Lombard*, 137 N. Y. 417; 33 Am. St. Rep. 743.

Agent Acting Without Authority.—If the corporation had power to make the contract in question, but the officer or agent who assumed to represent it did not have authority to do so, and the contract therefore cannot be enforced against it, there is no doubt that the other party to the contract is entitled to redress against the agent or officer (Thompson on Corporations, sec. 5028), but the courts have not agreed as to the nature of the liability, nor as to the mode in which relief must be sought. If, indeed, the want of authority in the agent was known to the other party, and perhaps in all cases where he has notice of the facts, as where both he and the agent have assumed that the authority existed because of their common mistake or misapprehension of the law, there can be no liability on the part of the agent: *Newman v. Sylvester*, 42 Ind. 112; *Jenkins v. Atkins*, 1 Humph. 294; 34 Am. Dec. 648; *Ogden v. Raymond*, 22 Conn. 379; 58 Am. Dec. 429; *Hall v. Huntoon*, 17 Vt. 244; 44 Am. Dec. 332. He may have expressly represented himself to have authority, or such representation may have been implied from his undertaking to act on behalf of the corporation. His legal liability is in either case the same; nor is it material that he acted in good faith. This liability, in some of the courts, is regarded as a liability resting in contract, and, having no principal, the contract is treated as the agent's, and a recovery had against him thereon as if he had executed it in his own name: *Dale v. Donaldson etc. Co.*, 48 Ark. 188; 3 Am. St. Rep. 224; *McCurdy v. Rogers*, 21 Wis. 197; 91 Am. Dec. 468; *Frankland v. Johnson*, 147 Ill. 520; 37 Am. St. Rep. 234; *White v. Skinner*, 13 Johns. 307; 7 Am. Dec. 381; *White v. Madison*, 26 N. Y. 123; *Mechem on Agency*, secs. 542-545; *Knickerbocker v. Wilcox*, 83 Mich. 200; 21 Am. St. Rep. 595; *Solomon v. Penoyar*, 89 Mich. 11; *Bank of Hamburg v. Wray*, 4 Strob. 87; 61 Am. Dec. 659; *Keener v. Harrod*, 2 Md. 63; 56 Am. Dec. 706; *Rossiter v. Rossiter*, 8 Wend. 494; 24 Am. Dec. 62. Other courts, while treating the liability as being ex contractu, do not concede that it is upon the contract which the agent has entered into in the name of the corporation. They proceed upon the theory that when the agent by his words and conduct has caused the other contracting party to believe that authority on the part of the agent existed, and to act upon such belief, this act or conduct amounts to a warranty of authority on the part of the agent, and that an action may be maintained against him for the breach of such warranty, whether it was expressed or implied: *Collen v. Wright*, 7 El. & B. 301; 26 L. J., Q. B., 147; 8 El. & B. 647; 27 L. Q. B. 215; *Cherry v. Colonial Bank of Australasia*, L. R., 3 P. C. 24; *Rashdall v. Ford*, L. R. 2 Eq. 750; *Beattie v. Lord Elbury*, L. R. 7 Ch. App. 777. It is, of course, the theory of these

and other decisions that the agent is not liable on the contract itself; (*Hall v. Crandall*, 29 Cal. 567; 89 Am. Dec. 64; *Wallace v. Bentley*, 77 Cal. 19; 11 Am. St. Rep. 231; *Sayre v. Nichols*, 7 Cal. 535; 68 Am. Dec. 280; *Cole v. O'Brien*, 34 Neb. 68; 33 Am. St. Rep. 616), and that the action to enforce his liability must be in the nature of an action upon the case or in tort for falsely assuming to act as agent: *Duncan v. Niles*, 32 Ill. 532; 83 Am. Dec. 293; *Harper v. Little*, 2 Greenl. 14; 11 Am. Dec. 25; *Stetson v. Patten*, 2 Greenl. 358; 11 Am. Dec. 111; *Barilett v. Tucker*, 104 Mass. 336; 6 Am. Rep. 240; *Long v. Colburn*, 11 Mass. 97; 6 Am. Dec. 160; *Bailou v. Talbot*, 16 Mass. 461; 8 Am. Dec. 146; *Jefts v. York*, 4 Cush. 371; 50 Am. Dec. 791; *Moor v. Wilson*, 26 N. H. 332; *Noyes v. Loring*, 55 Me. 408.

It is, in every instance in which a person contracts for another as his agent, essential that the contract, to relieve the agent from liability, should in form be such that it is binding upon his principal. If an agent contracts in his own name he is personally answerable, and cannot escape liability by proving that he had a principal, and intended to contract for him alone. Therefore, if the contract is, on its face, in the name of the agent, and contains what appears to be his promise, he is personally liable upon it (*Wharton on Agency*, secs. 490, 496); and this rule is as applicable to corporations and their officers and other agents as it is to natural persons and their agents. In the case of an agent representing a natural person it is not sufficient, to exonerate the agent from liability, that he had a principal whom he was authorized to represent and for whom he had authority to make the contract in question. It must therefore appear that, at or before entering into the contract, he disclosed the name of his principal: *Neeley v. State*, 60 Ark. 66; 46 Am. St. Rep. 148; *Holt v. Ross*, 54 N. Y. 472; 13 Am. Rep. 615. If the contract is in the name of the agent, and contains what appears to be his covenant or promise, but he, in signing it, also adds to his signature the word "agent" (*Dutton v. Marsh*, L. R. 6 Q. B. 361; *Brinley v. Mann*, 2 Cush. 337; 48 Am. Dec. 669; *Simonds v. Heard*, 23 Pick. 120; 34 Am. Dec. 41; *Collins v. Insurance Co.*, 17 Ohio St. 215; 93 Am. Dec. 612), or the name of his office, as treasurer, manager, president, secretary and the like, still, if from the whole contract it does not appear to be the contract of his principal, the agent is personally liable thereon: *Downman v. Jones*, 4 Q. B. 235; *Childs v. Monino*, 2 Brod. & B. 460; *Dutton v. Marsh*, L. R. 6 Q. B. 361; *Moss v. Livingston*, 4 N. Y. 208; *Pentz v. Stanton*, 10 Wend. 271; 25 Am. Dec. 558; *Mellen v. Moore*, 68 Me. 390; 28 Am. Rep. 77; *Forster v. Fuller*, 6 Mass. 58; 4 Am. Dec. 87; *Hovey v. Magill*, 2 Conn. 680; *Price v. Taylor*, 5 Hurl. & N. 540; *Pershing v. Severson*, 58 Minn. 310.

Of the proposition that the officers and other agents of a corporation are personally liable upon contracts entered into by them, unless it appears from such contract that the corporation is bound thereby, there can be no doubt: *McClure v. Bennett*, 1 Blackf. 189; 12 Am. Dec. 223; *McConlin v. Gilpin*, L. R. 5 Q. B. Div. 390; *Thompson on Corporations*, sec. 5015; *Pickering's Claim*, L. R. 6 Ch. 525; but different courts may not agree upon the interpretation of instruments substantially alike, and may disagree as to whether or not a particular instrument discloses an intention to bind the corporation, and therefore imposes no liability upon its agent. Thus, a note in which the promisors describe themselves as trustees of a religious association or corporation, and purport to bind themselves to pay a sum designated and signed by each, and in which, after the signature, appeared the words, "Trustees of the First Presbyterian Congregation," was held to be the personal contract of such trustees: *McClure v. Bennett*, 1 Blackf. 189;

12 Am. Dec. 223. A similar ruling was made in England, though the seal of the corporation was also affixed to the note: *Dutton v. Marsh*, Q. B. 19 W. R. 754. As the seal of a corporation is almost always employed to denote its assent to a contract and its purpose to bind itself thereby, and would be out of place and entirely superfluous in the contract of an officer or other agent in his personal and private capacity, we should regard its presence as always material and generally controlling, and should construe a note or other obligation on which the name of an officer or other agent of a corporation appears with a designation of his official title, and upon which is impressed the corporate seal, as the contract of the corporation, and not that of the officer: *Means v. Swornstedt*, 32 Ind. 87; 2 Am. Rep. 330. The mode in which an agent must sign or execute a contract, so as to bind his principal and not to bind himself, has already received consideration in this series and will not be further treated here: Notes to *McDonough v. Templeman*, 2 Am. Dec. 513-518; *Barker v. Mechanics' etc. Co.*, 3 Wend. 94; 20 Am. Dec. 666; it being sufficient for our present purpose to state that whatever be the form necessary in the state in which the question arises to indicate that the contract is not that of the agent must be pursued to exonerate him from liability and that the law upon this subject is the same whether the agent represents a natural or an artificial person: Thompson on Corporations, sec. 5028-5039. As to a negotiable instrument executed by an officer or other agent of a corporation, he must, to escape personal liability thereon, see that such instrument is in such form that from its face it can be seen who was the principal, and that the promise therein contained is the promise of such principal, and not the promise of the agent, and that the promise is a corporate promise is not sufficiently manifested from the mere fact that the person signing it adds to his signature the word "agent," "director," "president," or any other official designation, or otherwise describes his representative or official capacity: *Jefts v. York*, 4 Cush. 371; 50 Am. Dec. 791; *Barker v. Mechanics' etc. Co.*, 3 Wend. 94; 20 Am. Dec. 664; *Powers v. Briggs*, 79 Ill. 493; 22 Am. Rep. 175; *Burlingame v. Brewster*, 79 Ill. 515; 22 Am. Rep. 177, and note; *Chick v. Trevett*, 20 Me. 462; 37 Am. Dec. 68; *Hobson v. Hassett*, 76 Cal. 203; 9 Am. St. Rep. 193; *Dutton v. Marsh*, L. R. 6 Q. B. 361; 40 L. J. Q. B. 175; *Caphart v. Dodd*, 3 Bush, 584; 96 Am. Dec. 258; *Pack v. White*, 78 Ky. 243; Thompson on Corporations, sec. 5129; *Rand v. Hale*, 3 W. Va. 495; 100 Am. Dec. 761; *Sharpe v. Bellis*, 61 Pa. St. 69; 100 Am. Dec. 618; *Slawson v. Loring*, 5 Allen, 340; 81 Am. Dec. 750. There are cases to the effect that if the instrument shows that the person signing it is an officer of a corporation, the name of which is also disclosed, and the language is ambiguous, and may import either a personal or a corporate liability, parol evidence is admissible to prove which was intended: *Kean v. Davis*, 21 N. J. L. 683; 47 Am. Dec. 182; *Haile v. Peirce*, 32 Md. 327; 3 Am. Rep. 139. If the note purports to contain the promise of the corporation, the fact that it is signed by the agent only, instead of purporting to be signed by the corporation by himself as agent, is not material. In such case, the words constituting the body of the note are controlling, and the promise there appearing to be the promise of the corporation, its name need not appear in the signature also: *Shaver v. Ocean etc. Co.*, 21 Cal. 45; *Commercial Bank v. Newport etc. Co.*, 1 B. Mon. 13; 35 Am. Dec. 171. In some instances the form of executing a contract has been such as to leave doubt whether it might be the obligation both of the corporation and of the agent executing it, as where a promissory note, after stating in the body that "We promise to pay," is signed with the name of the corporation followed

by the words "A. B., president," or the like. In one case, a note so executed was held to be the joint note of the corporation and of the agent, *McCandless v. Belle Plaine etc. Co.*, 78 Iowa, 161; 16 Am. St. Rep. 429. This is believed to be a mistaken view. In our judgment, the addition of the official designation after the names of the officers is sufficient, and shows that they were not acting in their personal capacity, and, where their names are also preceded by the name of the corporation, it sufficiently appears that the obligation is executed by them on behalf of the corporation, and not on behalf of themselves, and the use of the pronoun "we" is a mere inadvertence, having no tendency to induce the acceptance of the obligation on the ground that it binds the officers themselves in addition to binding the corporation: *Reeve v. First Nat. Bank*, 54 N. J. L. 208; 33 Am. St. Rep. 675; *Liebacher v. Kraus*, 74 Wis. 337; 17 Am. St. Rep. 171; *Beas v. Pioneer etc. Co.*, 66 Cal. 451; 56 Am. Rep. 106; *Castle v. Belfast etc. Co.*, 72 Me. 167; *Falk v. Moebis*, 127 U. S. 597; *Draper v. Massachusetts etc. Co.*, 5 Allen, 338; *Olcott v. Tioga R. R.*, 27 N. Y. 546; 84 Am. Dec. 298; *Thompson v. Ellens*, 58 Minn. 301.

Upon principle, the true question for consideration in every case is, or, at least, ought to be, whether, taking the writing as a whole, it sufficiently appears therefrom that it is intended to be binding upon the corporation rather than upon the agent who has signed it. It is not at all usual for a person, executing a note or other contract, to add words descriptive of himself, or to refer to his relation to other persons, whether natural or artificial, who have no connection with the transaction, and, when he designates his representative capacity, to assume that such designation was intended merely as a description of himself is to assume something which is rarely, and perhaps never, in harmony with the facts. Of course, if he only describes himself as an agent or officer without indicating who his principal is, the instrument must necessarily be accepted as the obligation of the agent, or treated as void for want of a designated obligor. If, on the other hand, he, upon the face of the writing, discloses not only that he is an agent or officer, but also of whom he is such agent or officer, we must be astute to misapprehend, or else we must concede that he has employed language better calculated to evidence the obligation of his principal than of himself. There is a growing inclination to consider an instrument as it would manifestly be understood by the average business man, or, in other words, as it was most probably understood by the party receiving and the party signing it, and to exonerate the latter from liability, when, according to such construction, it appears to the court that he did not intend, and was not understood, to bind himself, but to act for the corporation of which he was the authorized agent: *Despatch etc. Co. v. Bellamy etc. Co.*, 12 N. H. 205; 37 Am. Dec. 203; *Magill v. Hinesdale*, 6 Conn. 464; 16 Am. Dec. 70; *Smith v. Alexander*, 31 Mo. 193; *McClellan v. Reynolds*, 49 Mo. 312; *Pratt v. Beaupre*, 13 Minn. 187; *Johnson v. Smith*, 21 Conn. 627; *Wyman v. Gray*, 7 Har. & J. 409; *Means v. Swormstedt*, 32 Ind. 87; 2 Am. Rep. 330; *Vater v. Lewis*, 36 Ind. 288; 10 Am. Rep. 29; *Farmers' etc. Bank v. Colby*, 64 Cal. 352. The use of the corporate seal is a material circumstance, and in doubtful cases should turn the scale; for its use, while consistent with the corporate obligation, is neither usual nor consistent when a personal liability is intended: *Guthrie v. Imbrie*, 12 Or. 182; 53 Am. Rep. 331; *Scanlan v. Keith*, 102 Ill. 640; 40 Am. Rep. 624. So the fact that the paper upon which the note or other contract is written contains on the heading, or other prominent part thereof, the name of the corporation, has been considered by some

of the courts as indicating an intention to do a corporate act, and, therefore, as sustaining the claim that the corporation alone is liable: *Carpenter v. Farnsworth*, 106 Mass. 561; 8 Am. Rep. 360.

For Every Active Tort Committed by an Agent, whether of a natural or of an artificial person, there is no doubt that he is personally liable, whether his principal is also answerable therefor or not. We have already shown that, in some of the cases maintaining the liability of agents for entering into contracts in which they had no power to represent their principal, they have been held personally liable because their action amounted to an express or implied representation of the existence of authority on their part. The same principle applies to misrepresentations in other respects, unless, indeed, representations as to matters of law may be regarded as exceptions to this rule. For in so far as any representation, express or implied, made by an agent or officer of a corporation, may properly be regarded as a representation of a matter of law, he cannot be held liable therefor, because the party to whom the representation was made is, equally with such officer or agent, deemed to have knowledge of the law of the land, and had no right to rely upon any statement or representation to the contrary: *Rashdall v. Ford*, L. R. 2 Eq. 750; 35 L. J. Ch. 769; 14 Week Rep. 590; 14 L. T., N. S., 790; *Beattie v. Ebury*, L. R. 7 Ch. 777, 798; *Michael v. Jones*, 84 Mo. 578; *Ware v. Morgan*, 67 Ala. 461; *Hall v. Lauderdale*, 46 N. Y. 70.

As to any Fraud Committed or Willful Misrepresentation Made by an agent of a matter of fact, he is personally answerable in some form of action to any person who had a right to rely thereon, and so relying has been injured thereby, nor is it material that the misrepresentation should have been made directly to the person who claims indemnity for the loss sustained by it. It may have been made to one person with the expectation that he should communicate it to another, or have been contained in circulars or advertisements addressed to the general public, upon which it was hoped and expected that some one would rely. In either event, any person injured thereby has the same right of action therefor as if the misrepresentation had been communicated to him directly and personally by the officer or agent by whom it was made or authorized to be promulgated: *Hubbard v. Weare*, 79 Iowa, 678; *Westervelt v. Demarest*, 46 N. J. L. 37; 50 Am. Rep. 400.

It has, indeed, been said that an officer or other agent is not answerable for his mere carelessness or inattention, and that, to create a liability against him, there must also be present a fraudulent intention to deceive: *Derry v. Peek*, 14 App. Cas. 337; *Pasley v. Freeman*, 3 Term Rep. 51; *Haycraft v. Creasy*, 2 East, 92; *Cowley v. Smyth*, 46 N. J. L. 380; 50 Am. Rep. 432; *Weir v. Bell*, 3 Ex. Div. 238. While there are doubtless instances in which an agent may not be personally liable for the misrepresentation of a fact which has operated to the injury of another, because the agent had no fraudulent intent, and was not acting for the purpose of deceiving or defrauding, we apprehend that, on the other hand, the absence of an intent to defraud is not always conclusive in his favor. If he represents the corporation, his official position is such that he ought, at least, to inform himself upon all matters concerning which he makes a statement upon which he has reason to believe that the public or any particular portion of it will act, and his making such a statement, when he does not know whether or not it is true, and when his ignorance must be the result of inattention to his duties, amounts to a fraud, and to permit him to shield himself from liability

by his ignorance is to offer a premium to official recklessness, incompetency, and inattention. The better rule, therefore, and the one best sustained by the authorities, is, that if an officer or agent makes a misrepresentation of a matter of fact, he cannot defend an action to recover damages suffered by a party relying upon such representation by proving that he himself was ignorant, if the matter was one of which it was his duty to be informed: *Arnison v. Smith*, 41 Oh. Div. 348; *Hubbard v. Wear*, 79 Iowa, 678; *Kinkler v. Junica*, 84 Tex. 116.

The most frequently recurring class of misrepresentation on the part of officers and agents of corporations concerns the solvency of the corporations which they represent, and the liability for such misrepresentation has already been the subject of a note in this series: Note to *Seale v. Baker*, 8 Am. St. Rep. 604-606. The principle applicable to every class of misrepresentation is the same. Such a representation is a fraud, and for every fraud committed by an officer or agent he is personally liable: *Hammon v. Hussey*, 51 N. H. 40; 12 Am. Rep. 41; *Campbell v. Hillman*, 15 B. Mon. 506; 61 Am. Dec. 195; *Reed v. Peterson*, 91 Ill. 288; *Salmon v. Richardson*, 30 Conn. 360; 79 Am. Dec. 255. The purpose for which the misrepresentation was made is not material, provided it accomplished some object of the corporation or of the agent, and was made for the purpose of inducing some other person to act upon it. Therefore, liability exists where the object of the misrepresentation was to procure a loan or otherwise to secure credit for the corporation: *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Weeks v. Propert*, L. R. 8 Com. P. 427; *Schley v. Dickson*, 24 Ga. 273; 71 Am. Dec. 121; *Weir v. Barnett*, L. R. 3 Ex. Div. 32; or to make a sale: *South Covington &c. R. Co. v. Gest*, 34 Fed. Rep. 628; *Clark v. Edgar*, 84 Mo. 106; 54 Am. Rep. 84; or to induce and retain depositors in a bank: *Zinn v. Mendel*, 9 W. Va. 580; *Seale v. Baker*, 70 Tex. 283; 8 Am. St. Rep. 592, and note; *Delano v. Case*, 121 Ill. 247; 2 Am. St. Rep. 81; or to secure patrons to an insurance corporation: *Salmon v. Richardson*, 30 Conn. 360; 79 Am. Dec. 255; *Hedden v. Griffin*, 136 Mass. 229; 49 Am. Rep. 25; *Kroeger v. Pitcairn*, 101 Pa. St. 311; 47 Am. Rep. 718. Another frequent form of misrepresentation of which the officers of corporations are guilty relates to the corporate stock, as where they represent it to be fully paid up when such is not the case: *National Bank v. Texas Investment Co.*, 74 Tex. 421; or issue certificates of stock in excess of the amount authorized. There is no doubt that the issuing of a certificate of stock by any officer of a corporation is equivalent to an express representation by him of the facts stated in such certificate or implied from its issuance, and that he is answerable, if such representations are false, to any person injured thereby: *Huntington v. Atwill*, 118 N. Y. 365; *Thompson on Corporations*, secs. 1503, 4141.

A director or other officer of a corporation is not answerable for false representations made by brokers employed on behalf of the corporation, of which representations the directors had no personal knowledge: *Arthur v. Grinsold*, 55 N. Y. 400; *Weir v. Barnett*, L. R. 3 Ex. Div. 32; and it has been held that a director of a corporation is not answerable for a representation, false in fact, but not known by him to be so, published in a circular of the corporation in which his name appears only as one of the directors: *Wakeman v. Dalley*, 51 N. Y. 27; 10 Am. Rep. 551. We should incline to the view, however, that if he knew, or by the exercise of reasonable official diligence should have known, of the issuing and contents of the circular, that then he could not relieve himself from liability, except by further establishing that his ignorance respecting the matters asserted in the circular

was compatible with reasonable diligence on his part in the discharge of the official duties assumed by him.

The Principal cannot Authorize a Tort.—An officer or other agent of a corporation may, like the agent of a natural person, be liable for acts of so mischievous and willful a character that they are not deemed the acts of his principal at all, and hence the liability therefor rests wholly on the agent: *Wharton on Agency*, sec. 540; *Wright v. Wilcox*, 19 Wend. 343; 32 Am. Dec. 507. Even had he acted at the request of his principal, and thus included the latter in the wrongdoing, the liability of the agent, though it would have been shared, would not have been diminished. If an act is unlawful, no person can authorize it to be done, and any such authorization is void, except that it may operate to the extent of making the party who undertakes to grant the authority equally guilty and equally responsible with the person acting in pursuance of it. Therefore, no person can escape liability for a tort by proving that he acted by the command or authorization of another: *Richardson v. Kimball*, 23 Me. 463; *Permyer v. Kelly*, 18 Ala. 716; 54 Am. Dec. 177; *Johnson v. Barber*, 5 Gilm. 425; 50 Am. Dec. 416; *Austin v. Daniels*, 4 Denio, 299. Therefore, an agent is answerable for any trespass committed by him, though done in the course of his duties and by the direction of his principal: *Mitchell v. Harmony*, 13 How. 115; *Pech v. Cooper*, 112 Ill. 192; 54 Am. Rep. 231. Hence an agent is liable for wrongfully ejecting a passenger from a railway car: *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465; 64 Am. Dec. 83; *Holmes v. Wakefield*, 12 Allen, 580; 90 Am. Dec. 175; or for misappropriating moneys of the corporation, as by taking a special deposit and paying it out to the general creditors: *United Society of Shakers v. Underwood*, 9 Bush, 609; 15 Am. Rep. 731; or procuring an illegal issue of stock: *Baker v. Wasson*, 53 Tex. 150; or engaging in the infringement of a patent: *Iowa Barb Steel Wire Co. v. Southern Barbed Wire Co.*, 30 Fed. Rep. 123; *Oahome Barnet etc. Co. v. Rubber etc. Co.*, 45 Fed. Rep. 582; *National etc. Co. v. Terre Haute etc. Co.*, 19 Fed. Rep. 514; *Good-year v. Phelps*, 3 Blatchf. 91; *Poppenhusen v. Faulke*, 4 Blatchf. 493; *contra*, *United Nickel Co. v. Worthington*, 13 Fed. Rep. 392.

For Conversion of Chattels.—There are many instances in which a person is guilty of a conversion of personal property, and therefore liable to an action of trover, when he has not been guilty of any conscious wrongdoing, as where he sells property of which he believes himself to be the owner, but which, in fact, belongs to another. As a general rule, any unlawful or unauthorized intermeddling with the chattels of another, may, at his election, be treated as a conversion thereof. This rule is none the less applicable in cases in which the intermeddler is acting for another and carrying out his commands believed to be just and proper: *Arthur v. Balch*, 23 N. H. 157; *Jones v. Hart*, 2 Salk. 441; *Spraghts v. Hawley*, 39 N. Y. 441; 100 Am. Dec. 452; *Dench v. Walker*, 14 Mass. 500. Therefore, a cashier of a bank, though acting for the corporation, is personally liable for replying or reselling collaterals which the bank was not, under the circumstances, authorized to pledge or sell: *Hempfling v. Burr*, 59 Mich. 294; and an agent selling stolen property for his principal is liable to the true owner, though he has paid over the proceeds of the sale to the principal, and acted in all he did in good faith and without any notice of any defect in the title to the property: *Lee v. Mathews*, 10 Ala. 682; 44 Am. Dec. 498; *Koch v. Branch*, 44 Mo. 542; 100 Am. Dec. 324.

Liability for Acts of Inferior Officers or Agents.—The only question of which there can be any serious doubt in cases of the class here under con-

consideration is, whether the officer or agent has participated in the wrong, so that it may justly be regarded as his act. If he has personally directed it to be done, or has directly participated in the doing of it, his liability is indisputable. He may, however, be a superior agent whose directions are to be carried out by subordinates, and they, while not in his presence, and not merely following the directions given by him, may be guilty of a tort. In such a case he is not answerable for their act, though it may be so within the duties delegated to them that the corporation itself is liable therefor: *Bath v. Caton*, 37 Mich. 199; *Hewett v. Swift*, 3 Allen, 420; *Brown v. Lent*, 20 Vt. 529; *Stone v. Cartwright*, 6 Term. Rep. 411; *Bachelor v. Pinkham*, 68 Me. 253; *Weir v. Barnett*, 3 Ex. Div. 32; affirmed on appeal 3 Ex. Div. 238. There is no doubt, for instance, that a corporation is answerable for a libel committed by it, and that its officers or other agents, through whose procurement such libel is published, are equally liable with the corporation; but the fact of a publication of a libel does not necessarily involve the liability of the directors or other managing agents of the corporation. The rule upon this subject is thus stated in a recent case: "If a corporation publishes and circulates a libel by the aid and assistance of others, they are equally guilty, and will be held liable, either jointly or severally, as the pleader may elect. Their liability does not grow out of the fact that they are stockholders or members of the corporation, but springs from their active agency in producing and circulating the libel. It is the corporation that is the publisher, and not the persons constituting its membership. Simply to show that persons are stockholders and officers of the publishing corporation will not make them responsible for libelous publications appearing in the paper, unless it is shown that they in some way aided or assisted and advised its publication or circulation, or unless their duties as officers of the concern were of such character as charged them with the performance of functions concerning the publication and circulation of the paper—such duties being of such a nature that the law would imply that such officer knew, or should have known, of the publication of such libelous matter": *Belo v. Fuller*, 84 Tex. 450; 31 Am. St. Rep. 75.

Negligence.—In discussing and determining the liability of officers and other agents of corporations for negligence, the judges have employed language which is often irreconcilable, and formulated rules which, however well understood in the abstract, have been difficult of application, and have led to conflicting judgments upon facts substantially identical. Every such officer, or agent, should be considered in two capacities, in each of which he has duties, for the negligent performance of which he is answerable to a person injured thereby only when his negligence or omission has been in respect to a duty owing by him to the person claiming to be aggrieved. Thus, a person employed in driving a team along a public highway owes certain duties to all others upon such highway to exercise skill in the management of his team, and reasonable care and prudence to avoid inflicting injury upon the person or property of others. This duty is the same whether he is acting as principal or as agent, and, if he is acting as agent, it does not depend on his agency. The omission of the duty may or may not be also an omission of the duty owing to his principal or employer, and, when liability arises, it may not have any connection with his relation to his principal. He may, on the other hand, owe duties to his principal which he does not owe to any other person, for an omission to perform which he is liable only to his principal, though it may occur that others than the principal are incidentally injured. By keeping this dual position of agents and the obli-

gations and liabilities dependent thereon in mind, we may be able to reconcile statements of law made by different judges which seem contradictory, except when considered in connection with the peculiar circumstances of the cases in which they were applied.

Negligence of the Corporation, when not the Negligence of its Officers.—In the first place, it is clear that an agent is not answerable for the negligence of his principal. He cannot be held liable for the omission of an act because his principal ought to have required him to perform it: *Hill v. Caverly*, 7 N. H. 215; 28 Am. Dec. 735. If, however, his principal is a corporation incompetent to exercise forethought, or perform duties except by its officers or agents, and the forethought is not exercised, or the duty is left undischarged, because the directors or other agents are incompetent, careless, or inattentive, should the negligence be regarded as that of the corporation alone, or may its officers also be deemed to have been negligent personally, and be held answerable to third persons injured thereby? Strange as it may seem, this precise question has rarely been discussed or decided. It was presented and determined in the case of *Lundy v. Delmas*, 104 Cal. 655. The defendants were regents of the University of California, and the complaint averred that they, as such, had constructed and maintained a telegraph and telephone line so negligently that by their culpable negligence they allowed divers of the poles thereof to rot and decay, and to fall to the ground, and that, by reason of such rotting and falling, the wires attached to the poles had been brought across a public highway so near the ground as to endanger the lives of persons traveling thereon, and that, by reason thereof, one Lundy, traveling along the road, was, without any fault on his part, caught by the wires, thrown to the ground, and instantly killed. A verdict and judgment having been given against the defendants, they appealed to the supreme court of the state, where the judgment against them was reversed upon the ground that they were not public officers, but only officers of a corporation, and that the negligence alleged in the complaint was merely "that of the corporate body, not of the individuals composing it, and the liability rests upon it." The question was not much discussed by the court, but it based its decision upon the case of *Bassett v. Fisk*, 75 N. Y. 303, in which the trustees of a school district were held not to be liable for negligence in suffering the floor of one of the recitation rooms in the schoolhouse to become and remain out of repair, in consequence of which plaintiff, who was employed as a teacher in the school, stepped through a hole in the floor and was injured.

The general language of the authorities is that an agent is answerable to third persons for acts of misfeasance, but is answerable only to his principal for acts of nonfeasance, though their injurious consequences are not restricted to him. The former is said to be the improper doing of an act which a person may lawfully do, and the latter to be the omission of an act which a person ought to do: *Bell v. Josselyn*, 3 Gray, 309; 63 Am. Dec. 741; *Greenberg v. Whitcomb etc. Co.*, 90 Wis. 225; *ante*, p. 911. If we accept and apply this distinction, it must follow that when the negligence of an agent is of an inactive character, consisting of not doing something which he ought to do, and a stranger is injured thereby, he is without redress, except as against the agent; while, on the other hand, when the agent is seeking to perform some duty, in the attempted performance of which he does not use the degree of care required to avoid the imputation of negligence, he is answerable. We have already suggested that this is not the proper test for determining the agent's liability, and that the only proper inquiry is whether

or not he has failed in the performance of some duty which he owed to the person claiming to be aggrieved: *Delaney v. Rochereau*, 34 La. Ann. 1123; 44 Am. Rep. 456; *Murray v. Usher*, 117 N. Y. 542; *Colvin v. Holbrook*, 2 N. Y. 128. Persons entitled to have certain corporate stocks transferred to their names applied to officers of the corporation for such transfer, which they refused or neglected to make, and an action was brought against them. In directing a judgment for the defendants, the court said: "If the plaintiffs have a cause of action against any one, it is not against the defendants, but against the Planters' Bank. The defendants are not agents of the plaintiffs, and owed them no duty. They were agents of the plaintiffs, Planters' Bank, and for a neglect to discharge their agency are answerable to the principal, and to no one else": *Denny v. Manhattan Co.*, 2 Denio, 115; Wharton on Agency, sec. 535. In an action against an agent for neglecting to pay over money to which the plaintiff was entitled, it was also said: "It is also settled, if anything can be established by authority, that an agent is not liable to a third person for an omission or neglect of duty in the matter of his agency; but that the principal alone is responsible": *Colvin v. Holbrook*, 2 N. Y. 129. One having goods at his factor's told an agent of the latter that he did not wish such goods sold until further orders. This agent having neglected to communicate this information to his principal, to the damage of the owner of the goods, he brought an action to recover such damages, but was defeated because it was conceded "that, unless the rule had been changed by the code, an agent is not liable to a third person for damages resulting to him from a nonperformance or neglect of a duty which the agent owed to the principal," and no provision could be found in the code of the state abrogating or modifying this rule: *Reid v. Humber*, 49 Ga. 207. Where several persons were joined in one action as defendants, some of them being principals and others agents, they asked that the jury be instructed "that an action on the case for negligence cannot be maintained by a third person against an agent, where the negligence consists of the omission of a duty imposed." The court charged that "this is true abstractly, but where there was negligence or improper conduct in the doing of an act, and injury was thereby done to another, that an action could be sustained against the agent. In reversing a judgment based on this instruction, the court said: "We understand the law in regard to the liability of the principal and the agent to third persons for torts occurring in the course of the agency to be this: The principal is always liable to third persons for misfeasances, negligences, and omissions of duty of his agent in all cases within the scope of his agency. The agent is also personally liable to third persons for his own misfeasances and positive wrongs. But he is not in general liable to third persons for his misfeasances and omissions of duty in the course of his employment. His liability in these latter cases is solely to his principal, there being no privity between him and such third persons; the privity exists only between him and his principal. And hence the general maxim as to all such negligences and omissions of duty is, in cases of private agency, respondeat superior": *Henshaw v. Noble*, 7 Ohio St. 226. "A servant, as between himself and his master, is bound to serve him with fidelity and to perform the duties committed to him. The omission to perform them may subject third persons to harm and the master to damages, but the breach of the contract of service is a matter between the master and the servant alone, and the nonfeasance of the servant causing the injury to third persons is not generally, at least, a ground for a civil action against the servant in their favor": *Murray v. Usher*, 117 N. Y. 542.

Assuming that it is only for misfeasance and wrongful action, and never for nonfeasance or wrongful inaction, that an agent is answerable to his principal, it must follow that if he is placed in charge of property of his principal, and assumes the duty of caring for it and keeping it in proper repair, a failure to perform his duty cannot create any liability against him except in favor of his principal. Such has been the ruling in some of the courts (*Carey v. Rochereau*, 16 Fed. Rep. 87; *Delaney v. Rochereau*, 34 La. Ann. 1123; 44 Am. Rep. 456; *Labadie v. Hawley*, 61 Tex. 177; 48 Am. Rep. 278), though his inaction was attended with the desire of inflicting injury upon a third person: *Feltus v. Swan*, 62 Miss. 415.

These decisions are correct if the only ground of an agent's liability is misfeasance. If, on the other hand, we assume that an agent owes duties to others, as well as to his principal, for the nonperformance of which he may be answerable to them, these decisions become indefensible. Every person unquestionably owes the duty to his fellowmen to abstain from injuring them, whether by act or by neglect. Therefore if he assumes, and has full control of property, whether it be his own or the property of another person, and places himself in a position where it is his duty to perform the obligations of the owner, in omitting to discharge such duty, he omits something which he owes to third persons liable to be injured by such omission, as well as his principal, the owner of the property. Therefore the weight of authority affirms his liability in this class of cases. "It is not his contract with the principal which exposes to, or protects him from, liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entering upon the duties of his agency, nor can its breach be excused by the plea that his principal is chargeable": *Nunnally v. Southern etc. Co.*, 94 Tenn. 397; *Baird v. Shipman*, 132 Ill. 16; 22 Am. St. Rep. 504; *Ellis v. McNaughton*, 76 Mich. 237; 15 Am. St. Rep. 308. Therefore agents in control of a wharf, when maintaining it in a dangerous condition, or permitting it to become and remain so out of repair that it is dangerous to persons using it, are answerable for the injuries resulting to them therefrom: *Campbell v. Portland etc. Co.*, 62 Me. 552; 16 Am. Rep. 503. So if an officer or agent undertakes the duty of furnishing safe appliances with which employees may work, or of instructing young and inexperienced employees so that they shall be able to understand and guard against the perils to which their employment exposes them, and who omits in the one case the duty of furnishing reasonably safe appliances, or in the other puts an inexperienced employee to work without due instruction, he is guilty of a breach of duty to the employee as well as to his principal, and is answerable therefor to the former: *Osborne v. Morgan*, 130 Mass. 102; 39 Am. Rep. 437; *Greenberg v. Whitcomb etc. Co.*, 90 Wis. 225; ante, p. 911; *Mayer v. Thompson-Hutchison etc. Co.*, Ala., Nov. 27, 1894. "In such case the agent is personally responsible whether he did the wrong intentionally, or ignorantly under the authority of his principal, for the principal could not confer authority to commit a wrong upon the rights or property of another": *Erwin v. Davenport*, 9 Heisk. 51.

If the Negligence Occurs in the Doing of an Act on behalf of the principal, then the liability of the agent to third persons is unquestionable, and may be sustained by the general rule, that it is not possible for the principal to authorize the doing of a tortious or wrongful act so as to relieve the doer from liability therefor. He who undertakes to act assumes the duty of so acting

that he shall not by his negligence injure others who are without fault on their part, and it is not material to inquire whether he is acting for himself or for another, except when it is sought to hold that other answerable: *Bruff v. Mall*, 36 N. Y. 200, 205; *Harriman v. Stowe*, 57 Mo. 93; *Lane v. Cotton*, 12 Mod. 489; 1 Ld. Raym. 686; *New York etc. Ry. Co. v. Schuler*, 34 N. Y. 30; *Phelps v. Wait*, 30 N. Y. 78; *Salmon v. Richardson*, 30 Conn. 360; 79 Am. Dec. 255; *Wright v. Wilcox*, 19 Wend. 343; 32 Am. Rep. 507. Hence he is liable to a third person for turning water into the pipes upon the premises of his principal without first seeing that they are in a proper condition to receive and retain it: *Bell v. Josselyn*, 3 Gray, 309; 63 Am. Dec. 741; or for firing a blast upon such premises without taking precautions for the safety of adjacent persons or property, *Wright v. Compton*, 53 Ind. 337; or for constructing and leaving open a trap-door: *Harriman v. Stowe*, 57 Mo. 93; or for failing to put up bars which had been taken down in crossing the premises of another: *Horner v. Lawrence*, 37 N. J. L. 46; or for managing and running a locomotive so as to inflict injury upon another: *Martin v. Louisville etc. Ry.*, 95 Ky. 612; or for negligently placing dangerous articles in such position that a fellow-servant or agent is injured thereby: *Osborne v. Morgan*, 130 Mass. 103; 39 Am. Rep. 437. In this last case the law upon the subject was correctly expressed as follows: "It is often said in the books that an agent is responsible to third persons for misfeasance only and not for nonfeasance. And it is doubtless true that if an agent never does anything toward carrying out his contract with his principal, but wholly omits or neglects to do so, the principal is the only person who can maintain any action against him for nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance or doing nothing, but it is misfeasance, doing improperly: *Ulpian in Dig.* 9, 2, 27, 9; *Parsons v. Winchell*, 5 Cush. 592; 52 Am. Dec. 745; *Bell v. Josselyn*, 3 Gray, 309; 63 Am. Dec. 741; *Nowell v. Wright*, 3 Allen, 166; 80 Am. Dec. 62; *Horner v. Lawrence*, 37 N. J. L. 46. Negligence and unskillfulness in the management of inflammable gas, by reason of which it escapes and causes injury, can no more be considered as mere nonfeasance, within the meaning of the rule relied on, than negligence in the control of fire, as in the case in the *Pandects*; or of water, as in *Bell v. Josselyn*, 3 Gray 309; 63 Am. Dec. 741; or of a drawbridge, as in *Nowell v. Wright*, 3 Allen, 166; 80 Am. Dec. 62; or of domestic animals, as in *Parsons v. Winchell*, 5 Cush. 592; 52 Am. Dec. 745, and in the case in New Jersey."

Directors of a Corporation may so Mismanage or Neglect its Business as to inflict great loss upon its creditors. This is especially true when the corporation is formed for banking purposes or for receiving deposits to be invested or loaned. A neglect of this character is doubtless a neglect of a duty to the corporation, and except when officers have been guilty of some misstatement, deceit, or other fraud, or have made some express or implied warranty, we believe the creditors cannot, as such, maintain any action against them: *Frost etc. Co. v. Foster*, 76 Iowa, 535; *Zinn v. Mendel*, 9 W. Va. 580. The circumstances under which directors may be regarded as guilty of actionable negligence in the management of the corporate business

are treated in the note to *Marshall v. Farmers' Bank*, 17 Am. St. Rep. 95-101. The conclusion there reached was that their liability could not be enforced by a creditor of the corporation, unless it appeared that the corporation itself would not act. In such a case, or where the corporate rights are vested in a receiver, or other person entitled to pursue for the benefit of the stockholders or creditors all remedies which originally were open to the corporation, actions may be sustained against the delinquent directors or other officers: *Marshall v. Farmers etc. Bank*, 85 Va. 676; 17 Am. St. Rep. 94; *Bank v. Boisseaux*, 4 Hughes, 398; 3 Fed. Rep. 817; *Robinson v. Smith*, 3 Paige, 222; 24 Am. Dec. 212. Such actions, however, are based upon the negligence of the defendants in the discharge of their duties to the corporation, and the plaintiff, if permitted to recover, must be regarded rather as enforcing a corporate cause of action, than as proceeding upon a cause of action belonging to him personally. It is not the purpose of this note to treat of this class of actions, nor to discuss the right of action of a corporation against its officers or agents for not properly discharging their duties.

One question of very considerable importance the adjudications seem not to have yet touched, and that is, whether officers and agents of a corporation may be held answerable to third persons for their negligence in not properly supervising their subordinates and not taking steps to guard against their negligence. An omission of this character we should regard in ordinary cases as a mere nonfeasance, or a neglect of a duty owed to the corporation, and should therefore conclude that if any cause of action arose from it, it would be one in favor of the corporation alone.

STATE v. DUKET.

[90 WISCONSIN, 272.]

MARRIAGE, LEGISLATIVE IMPAIRMENT OF OBLIGATION OF.—Legislation affecting or annulling the marriage relation is not within the protection of constitutional provisions against the impairment of contracts.

MARRIAGE AND DIVORCE—CONSTITUTIONAL LAW.—A statute providing that when either party shall be sentenced to imprisonment for life, the marriage shall be thereby absolutely dissolved, without any judgment of divorce or other legal proceedings, is not unconstitutional.

CONSTITUTIONAL LAW—DIVORCE.—Though a constitution forbids the legislature from granting any divorce, it is not thereby forbidden from enacting a statute declaring that, on the sentence to imprisonment of either spouse for life, the marriage shall be thereby absolutely dissolved.

MARRIAGE AND DIVORCE—REVERSAL OF JUDGMENT.—The dissolution of marriage consequent upon the sentence of either spouse for life is absolute, and the reversal of the sentence does not restore the parties to their marital relations, where the court announcing the sentence had jurisdiction of the accused and of the offense.

PROSECUTION for adultery. The defendant married Lucy M. French, who had been the wife of William G. French. He had been convicted of murder in the first degree and sentenced to imprisonment for life. The marriage between them was therefore dissolved by the statute of the state mentioned

in the opinion. The sentence, after the marriage of the wife, was reversed, and it was claimed that such reversal restored the marriage relations of French and his wife, and therefore that the marriage of her by the accused could not shield him from the present prosecution. The court so instructed the jury, which returned a verdict against him, and the defendant thereupon appealed.

Attorney general, and L. K. Luss, assistant attorney general, for the plaintiff.

Tompkins & Merrill, for the defendant.

347 PINNEY, J. 1. The exceptions present questions of some difficulty and of great importance, namely: 1. In respect to the validity and effect of section 2355 of the Revised Statutes, which provides that "when either party shall be sentenced to imprisonment for life, the marriage shall be thereby absolutely dissolved, without any judgment of divorce or other legal process, and no pardon granted to the party so sentenced shall restore 375 such party to his or her conjugal rights"; 2. Whether the marriage of the defendant with the former wife of French, which took place after his conviction and sentence to imprisonment for life, and, while he was imprisoned under it, but before the reversal of the sentence, was rendered void by such reversal, and French was thereby restored to his former conjugal rights.

The statute in question has been in force ever since the Revision of 1849, and has not hitherto been the subject of consideration in this court. Such or similar statutes exist in Michigan and Maryland, and perhaps in other states. Prior to the adoption of the state constitution, the district courts of the territory had jurisdiction to grant divorces, on bills filed for that purpose, for specified causes (Terr. Stats. 1839, p. 140), and the territorial legislature exercised at the same time a power of granting divorces by special acts, twenty-four of which were granted at the last session of the territorial legislature. By section 24, article 4, of the constitution, it is provided that "the legislature shall never authorize any lottery, or grant any divorce"; and ever since the adoption of the constitution the courts have had power to grant divorces from the bonds of matrimony for specified causes, and, among others: "When either party, subsequent to the marriage, has been sentenced to imprisonment for

three years or more; and no pardon granted after divorce for that cause shall restore the party sentenced to his or her conjugal rights." Similar statutes to the last have existed from an early period in other states. The contention on the part of the state is that section 2355 of the Revised Statutes is void, in that, in effect, in the case specified, it grants a divorce, and that, if valid and operative, the subsequent reversal of the sentence of French avoided the marriage of his wife with the defendant, which had taken place in the meantime, and restored French to his former conjugal rights, and rendered the subsequent cohabitation of the defendant with Lucy M. French criminal. ²⁷⁶ The relation of two married persons to each other is not a mere personal relation, or a mere contract between them, though it comes into existence in pursuance of a contract; but it is a status or legal condition established by law, involving, not only the well-being of the parties, but also the highest interests of society and the state, and having more to do with the morals and civilization of a people than any other institution. It has always been subject to the control of the legislature; and it has always been competent for the legislature, in the absence of constitutional restriction, to put an end to the relation, in the interests of the parties as well as of the state. Subject to this qualification, and saving the rights of property already vested in either party, the state that created the relation can change or abrogate it; and, as it is not a contract or a vested right, the law putting an end to the relation, and extinguishing the status of the parties as husband and wife, does not fall within the prohibition against the impairment of the obligation of contracts or the divesting of vested rights. The power of the state, within these limitations, over the civil status of its own citizens, is supreme and absolute, and the legislative will is a sufficient reason for its action: Cooley on Constitutional Limitations, 111, 112; 1 Bishop on Marriage, Divorce, and Separation, secs. 11-15, 1426 et seq., 1492; *Cook v. Cook*, 56 Wis. 207; 43 Am. Rep. 706; *Shaffer v. Bushnell*, 24 Wis. 372; *Maynard v. Hill*, 125 U. S. 205; *Pennoyer v. Neff*, 95 U. S. 734; *Cronise v. Cronise*, 54 Pa. St. 255, 261; *Maguire v. Maguire*, 7 Dana, 181, 183; *Starr v. Pease*, 8 Conn. 541; *Ditson v. Ditson*, 4 R. I. 87; *Noel v. Ewing*, 9 Ind. 37. In *Niboyet v. Niboyet*, 4 Prob. & Div. 11, Brett, L. J., said that "Marriage is the fulfillment of a contract satisfied by the solemnization of the marriage; but marriage, directly it exists, creates by law a relation between the parties, and

what is called a status of each. The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of the community. That ²⁷⁷ relation between the parties and that status of each of them with regard to the community which are constituted upon marriage are not imposed or defined by contract or agreement, but by law." In *Maynard v. Hill*, 125 U. S. 205, the same conclusion was reached, and it was there held that marriage is an institution of society, regulated and controlled by public authority, and that legislation affecting it and annulling the relation between the parties is not within the prohibition of constitutional provisions against the impairment of contracts by state legislation; and the validity of legislation, whether general or special, dissolving the relation on particular grounds, is within the competency of legislative authority, unless restrained by constitutional provisions. The opinion of the court in this case, by Mr. Justice Field, is an elaborate and learned exposition of the law on the subject under consideration.

The power of the legislature over the subject of marriage as a civil status is unlimited and supreme, subject only to the restriction in the constitution that the legislature shall never "grant any divorce." This statute does not grant a divorce to any one, either absolutely or conditionally. It provides that "when either party shall be sentenced to imprisonment for life, the marriage shall be thereby absolutely dissolved without any judgment of divorce or other legal process"; that is to say, the termination of the matrimonial status is unconditional, for the reason that the party against whom it has been pronounced is no longer capable of performing the duties, public and domestic, of the matrimonial relation. The dissolution of the marriage is consequent upon the sentence, and results from the operation of a general law, acting uniformly and affecting alike all persons under the conditions specified in the statute, and not by special grant or in a particular instance. The legislature had the power to enact general laws prescribing the result of such a sentence upon the civil status of the defendant, as ²⁷⁸ well as the matrimonial status of any one to whom he might be united in marriage.

By the common law certain consequences resulted from judgment given in capital cases, namely, attainder, by which the defendant was "no longer of any credit or reputation.

He cannot be a witness in any court, neither is he capable of performing the functions of another man; for, by an anticipation of his punishment, he is already dead in law." And the consequences of attainder were forfeiture and corruption of blood, which worked forfeiture of his real and personal estates: 4 Blackstone's Commentaries, 380, 381. There is no such thing as civil death in this country, and no conviction in this state can work corruption of blood or forfeiture of estate: Const., art. 1, sec. 12. Yet, by general laws, in this as well as other states, it has been provided that certain consequences shall result from conviction or sentence for crime. We are not aware that the power to enact such laws has ever been judicially questioned. Certainly we see no ground for doubting the validity of such acts so long as they relate only to subjects within the undoubted scope of legislative power. Constitutional disqualification to exercise the right of suffrage exists, as that no "person convicted of treason or felony shall be qualified to vote at any election unless restored to civil rights": Const., art. 3, sec. 2. This is a law, merely, in its operation, but is embodied in the constitution to give it a sanction and permanency not incident to ordinary legislation to secure the purity of the ballot box. And it is provided that laws may be passed excluding from the right of suffrage all persons who have been, or may be, convicted of any infamous crime, and depriving every person who shall make or become, directly or indirectly, interested in any bet or wager dependent upon the result of any election of the right to vote at such election: Const., art. 3, sec. 6; Rev. Stats., sec. 12, subd. 4. By section 4935 it is provided that, when any person sentenced to imprisonment in the ²⁷⁹ state prison is holding at the time any office under the constitution and laws of the state, such office shall be deemed vacated from the time of his commitment to prison, but if the judgment is reversed he shall be restored to his office, with its rights, etc., but not by reason of being pardoned.

The intent of the constitutional provision that the legislature shall not "grant any divorce" was not to restrict the legislature in the enactment of appropriate general laws, but the mischief sought to be suppressed was the granting of divorces by the legislature in special instances by special laws—in view of the ease and facility with which such divorces might be procured, a power likely to be capriciously,

improvidently, and sometimes unjustly exercised. By the constitution of the state of Michigan, in 1836, it was provided that "divorces shall not be granted by the legislature, but the legislature may by law authorize the higher courts to grant them under such restrictions as they may deem expedient"; and under this provision an act was passed authorizing the circuit court in St. Joseph county to grant a divorce between parties named therein, under the general provisions of the statute, provided that it should be made to appear satisfactorily that the wife had been for the term of five years preceding the time of filing the petitioner's bill, and still continued to be, hopelessly and incurably insane; but, before any decree was rendered, the constitution was amended, declaring that "divorces shall not be granted by the legislature," and subsequently the divorce was granted pursuant to the act. It was held that the divorce, in effect, was a legislative one, though granted by the court, but this was upon the ground that the law in this special instance assumed that the power which it vested in the court was the power which the legislature itself was inhibited from exercising, and that it was equivalent to the granting of a divorce in a particular case and for a particular cause for which no general law authorized one to be granted: *Teft* ²⁸⁰ v. *Teft*, 3 Mich. 67. The constitutional provision that the legislature shall not "grant any divorce" must be construed with reference to, and limited by, the mischiefs against which it was evidently aimed—the granting of divorces by special acts in particular cases—and it was not intended to otherwise limit the power of the legislature, or restrict it in the enactment of just and proper laws affecting all persons alike in their matrimonial status or condition.

In considering the provision "with a view to its interpretation, the thing which we are to seek is the thought which it expresses. To ascertain this the first resort in all cases is to the natural signification of the words employed": Cooley on Constitutional Limitations, 1st ed., 57. Says Marshall, C. J., "The framers of the constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have understood what they meant": *Gibbons v. Ogden*, 9 Wheat. 188. When we examine the very clear and direct provision in question, we look in vain to find any expression or intimation forbidding or restraining the legislature from passing a law such as the one under consid-

eration, general in its terms, operating alike upon all persons falling within its provisions, which does not grant or authorize the granting of any divorce, but which provides a general consequence attendant upon the life sentence of any married person, namely, that his marriage "shall be thereby absolutely dissolved." It might with as much propriety be said that the statute prescribing the punishment for murder in the first degree was a statute to imprison French during the term of his natural life, as that the statute in question was a legislative divorce granted to him from the bonds of matrimony. If it was not such divorce, it is clearly established by the authorities referred to that the legislature might lawfully enact the statute, as a law affecting in the future the status of all married persons, citizens of the state, who should, by life sentence of imprisonment be brought within its provisions.

251 2. The statute was self-executing. Upon sentence given, the marriage between French and his wife was "absolutely dissolved." Nothing whatever remained to be done to make the dissolution operative—neither judgment of divorce nor other legal process. It was not a dissolution of the marriage nisi, dependent upon condition subsequent, express or implied, but was without restriction or condition. It did not suspend the conjugal relation, but extinguished it; and the language of the statute expressly excludes any implication that the reversal of the sentence might operate to restore the sentenced party to his or her conjugal rights, whatever might otherwise be the operation and effect of a reversal by the common law. The statute goes upon the ground that the social and public necessities of the marriage relation, and the competency of parties to contract it, require the dissolution to be final, absolute. The statute having executed itself in the present case, French and his wife became in law as utter strangers to each other. The new status of each was the result of the statute, and was not dependent for continuance upon the continued existence of the sentence of French, as in the case of a judicial divorce. The reversal of the sentence cannot operate to restore the parties to their former matrimonial relations, as in the case of reversal of a valid judgment of divorce for mere error in its rendition. In states where sentence to imprisonment in the state prison for a term of years is made ground for an action of divorce, it has been held that as soon as the sentence has been given, the right of the other party

to apply for a divorce is complete (*Handy v. Handy*, 124 Mass. 394), and that such right is not suspended by a bill of exceptions, on which the conviction and sentence may be reversed: *Cone v. Cone*, 58 N. H. 152.

The statute declares that "no pardon granted to the party so sentenced shall restore such party to his or her conjugal rights." "A pardon reaches both the punishment prescribed ²⁸² for the offense and the guilt of the offender; and, when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. . . . If granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights. It makes him, as it were, a new man, and gives him a new credit and capacity. . . . But it does not restore offices forfeited or property or interests vested in others in consequence of the conviction and judgment": *Ex parte Garland*, 4 Wall. 333, 380. As a pardon granted could not restore French to his conjugal rights, manifestly it was not intended that the reversal of his sentence should have that effect.

Evidently the dissolution of the marriage freed both French and his wife from its obligations, and she was free to marry the defendant, and her subsequent marriage with him would not be in any way affected or invalidated by such reversal. It is understood that they were both citizens of this state at the time of the sentence, and subject, as to their matrimonial status, to its laws: Says Mr. Bishop: "Taking one party out of the marriage relation, by whatever means, leaves the other single. A husband without a wife or a wife without a husband is unknown to the law": 2 Bishop on Marriage, Divorce, and Separation, secs. 1613, 1615.

It was error for the court to instruct the jury that this court had held the sentence of French to be illegal or invalid. On the contrary, this court held that the court pronouncing sentence had jurisdiction of the subject matter of the information against French and of his person, and it denied his application to be discharged from imprisonment under the sentence, holding that the sentence was valid, and could be avoided only on writ of error: *In re French*, 81 Wis. 597. And the sentence was reversed for error, and not for want of jurisdiction: *French v. State*, 85 Wis. 400; 39 Am. St. Rep. 855. Until ²⁸³ it was so reversed it was a valid and operative sentence. The cases relied on to show that the re-

versal of the sentence restored French to his former conjugal rights were all cases where the validity of the second marriage depended upon the validity of a former decree of divorce, and, with a single exception, the decree relied on was a nullity for want of jurisdiction in the court granting it, or was void by reason of gross fraud practiced on the court or opposite party by the one claiming its protection. The case of *Crouch v. Crouch*, 30 Wis. 667, was such a case.

We hold, therefore: 1. That section 2355 of the Revised Statutes is a valid enactment, and not in conflict with section 24, article 4, of the constitution, and operated to absolutely dissolve the marriage relation between French and his wife upon his being sentenced to imprisonment for life; and 2. That the marriage thereafter of the defendant with the former wife of French was valid, and was not avoided by the subsequent reversal of the sentence against French. The defendant's exceptions are therefore sustained, and his conviction is set aside, and the cause is remanded to the circuit court for a new trial.

By the COURT. Judgment is ordered accordingly.

MARRIAGE AND DIVORCE — LEGISLATIVE DIVORCES.—Divorce a vinculo matrimonii by legislative enactment is a constitutional and valid exercise of legislative authority: *Wright v. Wright*, 2 Md. 429; 56 Am. Dec. 723, and note. Divorces are the subject matter of judicial action, and cannot be granted by the legislature, in the absence of a power conferred upon it by the constitution, but, to avoid evil consequences, since the legislature has long exercised this power, divorces so granted will not be declared void, but the exercise of the power will be declared to be unwarranted and unconstitutional: *Bingham v. Miller*, 17 Ohio, 445; 49 Am. Dec. 471. This subject is fully discussed in the extended notes to *Gaines v. Gaines*, 43 Am. Dec. 437-439, and *People v. Hayes*, 37 Am. St. Rep. 593.

GREEN BAY AND MISSISSIPPI CANAL COMPANY v. KAUKAUNA WATER POWER COMPANY.

[90 WISCONSIN, 370.]

RIPARIAN PROPRIETORS—FLOW OF WATERS.—Unless affected by license, grant, prescription, public right, or the like, any proprietor of lands on the bank of a stream of water, whether navigable or not, has the right to use the water as it is wont to flow, without material alteration or diminution, and no riparian owner has the right to use the water to the prejudice of other proprietors above or below him by throwing it back upon the former or subtracting it from the latter.

RIPARIAN PROPRIETORS—RIGHT TO DAM STREAMS.—A statute declaring that whenever a water power shall be created by reason of any dam erected or other improvement made, such water power shall belong to the state, does not vest the state with any greater right to the use of the water than would belong to the owner of both banks of the stream, had he erected the dam for the purpose of creating the water power.

RIPARIAN PROPRIETORS—WATER POWERS.—The right of the state or of any private person to make an improvement in a stream for the purpose of creating a water power cannot be sustained to the extent of working an injury to a lower riparian proprietor, except in aid of navigation.

RIPARIAN OWNERS—RIGHT OF NAVIGATION.—The right of the state to improve a stream as a highway for the purpose of aiding navigation is subject to the rights of riparian owners. It may take and divert without compensation so much of the water as may be required to improve the navigation of the stream, and this water may be sold and leased, provided it is not diverted for the purpose of creating a water power under the pretense of improving navigation.

WATER, ADVERSE TITLE TO.—The diversion of an inconsiderable part of the waters of a stream is not such a strong act of exclusive possession, that it is notice per se of an adverse claim of right.

RIPARIAN OWNERS—RETURNING WATER TO STREAM.—If water is taken from a stream for the purpose of creating a power, it must be returned thereto in such place, and in such manner, as that it shall flow past the banks of lower riparian owners in its accustomed channel, and as it was accustomed to flow.

ACTION by the Patten Paper Company seeking an adjudication of the proportions of the flow of the waters of the Fox river below the dams in the several channels, and to enjoin the Kaukauna Water Power Company from diverting any water to the south channel from the middle channel. Before the trial the character of the contest had so changed that the chief question involved was the right of the Green Bay & Mississippi Canal Company to divert the waters of the stream for water power as against the claims and rights of riparian proprietors of water powers below the dam. The Green Bay & Mississippi Canal Company claimed to be the owner of all

the water powers created by the government dam, and to have the right to make exclusive use of such waters upon any point on its own lands where they can be made available. In 1846, Congress granted to Wisconsin, when it should become a state, lands to be used for improving the navigation of the Fox and Wisconsin rivers. This grant was accepted by the state in 1848, and the construction, maintenance, and operation of such improvement was placed under the control of a board of public works by a statute, which, among other things, provided that, "In the construction of such improvements, said board shall have power to enter on, to take possession of, and use all lands, waters, and materials, the appropriation of which for the use of such works of improvement shall in their judgment be necessary." The Fox & Wisconsin Improvement Company was incorporated in 1853 by the legislature of the state which granted to it all the works, improvements, land, and property of the state connected therewith. The property so granted consisted in an easement in the lands occupied by the canal, dams, and ponds, and the water powers incidentally created by the dam. The water rights thus granted by the state had accrued to it under and by virtue of section 16 of the act of 1848, providing that, "Whenever a water power shall be created by reason of any dam or other improvement made on any of said rivers, such water power shall belong to the state." In 1866 the interest of the improvement company of every character passed by a foreclosure sale to purchasers who afterward became incorporated by the name of the Green Bay & Mississippi Canal Company. This company, in September, 1872, conveyed its property to the United States, reserving to itself, however, "the water powers created by the dams, and the use of the surplus waters not required for purposes of navigation, and lots necessary to the enjoyment of the same." Fox river is a navigable stream with a flow at low water of one hundred and fifty thousand cubic feet a minute, and with an ordinary flow of twice that amount. At Kaukauna are rapids having a descent of about forty-two feet in a mile and a half. Between 1851 and 1856 a public dam was built at Kaukauna at the head of the rapids, for the purpose of creating slack water and feeding a canal around the rapids. One thousand cubic feet of water a minute is necessary in this canal for the purposes of navigation. The balance constitutes the surplus water power created by the dam.

The river is divided by islands into three channels, known as the north, middle, and south channels. The water in the river below the dam naturally flows as follows: ninety-five two-hundredths in the north channel, sixty-two two-hundredths in the middle channel, and forty-three two-hundredths in the south channel. The canal receives its water at the north bank of the stream from a pond situate above the dam. The waters of the canal to the first lock, a distance of eleven hundred feet, are of the same level as the waters of the pond. A guard lock was formerly kept at this point, but it has been abandoned. The Green Bay & Mississippi Canal Company cut the south bank of the canal between the dam and the first lock to make water power. For this purpose it diverted through the canal a large part of the natural flow of the stream, discharging it below the heads of islands Nos. 8 and 4, thereby depriving the south and middle channels of a considerable part of the natural flow of water therein. The trial court entered a judgment containing the following provisions: "It is hereby considered, adjudged, and decreed that the defendant, the Green Bay & Mississippi Canal Company, is the owner of, and entitled, as against all of the parties to this action and their successors, heirs, and assigns, to the full flow of the river not necessary for navigation from the said upper or government dam across the Fox river at Kaukauna, and it is not obliged to permit any of the water of the river or pond to flow over the dam, but is entitled to withdraw from the pond made by said dam all of the surplus waters not necessary for navigation, either through the canal extending from the pond to slack water below the rapids, or directly from the pond, and use the same from said canal or said pond, and let such water to others to be used wherever it may be available for water power, and return the same to the river where it shall seem fit, and is not obliged to permit any of the waters from the river or pond to flow over said dam. And it is further considered and adjudged that all, and singular the other parties to this action are hereby forever enjoined from interfering with the said Green Bay & Mississippi Canal Company in so withdrawing and using such water." The plaintiff and other parties to the action appealed.

David S. Ordway, Alfred L. Cary, John T. Fish, Hooper & Hooper, and George G. Greene, for the appellants.

B. J. Stevens and E. Mariner, for the respondents.

397 NEWMAN, J. It is settled by the decisions in *Green Bay etc. Canal Co. v. Kaukauna etc. Co.*, 70 Wis. 635, and *Kaukauna etc. Co. v. Green Bay etc. Canal Co.*, 142 U. S. 254, that the respondent in these appeals, the Green Bay & Mississippi Canal Company, is the legal owner of all the water power which has been created by the dam at the head of the rapids at Kaukauna beyond what is required for the purpose of navigation; and that it has all the right and title in that water power which the state acquired in it under section 16 of the act of 1848 (Laws 1848, p. 62); and that such title amounts to entire and absolute ownership. 398 But the court in those cases did not "determine the relative rights of the respondent, and the other riparian owners below the dam, in respect to the use of the water which would run over the dam if not taken from the pond into the canal," nor "whether there is any restriction upon the manner or place in which the water shall be returned to the river below the dam."

The questions so left undecided in that case are the very questions presented by the record for decision here. The court is now called upon to determine and define the relative rights of the respondent and the other riparian owners below the dam in respect to the use of the water which would run over the dam if not taken from the pond, through the canal, to furnish water power lower down the stream, and whether there is any restriction in the manner or place in which the water shall be returned to the river below the dam.

There is no question of the right of the government to divert through the canal so much of the water of the stream as is required for the purpose of navigation. This amounts to about one per cent of the water of the stream. The controversy concerns only the use of the surplus water after the purposes of navigation have been served. The ordinary rule governing such questions would, no doubt, require the person owning or controlling the Kaukauna dam, and the water power created by it, to so use his right as that the water should be returned to the stream in such a manner and at such a place as not to deprive a lower riparian owner of its use as it has been accustomed to flow past his banks; for, as said by Lyon, J., in *Kimberly etc. Co. v. Hewitt*, 79 Wis. 334: "The rule is elementary that, unless affected by license, grant, prescription, or public right, or the like, every proprietor of land

on the bank of a stream of water, whether navigable or not, has the right to use the water as it is wont to run, without material alteration or diminution; and ³⁹⁹ no riparian owner has the right to use the water of the stream to the prejudice of other riparian owners above or below him, by throwing it back upon the former or subtracting it from the latter." This must be the extent and limit of the respondent's right, unless the state, whose title it has acquired, had greater rights.

The statute which vested the title to this water power in the state is in these words: "Whenever a water power shall be created by reason of any dam erected or other improvement made, . . . such water power shall belong to the state": See act of 1848, sec. 16. It is by no means clear that this statute invested the state with a title more absolute or with rights more extensive or exclusive, in the water of the stream, than would belong to the owner of both banks of the stream who should have erected the dam for the purpose of creating water power. Such a private owner would own the water power created by the dam, absolutely and entirely, subject only to the public right to divert the water required for navigation. It is not easy of apprehension how the state could acquire a title more ample. The state could acquire title to such water power only as was created by improvements in the stream which it might lawfully make. It could not lawfully make a dam or any other improvement in the stream for the purpose of creating a water power, if such improvement should work injury to a lower riparian owner, any more than could a private person; for the riparian rights of the lower owners of land upon the bank of the stream are property such as cannot be taken by the state for even a public use—except in aid of navigation—without compensation to the owner, and cannot be taken at all or impaired for a private use: *Chapman v. Oshkosh etc. R. R. Co.*, 33 Wis. 629; *Delaplaine v. Chicago etc. Ry. Co.*, 42 Wis. 214; 24 Am. Rep. 386; *Janesville v. Carpenter*, 77 Wis. 288; 20 Am. St. Rep. 123; *Attorney General v. Eau Claire*, 37 Wis. 400, 436; ⁴⁰⁰ *Cole v. La Grange*, 113 U. S. 1; *Kaukauna etc. Co. v. Green Bay etc. Canal Co.*, 142 U. S. 254, 272, 273.

The right of the state to improve the stream as a highway and for the purpose of aiding its navigation is superior to the rights of riparian owners. It may take and divert, absolutely and without compensation, so much of the water of

the stream as may be required to improve its navigation. But that is the limit of its right. But, because it is not practically feasible to measure and determine with exactness the amount of water required for this public purpose, some discretion is allowed; and it may well happen that an excess of water will be produced by a dam. As in this case, it may be necessary to stop the entire flow of the stream, by a dam, in order to divert some small part of the water for the uses of navigation. In that case the surplus need not be permitted to run to waste. The power so created by the surplus water may be leased or sold. This is the water power created by the dam, which the state owned.

In *Kaukauna etc. Co. v. Green Bay etc. Canal Co.*, 142 U.S. 273, it is said: "It is probably true that it is beyond the competency of the state to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes." And on page 275: "The true distinction seems to be between cases where the dam is erected for the express or apparent purpose of obtaining a water power to lease to private individuals, or where, in building a dam for a public improvement, a wholly unnecessary excess of water is created, and cases where the surplus is a mere incident to the public improvement, and a reasonable provision for securing an adequate supply of water at all times for such improvement. . . . So long as the dam was erected for the bona fide purpose of furnishing an adequate supply of water for the canal, and was not a colorable device for creating a water power, the agents of the state are entitled to great ⁴⁰¹ latitude of discretion in regard to the height of the dam and the head of water to be created."

But it is not the dam itself of which complaint is made. It is claimed that the dam is unlawfully used as a colorable device for the purpose of creating a water power at a point at some distance removed from the dam. It is evident that the water power which was created incidentally by the erection of the dam is due to the gravity of the water as it falls from the crest to the foot of the dam. What further power it may have in its present distribution is not incidental to the erection of the dam, but such as has been added to it from deliberate design. The first reach of the canal, to the first lock, did not create a water power. No power existed there until the bank of the canal was cut for the very purpose of creating it. Until then all the water of the stream not re-

quired for navigation passed over the dam. There it created a power which was, in a true sense, incidental to the erection of the dam. The power created by the cutting of the canal was not incidental to the erection of the dam or to the construction and use of the canal for navigation, but was *ex industria*, for the purpose of creating a water power. It was created for its own sake and not incidentally. So far from being an incident to the lawful public improvement, it is in derogation of the public improvement. It impedes rather than aids the navigation of the stream.

In some sense it may be said that the first reach of the canal, down to the first lock, is a part of the dam. Since the use of the guard lock has been abandoned it upholds the pond. In that sense it is a part of the dam. But, as bearing upon the question as to what rights are incidental to the building of the dam proper, it is a perversion of terms and ideas. It is merely color to cover the subtraction of the riparian right to this private use of the water of the stream.

There seems to be no sufficient ground for holding that the respondent has acquired additional right by prescription. ⁴⁰² Twenty years before the commencement of the action it had diverted and was diverting only a small part of the water of the stream. The amount diverted was inconsiderable. It was no such "strong act of exclusive possession" as that it was, *per se*, notice of an adverse claim of right.

The state owned no such right to divert the water from the lower riparian owners as is claimed by the respondent. The respondent has acquired no such right. The ordinary rule which governs the relative rights of riparian owners is the rule which governs this case. The lower owners are entitled to have the water—except what is required for navigation—returned to its accustomed channels in such manner and place as that it shall flow past their lands as it was accustomed to flow.

By the COURT. The judgment of the superior court of Milwaukee county is reversed upon each of the three appeals, and the cause is remanded, with directions to enter judgment in accordance with this opinion.

The respondent moved for a rehearing. The following opinion was filed June 30, 1895:

NEWMAN, J. This action was originally commenced by the Patten Paper Company (Limited), one of the appellants,

to obtain an adjudication of the relative proportions of the flow of the river below the dam in the several channels, and to enjoin the Kaukauna Water Power Company from diverting any water to the south channel which of right should flow in the middle channel. An adjudication of these relative rights is included in the judgment of the trial court, and all parties are by it enjoined from interfering with the flow of the water in the several channels in the proportions adjudged to be the due of each channel. There is no appeal from this part of the judgment; so no consideration of it by this court is due or proper. But in the course of the litigation ⁴⁰³ a new issue was introduced by the Green Bay & Mississippi Canal Company. It claimed that, by its purchase from the state of the canal and improvements, and the water powers which were created by the improvements, it became the absolute owner of the water of the stream, with the right, as against the owners of water powers on the rapids below the Kaukauna dam, to divert all the water of the stream, and to use it wherever it best suited its interests, and to return it to the stream wherever it chose, regardless of its effect upon the water powers and rights of such lower owners. This claim the trial court sustained to its full extent. It gave judgment sustaining it, and enjoined all the other parties to the action from interfering with the complete exercise of the rights so claimed. From this part of the judgment these appeals were taken. The right of this contention of the Green Bay & Mississippi Canal Company was the only question presented by these appeals. This court held that the Green Bay & Mississippi Canal Company owned all the water power which was created by the construction and operation of the government dam at Kaukauna; that it had the right to use all the water of the stream, not used for the purposes of navigation, for the purposes of power, wherever it could or chose, so far as it could do so without impairing the just rights of other owners of water powers upon the stream; that it was due to other owners of water powers below the dam that the water, after being used by it, should be returned to the stream at such place and in such manner as that it shall flow past the banks of such lower owners in its accustomed channels and as it was accustomed aforetime to flow. The limit to its right is at the point where it infringes upon the rights of others. It concedes to it all the rights which the state had or could acquire as against such lower

owners. The place where it may use the water for power is restricted only by its duty to refrain from injuring others. The court is satisfied of ⁴⁰⁴ the correctness and justice of its judgment. It is not deemed to be inconsistent with anything previously said or decided by this court, or with the decision of any other court to which attention has been called. It is believed to be grounded impreguably upon that widely applied mandate of the law, "*Sic utere tuo ut alienum non lædas.*"

But it is urged upon this motion that the language of the opinion is only general, and will not enable the trial court to determine and direct in what specific place, or in what precise manner, the water must be returned to the stream; nor how and where the respondent may lawfully use that relative proportion of the flow of the stream which is appurtenant to its bank, below the dam. Probably this is a just estimation of the opinion. It has assumed to determine only the general principle by which the relative rights of the parties are to be determined, and has pronounced that general principle in general terms only. It could well do no more. The court had no concrete question before it. No such issue was made, nor such judgment asked by the respondent's pleading; nor was any such issue adjudged by the trial court. Nor does the record furnish data by which such questions can be determined by this court. These are practical questions which cannot be answered by the aid only of mere theory. Probably it cannot be satisfactorily predicted, in advance of experiment, just where and how the water must be returned to the stream so as to work no injury to lower owners. Certainly, it cannot be determined by a court without evidence of some kind. The court has performed its full function in this case when it has established the general rule which governs it. The judgment of the superior court of Milwaukee county is reversed, upon each of the three appeals, as to those parts of the judgment which were appealed from, and the cause is remanded with direction to enter judgment in accordance with the opinion.

By the COURT. The motion for a rehearing is denied.

WATERS—RIPARIAN OWNERS' RIGHT TO NATURAL FLOW OF STREAM.—Riparian proprietors have the right to the flow of water in its natural current without any obstructions injurious to them: *Pillsbury v. Moore*, 44 Me. 154; 69 Am. Dec. 91, and note; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587; 11 Am. St. Rep. 72, and note; *Evans v. Merriweather*, 3 Scam. 492; 38 Am. St. Rep., Vol. XLVIII.—60

Dec. 106, and note; *Clark v. Pennsylvania R. R. Co.*, 145 Pa. St. 438; 27 Am. St. Rep. 710, and note; *Tennessee etc. R. R. Co. v. Hamilton*, 100 Ala. 252; 46 Am. St. Rep. 48, and note. See, especially, the extended note to *Davis v. Getchell*, 79 Am. Dec. 638.

WATERS—ERECTION OF DAMS, CREATION OF WATER POWER.—An upper and prior owner of a dam in a natural stream cannot be enjoined by a lower owner from penning back the water and raising a sufficient pond to supply his mill with water to run the machinery therein, although such use at times holds back the water so as to deprive the lower owner of a sufficient supply thereof; *Mumpower v. City of Bristol*, 90 Va. 151; 44 Am. St. Rep. 902, and note. This question is fully discussed in the notes to *Riverdale Park Co. v. Westcott*, 28 Am. St. Rep. 253, 254; *Kay v. Kirk*, 35 Am. St. Rep. 413, and *Davis v. Getchell*, 79 Am. Dec. 643.

WATERS—NAVIGABLE—IMPROVEMENT BY STATE.—The principle that individuals have no cause of action for damages occasioned by the exercise of the powers of the state to improve navigation and to do all acts essential thereto has frequently been recognized by the courts. Thus riparian proprietors cannot recover damages for the obstruction of a stream, when done by the authority of the state, though benefits and advantages enjoyed by them are thereby cut off: Note to *Banner v. Atlantic Dredging Co.*, 30 Am. St. Rep. 654.

PEAKE v. BUELL.

[30 WISCONSIN, 503.]

PRACTION.—A GENERAL DEMURRER DOES NOT ADMIT MERE CONCLUSIONS OF LAW. An allegation in a complaint that it was the duty of the defendant to erect and maintain certain guards, etc., about an elevator shaft must, therefore, be regarded as the pleader's conclusions of law from other things alleged.

LANDOWNER'S DUTY TO LICENSEE ON PREMISES.—The owner of a building who invites a person to enter a hallway therein upon business does not thereby invite him to thrust his head through the window of an elevator shaft, and, therefore, is not liable for an injury received from such thrusting, though the elevator was at the time concealed, it not being then under the control of such owner.

ACTION TO RECOVER FOR PERSONAL INJURIES SUFFERED BY PLAINTIFF'S INTESTATE WHILE IN A BUILDING OWNED BY DEFENDANT. This building, at the time of the accident, was occupied by tenants of the defendant, but was partly unfinished. The decedent was invited by defendant to go into the building for the purpose of looking at unfinished portions, and making proposals respecting the plastering of the same. The decedent entered a room or hallway in which there was a window opening into an elevator shaft. The elevator therein was being operated by tenants of the defendant. The decedent thrust his head through the open window, where it was caught by the de-

ascending elevator, and fatal injuries inflicted. The complaint, after stating the facts attending the accident, contained a general allegation that it was the duty of the defendant to erect, put up, and maintain in and about said elevator shaft, and in the place where said window was located, and the opening therein, good and sufficient guards, locks, bolts, bars, and defenses, and to keep such window closed and properly barred, and to give notice, by proper signs and marks and otherwise, of the location of the elevator shaft, and of the elevator therein, and that, by reason of the disregard of such duty on the part of the defendant and his agents, the decedent had been injured, and from such injuries died. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, was overruled, and the defendant thereupon appealed.

George E. Sutherland, for the appellant.

Kelly & Kelly, for the respondent.

⁵¹³ **CASSODAY J.** The portions of the complaint alleging, in effect, that it was the duty of the defendant to erect, put up, and maintain guards, locks, bolts, bars, defenses, and protection over and above the window mentioned and the opening into the elevator shaft thereby caused, and that he disregarded and neglected such duty by allowing the window to remain open and unguarded, must be regarded as the pleader's conclusions of law from the facts therein alleged. While a general demurrer is an admission of all facts stated in the pleading demurred to, yet it does not admit such mere conclusions of law: *Pratt v. Lincoln County*, 61 Wis. 62, and cases there cited.

Counsel for the plaintiff is undoubtedly correct in contending ⁵¹⁴ that, "where the owner of land, expressly or by implication, invites others to come upon his land, if he permits anything in the nature of a snare to exist thereon, which results in injury to one availing himself of the invitation, and who, at the time, is exercising ordinary care, such owner is answerable for the consequences": *Beck v. Carter*, 68 N. Y. 283; 23 Am. Rep. 175. Counsel has cited numerous other cases to the same effect, notably *Elliott v. Pray*, 10 Allen, 378, 87 Am. Dec. 653, where there was a trapdoor negligently left open on the way leading to a stairway; and *Parker v. Portland etc. Co.*, 69 Me. 173, 31 Am. Rep. 262, where the door leading from a dark room into an elevator shaft had been

left open after business hours; and, although the judgment against the defendants was reversed for error, yet it was held, in effect, that defendants were bound to use ordinary care in keeping the premises, and the usual passageway to them, safe for the access of all persons exercising ordinary care in coming to them at seasonable hours by their invitation, express or implied, or for any purpose beneficial to them. If, instead of the window in question, there had been a door leading from the hallway into the elevator shaft, and that door had been left open, and the deceased, while in the exercise of ordinary care, had, by some inadvertence, stepped into the elevator shaft, and been injured, then we would have had the question presented which was involved in some of the cases relied upon. Here, the lower sill of the window in question was about four feet above the level of the floor in the hallway where the deceased stood when he put his head through the window. Had he kept wholly within the walls of the hallway, he would have remained free from danger. True, he was invited by the defendant to inspect certain unfinished rooms beyond the hallway, with the view of contracting to do certain labor therein. Of course, the invitation included an invitation to pass through the hallway in question, on his way to such rooms; but such invitation to ⁵¹⁵ the hallway was necessarily limited by the wall between the elevator shaft and the hallway. It included no express or implied invitation to thrust his head or his hands through the window into the elevator shaft. He could only do that by intending to do so, not by mere inadvertence or neglect. The opening through the window was sufficiently high to prevent injury to those merely using the hallway as a passageway. Injury could only be inflicted by the voluntary exposure of some part of the person through the opening. It may be, as contended, that the moving elevator which inflicted the injury was out of sight, and hence that the danger was concealed from those inside the hallway. Nevertheless, it was a danger outside of the hallway into which the deceased had been invited. The invitation to the hallway gave him no license to protrude himself through the window. The elevator was operated by the defendant's tenants, and not by him. The defendant owed the deceased no duty in respect to the operation of the elevator. To constitute actionable negligence, the defendant must be guilty of some wrongful act or breach of positive duty to the plaintiff: *Griswold v. Chicago*

etc. Ry. Co., 64 Wis. 652; *Cole v. McKey*, 66 Wis. 510; 57 Am. Rep. 293; *Dowd v. Chicago etc. Ry. Co.*, 84 Wis. 116; 38 Am. St. Rep. 917; *Goff v. Chippewa etc. Ry. Co.*, 86 Wis. 245. After careful consideration, we are forced to hold that the complaint fails to state facts constituting such wrongful act or breach of duty.

By the COURT. The order of the superior court of Milwaukee county is reversed, and the cause is remanded for further proceedings according to law.

PLEADING.—UPON DEMURRER the probative facts alone are admitted. Statements of conclusions of law or of fact are not admitted: *Longshore Printing Co. v. Howell*, 26 Or. 527; 46 Am. St. Rep. 640, and note.

REAL PROPERTY—DUTY OF OWNER TO LICENSEES ON PREMISES.—The owner of lands and buildings assumes no duty to one who is on his premises by permission, only as a mere licensee, except that he will refrain from willful or affirmative injurious acts: *Gibson v. Leonard*, 143 Ill. 182; 36 Am. St. Rep. 376. Licensees on the premises of others enjoy the license subject to its attendant risks: *Faris v. Hoberg*, 134 Ind. 269; 39 Am. St. Rep. 261; *Benson v. Baltimore Traction Co.*, 77 Md. 535; 39 Am. St. Rep. 436. See the extended discussion of this subject in the note to *Plummer v. Du*, 32 Am. St. Rep. 467-472.

STEWART v. STEWART.

[90 WISCONSIN, 516.]

COLOR OF TITLE, WHAT IS.—One entering into possession of land under a deed which is afterward adjudged to be void and set aside for want of delivery by the grantor may, nevertheless, be regarded as holding adversely by color of title founded on a written instrument.

SUBROGATION.—Persons in possession of land believing themselves to be the owners thereof, and who therefore discharge a mortgage thereon, are, on the conveyance under which they claim title being adjudged void for want of delivery, entitled to be subrogated to the rights of the mortgagees.

A COTENANT IS ENTITLED TO BE REIMBURSED for moneys expended in payment of taxes and extinguishing liens upon the common property, when called upon for an accounting by his fellow-tenant.

A TENANT IN COMMON SUED IN EJECTMENT may be allowed to set off the value of necessary repairs and permanent improvements as against the claim of his fellow-tenant for rents and profits.

ACTION of ejectment by John Stewart against Archibald Stewart to recover the undivided one-half of certain real property. This property in February, 1860, belonged to Alexander Stewart, who made a conveyance thereof to his nephews, Archibald Stewart and James A. Stewart, who went

into possession under such deed immediately after its execution. The property was at that time subject to a mortgage for five hundred dollars, and the grantees, believing themselves to be the owners of the realty, paid the mortgage and caused it to be satisfied, and also the taxes upon the property up to and including the year 1873, and expended other moneys in its improvement. The grantor in the deed referred to died in the year 1873, leaving as his heirs the grantees named in said deed, and certain other nephews and nieces, of whom the plaintiff in this action, John Stewart, was one. The deed, though made in 1860, was not filed for record until March 8, 1873. Soon thereafter John Stewart and his brothers and sisters brought a suit in equity against the grantees named in the deed to have it, and the record thereof, set aside. The result of the suit was that the deed was adjudged never to have been delivered, and it and the record thereof were canceled. Archibald Stewart became the grantee of the interests of his brother James in the property, and John Stewart became the grantee of the interests of the other nephews and nieces, and, therefore, at the commencement of the present action, the plaintiff, John, owned the undivided one-half of the property, and the defendant, Archibald, the other one-half. The defendant pleaded adverse possession, claim of title in good faith under the deed which had been canceled, and made claim for improvements and betterments which had been made upon the premises in good faith. It was found that the defendant and his brother had made expenditures upon the property in paying off mortgages and taxes, and in making improvements by way of fencing and clearing of stones, and that a fair rental value of the premises, taking into consideration the improvements made by Archibald since 1873, was sixty-six dollars a year, aggregating thirteen hundred and eighty-six dollars, and that after charging the defendant with the rents, there remained due him six hundred and thirty-one dollars and thirty-two cents for money expended. The judgment was that the recovery by plaintiff should be a conditional one on the payment to defendant, Archibald, the sum of six hundred and thirty-one dollars and thirty-two cents, which was declared to be a lien upon the real estate. The plaintiff appealed.

Curney, Clasen & Walsh, for the appellant.

Chafin & Parkinson, for the respondent.

520 CASSODAY, J. Upon the former appeal in this case it was fully determined that the decree in the equity suit, entered June 12, 1879, and affirmed by this court in *Stewart v. Stewart*, 50 Wis. 445, to the effect that the deed of February 3, 1860, was never in fact delivered, and that the plaintiff in this action of ejectment, commenced May 27, 1891, and the defendant are tenants in common, each owning an undivided one-half of the premises, was conclusive: *Stewart v. Stewart*, 83 Wis. 364; 35 Am. St. Rep. 67. The questions now presented for consideration are as to the amount, if anything, the defendant, Archibald, should be allowed for improvements and expenditures, on his accounting for rents, issues, and profits during the many years that he and his brother James A. were in possession.

1. Notwithstanding such conclusiveness of the decree in the equity suit, we are constrained to hold that the findings to the effect that James A. and Archibald were in possession of said premises, holding the same adversely by color of title asserted in good faith, founded on a written instrument, to wit, the deed of February 3, 1860, from the time they so entered, down to the rendition of said decree, is supported by the evidence, within the meaning of sections 3096-3098 of the Revised Statutes. By such color of title is included a tax deed void upon its face. It also includes a tax deed void for reasons going to the groundwork of the tax or assessment upon which such deed is issued: *Zwietusch v. Watkins*, 61 Wis. 620. Such holding adversely is only to be by color of title thus asserted in good faith, and such color of title may be by a written instrument having an infirmity making it absolutely void upon its face: *Zwietusch v. Watkins*, 61 Wis. 620. Otherwise, the statute would rarely afford any protection.

2. The mortgage upon the premises was paid by James A. and Archibald prior to the death of the uncle, but the circumstances under which it was so paid and discharged, as found, were such as to entitle them, in equity, to be subrogated to the rights of the mortgagee, even as against the 521 uncle; and certainly the equities in their favor are as strong, if not stronger, as against those who have taken title from him by descent: *Morgan v. Hammett*, 23 Wis. 30; *Blodgett v. Hitt*, 29 Wis. 169; *Levy v. Martin*, 48 Wis. 198; *Jones v. Parker*, 51 Wis. 218; *Carey v. Boyle*, 53 Wis. 574; *Wilton v. Mayberry*, 75 Wis. 191; 17 Am. St. Rep. 193; *Baker v.*

Baker, 2 S. Dak. 261; 39 Am. St. Rep. 776. In several of these cases, as here, the mortgage was discharged of record, but equity kept it alive for the purpose of doing justice and enforcing good conscience between the parties. Having in good faith paid the mortgage while thus in possession, James A. and Archibald should, in equity, be regarded as having thereby acquired an interest in the premises commensurate with the amount of money so paid.

8. As indicated in the opinion of Mr. Justice Pinney on the former appeal, the decree of June 12, 1879, conclusively determined that the parties were tenants in common in the land, and that since that date, at least, their respective rights as to this land are such as grow out of their relationship as tenants in common. Since the statute of Anne, which became a part of the common law of this country, the right to maintain an action for accounting for rents, issues, and profits has generally, if not uniformly, been recognized in the United States. In this state that statute has been, in effect, re-enacted and extended: Rev. Stats., secs. 2199, 3082, 3173, 3192. In such actions this court has repeatedly sanctioned the right of the tenant in possession to be allowed, in such accounting, to be reimbursed for moneys expended in payment of taxes and extinguishing liens upon the common property: *McLaughlin v. Curtis*, 27 Wis. 644; *Frentz v. Klotsch*, 28 Wis. 312; *Hannig v. Mueller*, 82 Wis. 243, 244, and cases there cited. So the tenant in common in possession may, in an ejectment suit, be allowed to set off the value of necessary repairs and permanent improvements: *Davis v. Louk*, 30 Wis. 308; *Clark v. Plummer*, 31 Wis. 442; *McCrudd v. Bray*, 36 Wis. 333. So the tenant ⁵²³ making such expenditures has been allowed to enforce contribution in an action of assumpsit or for an accounting: *Gwinneeth v. Thompson*, 9 Pick. 31; 19 Am. Dec. 350; *Wheeler v. Wheeler*, 111 Mass. 247; *Ruffners v. Lewis*, 7 Leigh, 720; 30 Am. Dec. 513. Such contribution has also been enforced in actions for partition: *Robinson v. McDonald*, 11 Tex. 385; 62 Am. Dec. 480, and notes; *Western v. Skiles*, 35 Fed. Rep. 674. The proceeding in the case at bar to enforce contribution is equitable in its nature, and hence the principles mentioned are peculiarly applicable. Applying those principles to this case, and we must hold that the defendant, Archibald, was properly allowed to be reimbursed for one-half the moneys paid by him and his brother, James A., while in possession, on account of the

mortgage, taxes, and interest thereon, and for one-half the value of the repairs and improvements made by them or either of them. While some of the items allowed are not specifically provided for in sections 3096-3098 of the Revised Statutes, yet, upon the broad principles of equity mentioned, the allowances made to the respective parties are substantially just and equitable, and mere technical errors, therefore, are to be disregarded: Rev. Stats., sec. 2829.

By the COURT. The judgment of the circuit court is affirmed.

COTENANCY.—IMPROVEMENTS MADE BY COTENANT, when may be credited against rents charged against him: See the note to *Moon v. Jennings*, 12 Am. St. Rep. 390. Where tenants in common have occupied the common property to the exclusion of a cotenant, they are entitled, in an accounting for the rents and profits, to a credit for their expenses and services actually rendered in a bona fide effort to render the property more valuable: *Ruffners v. Lewis*, 7 Leigh, 720; 30 Am. Dec. 513, and note.

COTENANCY.—REIMBURSEMENT FOR TAXES.—A tenant in common, who pays taxes against the whole of the common property, is entitled to contribution from his cotenants to the amount of the taxes due by each on his interest: *Cocks v. Simmons*, 55 Ark. 104; 29 Am. St. Rep. 28, and note; note to *Moon v. Jennings*, 12 Am. St. Rep. 390.

ADVERSE POSSESSION.—COLOR OF TITLE, WHAT IS.—Color of title is a writing professing to pass title, but failing to do so because the grantor had none to pass, or the writing is too defective to accomplish its object. It must not be so obviously defective that a person of ordinary comprehension could not be misled by it: *Tate v. Southard*, 3 Hawks, 119; 14 Am. Dec. 578, and extended note; *Beverly v. Burke*, 9 Ga. 440; 54 Am. Dec. 351, and note. An instrument indicating intention to pass from one party to another title to lands, of which a description is given, gives color of title to the lands described: *McCagg v. Heacock*, 34 Ill. 476; 85 Am. Dec. 327, and note.

SUBROGATION.—One who claims title to property in good faith, but whose claim is invalid, and who pays off a mortgage enforceable against the property, is entitled to be subrogated to the rights of the mortgagee, and to have the mortgage enforced for his benefit: *Betts v. Sims*, 35 Neb. 840; 37 Am. St. Rep. 470.

PORATH v. STATE.

[90 WISCONSIN, 527.]

CRIMINAL PRACTICE.—AN INFORMATION OR INDICTMENT MAY INCLUDE A CRIME IN ADDITION to, or different from, that with which the accused was charged before his preliminary examination, if such examination showed his probable guilt of such additional or different crime.

CRIMINAL PRACTICE.—JOINDER OF COUNTS.—THE CRIME OF INCEST AND THAT OF RAPE may be joined in the same information, where both charges are founded on the same criminal act, under a statute declaring that different offenses and different degrees of the same offense may be joined in one information, in all cases where the same might be joined by different counts in the same indictment.

INDICTMENT AND INFORMATION.—JOINDER.—Several counts may be included in one information or indictment for the purpose of meeting the evidence as it may develop at the trial, where all the counts are substantially for the same offense and founded on the same transaction.

CRIMINAL PRACTICE.—ELECTION BETWEEN COUNTS.—Where the same information contains two counts, both founded on the same transaction, and intended to meet the different legal aspects which the evidence may give the cause, the trial court may, in the exercise of its discretion, decline to compel the prosecution to elect upon which it will proceed.

EVIDENCE.—WHETHER LEADING QUESTIONS SHALL BE PERMITTED rests very much in the discretion of the court, and rulings in respect to them are not the subject of exceptions, unless there has been an improper exercise of such discretion.

INCEST.—ACCOMPLICE.—If, in the commission of an incestuous act, the female is the victim of force, fraud, or undue influence, so that she did not willfully join therein with the same intent as the accused, she ought not to be regarded as an accomplice.

CRIMINAL PRACTICE.—EVIDENCE OF OTHER CRIMES.—Where, upon a criminal trial, a witness testified in favor of the accused, and evidence was subsequently offered to show improper relations between them, an instruction to the jury that they should remember that the defendant was not being tried for such improper relation, but that the testimony was admitted to show the relation between them, and that the jury should consider it, and the facts disclosed by it, as it has bearing upon the question being tried, is erroneous, because it leaves the jury to determine the guilt of the accused upon evidence of what occurred at another time and place.

PROSECUTION of an information containing two counts, the first of which charged the defendant with rape committed upon his daughter Ada, and the second with incest committed with her at the same date. The defendant pleaded in abatement of the first count that he had no preliminary examination with reference to the offense charged in it. This plea was overruled. The defendant then, after pleading not guilty to both counts, asked that the district attorney be required to elect upon which he would proceed to trial. This motion

was also denied. The evidence of the prosecutrix, after stating that at the time of the commission of the alleged offense she was thirteen years of age and was sixteen at the time of the trial, was mainly given in monosyllables in response to what were manifestly leading questions, except that she stated that her delay in complaining of the crime had been caused by the threats of her father, the defendant. A witness named Bertha Baker testified, on behalf of the defendant, to statements made by the prosecutrix to the effect that the prosecution was made because she wanted to get some of her father's property, and, further, that the prosecutrix stated that her father had not been guilty of any of the criminal charges against him. This witness, on cross-examination, was shown to be the mother of an illegitimate child by a brother of the prosecutrix, and there was evidence tending to show that her relations with the defendant might also have been improper, but this testimony was contradicted by that of the witness. In charging the jury with respect to the witness Baker and her testimony, the court said: "There is some testimony in the case tending to show that the defendant may have been guilty of improper relations with the witness Bertha Baker. You will remember that the defendant is not being tried for any such offense. That testimony was admitted in the case to show the relations of the witness Bertha to the defendant, so as to throw light upon the credibility of her testimony; and you should only consider it, and the facts disclosed by it, as it has a bearing upon the question you are trying here—that is, whether the defendant is guilty of the offense with which he stands charged." The defendant was found guilty of the charge of incest and acquitted of that of rape. He made a motion for a new trial and in arrest of judgment, both of which being denied, he prosecuted an appeal on a writ of error.

T. R. Hudd, for plaintiff in error.

Attorney General and *L. K. Luse*, assistant attorney general, for the defendant in error.

533 PINNEY, J. 1. The plea in abatement to the first count of the information was properly overruled. It appeared that both counts were founded upon the same transaction, and were introduced to meet the legal aspects of the evidence as it might be produced at the trial, and in order that the defendant might not escape conviction of any offense

which it might be found the defendant had committed by the ⁵³⁴ single transaction in question. The statute (Sanborn and Berryman's Annotated Statutes, sec. 4653) makes it the duty of the district attorney to inquire into and make full examination "of all facts and circumstances connected with any case of preliminary examination as provided by law, touching the commission of any offense whereon the offender shall have been committed to jail, or become recognized or held to bail, and to file an information setting forth the crime committed, according to the facts ascertained on such examination and from the written testimony taken thereon, whether it be the offense charged in the complaint on which the examination was had or not." The facts disclosed upon the preliminary examination of the defendant warranted the district attorney in filing an information against the defendant for rape committed against the person of his daughter, and he had a right to add a count for the crime of incest, under section 4582, charged in the complaint on which the examination was held, to meet the legal aspects of the evidence as it might be produced at the trial: *State v. Leicham*, 41 Wis. 574. Both counts were founded on the same transaction, and the defendant had in fact had a preliminary examination upon the charge of incest.

2. The two counts contained in the information were properly joined. The statute provides (Rev. Stats., sec. 4650) that "different offenses, and different degrees of the same offenses, may be joined in one information, in all cases where the same might be joined by different counts in the same indictment; and, in all cases, the defendant shall have the same rights as to all proceedings therein as he would have had if prosecuted for the same offense upon indictment." Under the statute (Rev. Stats., sec. 4695), where any one indicted or informed against for felony shall on trial be acquitted by verdict of part of the offenses charged, and convicted of the residue, the court is required to receive and record the verdict; "and thereupon the person charged shall be adjudged ⁵³⁵ guilty of the offense, if any, which shall appear to the court to be substantially charged by the residue of such indictment and information, and shall be sentenced and punished accordingly." This provision applies to the case of a single count in which the lesser offense is included in, or may constitute a part of, the greater one, of which the defendant has been acquitted. Accordingly, it has been held in Massa-

chusetts, where substantially the same statutory provisions exist, that one indicted for rape may be convicted of a simple assault: *Commonwealth v. Drum*, 19 Pick. 479; *Commonwealth v. Dean*, 109 Mass. 349. And in general the rule is, in states where similar statutory provisions exist, that counts for a kindred line of offenses, if the subject of indictment or information, may be joined. It is always allowed where several counts are required for the purpose of meeting the evidence as it may transpire on the trial, where all the counts are substantially for the same offense or founded on the same transaction: *Commonwealth v. McLaughlin*, 12 Cush. 612, 614; *People v. Rynders*, 12 Wend. 426; 1 Bishop's Criminal Procedure, 3d ed., secs. 426, 427, 446; *Commonwealth v. Jacobs*, 152 Mass. 281; *Butler v. State*, 91 Ala. 87. The sentence or conviction is or may be separate on each count. If the varying counts comprehend only one transaction, their joinder and one trial on all are not objectionable, since the form of the verdict is under the authority of the court, and sentence or conviction is or may be separate on each count: 1 Bishop's Criminal Procedure, 4th ed., secs. 425, 453. Nor does it vary the case that one offense is a felony and the other a misdemeanor, one being a part of the same transaction with the other: Wharton's Criminal Pleading, 9th ed., secs. 284, 291; *Reg. v. Ferguson*, 6 Cox C. C. 454. Felonies and misdemeanors forming a part of the development of the same transaction may be joined: *Hunter v. Commonwealth*, 79 Pa. St. 503; 21 Am. Rep. 83; *Hawker v. People*, 75 N. Y. 487; *Commonwealth v. Costello*, 120 Mass. 358. The court, to protect the defendant from being prejudiced or embarrassed in his defense ^{see} by such joinder, may quash part of the counts, or put the prosecutor to elect, or otherwise, in the exercise of a sound judicial discretion. In the case of *State v. Shear*, 51 Wis. 460, relied on by the plaintiff in error, it was held that under an information of a single count, charging the defendant with the crime of rape, but not that it was committed on the person of a single woman, the defendant could not be convicted of fornication. In that case it was said: "Rape cannot be charged in one count and incest in another." And the case of *State v. Thomas*, 53 Iowa, 214, was cited in support of the remark. But in that case two of the five judges dissented. So, too, in the case of *State v. Hooks*, 69 Wis. 182, 2 Am. St. Rep. 728, in which *State v. Shear*, 51 Wis. 460, is referred to, there was but a single count for rape; but neither of

these cases involved the question of what counts might properly be joined. We therefore hold that in the present case, founded on a single transaction, a count for incest may be joined with one for rape.

8. Whether the court should have required the district attorney to elect upon which count of the information he would proceed is a question which addressed itself largely to the discretion of the court; and it having appeared upon the trial of the plea in abatement that there was but one criminal transaction involved, and that the joinder of two counts was intended only to meet the different legal aspects which the evidence might give the case, we think the court rightly refused the request that the district attorney should make an election of counts: 1 Bishop's Criminal Procedure, 8d ed., secs. 457, 462; *State v. Leicham*, 41 Wis. 566, 577. We are unable to see how the defendant can be said to have been prejudiced in making his defense by the course pursued in the present case, either as to the joinder of counts, or in respect to the question of election. The questions already considered, as well as the point made as to the sufficiency of the first count, have ceased to have any practical significance, ⁵²⁷ as the defendant has been acquitted of the charge of rape.

4. It is assigned for error that the court allowed leading questions to be put to the prosecutrix, as noticed in the statement, to the prejudice of the defendant. Whether leading questions should be permitted rests very much in the sound discretion of the court, and rulings in respect to them are not the subject of exception, unless there has been an improper exercise of discretion: *Barton v. Kane*, 17 Wis. 37; *Proper v. State*, 85 Wis. 626. The particular circumstances attending the examination of the witness lead us to think that the defendant was not prejudiced by the rulings in relation to these questions, and that their allowance was not error for which there should be a reversal; but it would have been quite as well, in view of the hostile feeling of the witness to the defendant subsequently disclosed, if the rule against leading questions had been applied more strictly.

5. It is contended that as to the crime of incest the prosecutrix must be regarded as an accomplice of the defendant, in that the crime implies consent on the part of the female, and that there should not have been a conviction upon her uncorroborated testimony. If the prosecutrix in this case is regarded as the defendant's accomplice in the commission of

the crime of which he was convicted, it was discretionary with the trial court, whether to direct an acquittal or not, and a judgment founded on such uncorroborated testimony alone will not be reversed: *Black v. State*, 59 Wis. 471. The court was not required to direct an acquittal on that ground, or to give any instructions to the jury as to the effect of the testimony of the prosecutrix. While it was proper that the court should have instructed the jury on the subject, error cannot be assigned in the present state of the record for the failure or omission, for want of any proper request or exception on the subject: *Knoll v. State*, 55 Wis. 249; 42 Am. Rep. 704; *Clifford v. State*, 58 Wis. 477; *Sullivan v. State*, 75 Wis. 650; *Winn* ⁵²⁸ *v. State*, 82 Wis. 571. We cannot say, upon the evidence as contained in the record, that it does not support the conviction, or that an acquittal should have been directed. The question of guilt of the defendant and the credibility of the witnesses was one peculiarly for the jury, and they evidently believed from the evidence that sexual intercourse had taken place between the defendant and the prosecutrix, but that, while she did not consent, her resistance was not as strenuous and effective as it might have been under the circumstances. The fact that the defendant used a certain amount of force to overcome the resistance actually made will not enable him to escape punishment for incest, the parties being within the prescribed degree of consanguinity, if the force and resistance used were not sufficient to constitute rape. It does not necessarily follow in such cases that the female is to be regarded as an accomplice, and particularly in a case like the present, in view of the relation between the parties and the coercive authority of her father over her: *Raiford v. State*, 68 Ga. 672; *Norton v. State*, 106 Ind. 163. If, in the commission of the incestuous act, the female was the victim of force, fraud, or undue influence, so that she did not act voluntarily and join in the commission of the act with the same intent that the accused did, then she ought not to be regarded as an accomplice. In all such cases, where it is to be proved inferentially, the question of accompliceship is one of fact for the jury: Wharton's Criminal Evidence, sec. 440; *Mercer v. State*, 17 Tex. App. 452.

6. The instruction to the jury upon the effect to be given to the evidence tending to show that the defendant may have had improper relations with the witness Bertha Baker is, we think, misleading and erroneous. The evidence on

that subject was very unfavorable to the defendant, and consisted of matters that appeared to have occurred after the commission of the alleged offense for which he was on trial. The court instructed the jury that they would remember ⁵³⁹ that the defendant was not being tried for having improper relations with Bertha Baker; that that testimony was admitted to show the relations of Bertha to the defendant, so as to throw light upon the credibility of her testimony; and that they "should only consider it, and the facts disclosed by it, as it has a bearing upon the question you are trying here—that is, whether the defendant is guilty of the offense with which he is charged." This instruction is so clearly erroneous that we suppose that it was the result of inadvertence. A greater latitude of proof as to other like occurrences is allowed in cases of sexual crimes; and, in a prosecution for adultery, evidence of previous acts of improper familiarity, amounting to adultery, between the same parties, was held competent, either in corroboration of witnesses for the prosecution, or to show the disposition of the parties to commit the crime: *Proper v. State*, 85 Wis. 630, and cases cited. It cannot, we think, be maintained that the subsequent improper relations of the defendant with Bertha Baker would be competent evidence to show that he had committed the offense of rape or incest for which he was on trial, or to show that the defendant had a tendency even to commit such crimes. Evidence of what occurred in these respects subsequently, at another time or place, with another party, would certainly not be competent evidence. The misleading and injurious tendency of the instruction is such that we feel bound to reverse the conviction, and grant a new trial.

By the COURT. The judgment of the circuit court is reversed, and the cause is remanded to the circuit court for a new trial; and, to that end, it is ordered that the warden of the state prison, in whose custody the said defendant, Ernest Porath, now is, do deliver him into the custody of the sheriff of the county of Brown, who is required to keep him in his custody until discharged therefrom according to law.

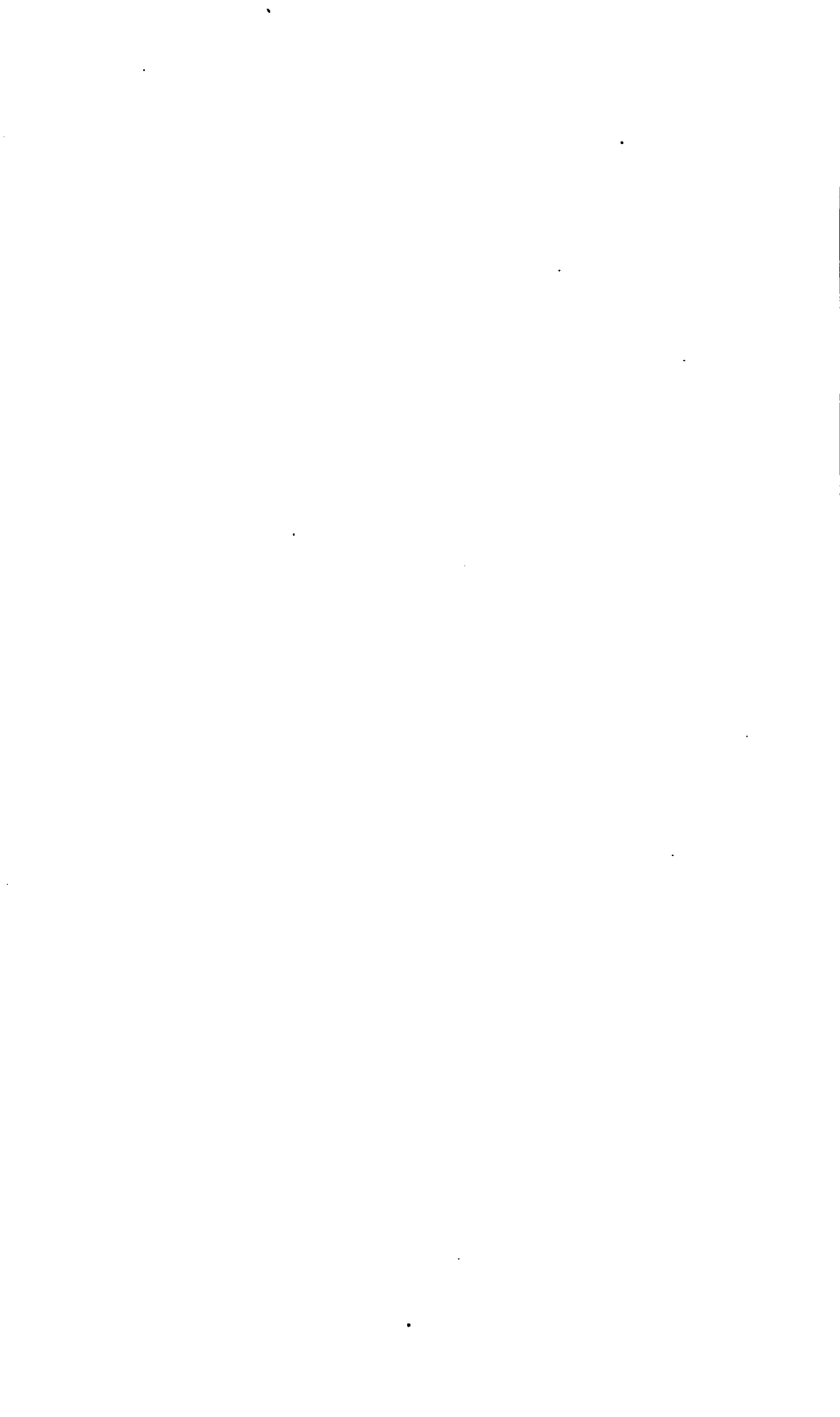
INDICTMENT.—JOINDER OF CRIMES OF RAPE AND INCEST in the same indictment is discussed in the extended note to *Commonwealth v. Bukman*, 41 Am. Rep. 249.

INDICTMENT.—JOINDER OF OFFENSES, GENERALLY.—Several distinct felonies may be charged in the same indictment, when all relate to the same

transaction and admit of the same legal judgment; and, as a rule, the prosecution will not be required to elect on which count it will proceed in such case: *State v. Howe*, 109 Mo. 654; 32 Am. St. Rep. 686, and note with the cases collected. See, also, the extended notes to *Ben v. State*, 58 Am. Dec. 247, and *State v. Bell*, 92 Am. Dec. 661.

TRIAL—LEADING QUESTIONS.—When may be asked, and discretion of court in allowing, is discussed in the extended note to *Turney v. State*, 47 Am. Dec. 84. Whether a leading question shall be permitted rests in the sound discretion of the court in which the trial is had, and decisions with respect to them are not the subject of exception: *Barton v. Kane*, 17 Wis. 38; 84 Am. Dec. 728, and note.

CRIMINAL LAW—EVIDENCE OF OTHER CRIMES.—Testimony tending to show the commission of another offense than the one charged is not, as a general rule, admissible; but, where such offense is intimately connected with the one charged, important proof to establish the latter cannot be excluded because it may tend to prove the former: *State v. Reed*, 53 Kan. 767; 42 Am. St. Rep. 322, and note. See, also, the short note to *Barbly v. Copeland*, 5 Am. St. Rep. 418.



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2. **RELATION OF HUSBAND AND WIFE—WHEN ACTION ARISING OUT OF PERSONAL WRONG DOES NOT SURVIVE.**—If a woman, having a lawful husband living, represents to another man, in ignorance of this fact, that she is single, and thereby induces him to assume and maintain toward her the status of husband, the deception is an injury to him complete with the consummation of the void marriage, and gives him a right of action against her for any pecuniary loss sustained by the fraud. His expenditures for her shelter, food, and clothing simply aggravate the damages caused by the deceit, and the cause of action, being founded wholly on a private wrong, does not survive against her legal representatives, where she acquired no property by her tort, though she did derive a benefit. *Payne's Appeal*, 215.

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AGENCY.

1. **A GENERAL AGENT** is one who is authorized to do all acts connected with a particular business or in a particular place, while a special agent is one authorized to act only in a specific transaction. *Union Stockyard etc. Co. v. Mallory*, 341.
2. **AUTHORITY IMPLIED FROM PREVIOUS ACTS.**—If the question is whether an agent who had purchased cattle for his principal had authority to receive them in his possession, the fact that in previous transactions between the same parties the principal had recognized the authority of his agent to receive cattle purchased is material, and a refusal to receive it in evidence is erroneous. *Union Stockyard etc. Co. v. Mallory*, 341.
3. **IMPLIED AUTHORITY—CUSTOM.**—A person dealing in a particular market will be taken to have dealt according to the custom and usage of the market, and if he employs another to act for him at such market, he will be held as intending that the business shall be conducted according to the general usage and custom of the market, and this rule is applicable whether he in fact knows of the custom or not. *Union Stockyard etc. Co. v. Mallory*, 341.
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5. **AGENCY FOR TWO PARTIES—PRESUMPTION.**—It is not presumed that the agent of two parties deals unfairly with either. It is only when an agent has personal interests conflicting with those of his principal that such presumption can arise. *Pauly v. Pauly*, 98.
6. **RIGHT OF AGENT TO DENY TITLE OF PRINCIPAL.**—The law will not enforce the performance of an agency which tends directly or indirectly to the commission of an illegal act, or an act opposed to public policy, or a control or monopoly of traffic in staple articles of commerce. *Bishop v. American Preservers' Co.*, 317.
7. **ESTOPPEL TO DENY.**—He who holds out another as his agent to act for him in a given capacity, and by his habits and course of dealing justifies the inference that such agent is authorized to act as his agent, whether it be in a single transaction or in a series of transactions, will not be allowed to deny the agency to the prejudice of an innocent party who has been led to rely upon the appearance of authority in the agent. *Union Stockyard etc. Co. v. Mallory*, 341.
8. **ESTOPPEL—SALE BY AGENT WITHOUT AUTHORITY.**—The fact that one who intrusts the possession and control of personal property to an agent

who sells it without authority, and without the knowledge of his principal, attempts, after receiving information of the sale, to procure a settlement with the agent for its value, and makes no demand of the buyer therefor until after suit is brought against him, does not estop the principal from asserting his claim against the buyer for its value. *Gilman etc. Oil Co. v. Norton*, 400.

9. **ESTOPPEL—SALE BY AGENT WITHOUT AUTHORITY.**—One who intrusts the possession and control of personal property to an agent, who sells it without authority, and without the knowledge of his principal, is not estopped from claiming it in the hands of an innocent purchaser without notice, though the agent was a dealer in property of like character. *Gilman etc. Oil Co. v. Norton*, 400.
 10. **SALE BY AGENT WITHOUT AUTHORITY.**—If one advances money to another to buy flaxseed for him, and to hold it as his agent, under an agreement vesting the title at once in the principal, without any condition and binding the agent not to buy or sell flaxseed to any one but the principal, a sale, by the agent, of seed so purchased, to a third person, without the principal's knowledge, conveys no title, though the agent is a dealer in wheat and other grains. *Gilman etc. Oil Co. v. Norton*, 400.
 11. **AN AGENT OR SERVANT IS RESPONSIBLE TO THIRD PERSONS** for injuries occasioned by his misfeasance, but not for those occasioned by mere nonfeasance. *Greenberg v. Whitcomb Lumber Co.*, 911.
- See CORPORATIONS, 11; CUSTOM, 2; HUSBAND AND WIFE, 1; INSURANCE, 10, 2-5, 26; RECEIVERS, 2; SALES, 2; TELEGRAPH COMPANIES, 2; USURY, 1.

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 2. **WHERE THERE IS NO RIGHT OF APPEAL**, there is no right to have a bill of exceptions settled. *Ray v. Hixon*, 899.
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3. **WHERE A BILL OF EXCEPTIONS DOES NOT PURPORT** to disclose all the evidence given, the appellate court will not presume that errors in excluding evidence offered by the losing party were cured by evidence offered by his adversary, and, therefore, could have justified a general charge in favor of the latter. *De Loach v. Robbins*, 46.
4. **WAIVER OF RIGHT OF.**—If an assignee for the benefit of creditors brings suit to set aside a mortgage made by his assignor, which results in a judgment against him, and thereafter, with the consent of the mortgagee and the advice of his counsel, sells the property, and pays over the proceeds to the mortgagee, and they thereupon discharge the mortgage, he thereby waives his right of appeal. *Ray v. Hixon*, 899.
5. **OBJECTIONS NOT REVIEWABLE.**—Objections to rulings on evidence not made in the court below will not be considered on appeal. *Riepe v. Elting*, 356.
6. **COLLISION—TURNING TO LEFT—SUBMITTING QUESTION OF NEGLIGENCE TO JURY—EVIDENCE TO SUPPORT VERDICT.**—If two horsemen on a dark night meet a vehicle coming rapidly toward them on a public highway, and, in order to avoid a collision, one turns to the right and the other to the left, both leaving the traveled part of the road, and being nearly twenty feet apart, but a shaft of the vehicle runs into the horse which turned to the left, causing injuries resulting in its death, and suit is brought to recover the value of the horse, the question of defendant's negligence as to driving in the darkness at a high rate of speed, and that of the rider's contributory negligence in turning to the left, is properly submitted to the jury, and a verdict for the plaintiff will not be set aside on appeal, as being unsupported by the evidence. *Riepe v. Elting*, 356.
7. **TELEGRAPH COMPANIES—GROSS NEGLIGENCE—FINDINGS—REVIEW OF.** A judgment based on findings of fact that a telegraph company has been guilty of gross negligence in transmitting a message is not subject to reversal on appeal if there is sufficient evidence to show such negligence prima facie, although the evidence is conflicting and there may be some doubt as to the correctness of the finding. *Redington v. Pacific Postal Tel. etc. Co.*, 132.
8. **EVIDENCE—IRREGULARITY IN TAKING.**—If plaintiff is unable to attend court, the fact that his evidence is taken at his residence, in the presence of the judge, jury, and counsel for the respective parties, though irregular, is not prejudicial error. *Sutton v. Snohomish*, 847.
9. **CRIMINAL TRIALS.—THE PRESUMPTION IS THAT ERROR OF THE TRIAL COURT** injuriously affected the accused, and his conviction after such error has been committed will be reversed, unless this presumption is clearly repelled by the record. *Sullivan v. State*, 22.
10. **JUDGMENTS—NONPREJUDICIAL ERROR.**—Entry of judgment without express disposition of a special plea filed by the defendant therein, though technical error, if not prejudicial, does not warrant a reversal. *Taylor v. Brunham*, 249.
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13. JUDGMENT ALLOWING EXEMPTION EXCESSIVE BY INSIGNIFICANT AMOUNT—NO REVIEW.—A judgment holding the personal earnings of an artist for painting pictures exempt from execution will not be disturbed on appeal because the amount of exemption thereby secured to the debtor includes a nominal sum for the cost of materials. *Millington v. Lawver*, 385.
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15. JUDGMENT ON DEMURRER—EXCEPTION TO.—After an exception is taken to a ruling on a demurrer, no exception need be taken to the judgment rendered on the ruling in order to sustain an appeal therefrom. *Haefler v. Mullison*, 451.
16. CRIMINAL PRACTICE—EVIDENCE OF OTHER CRIMES.—Where, upon a criminal trial, a witness testified in favor of the accused, and evidence was subsequently offered to show improper relations between them, an instruction to the jury that they should remember that the defendant was not being tried for such improper relation, but that the testimony was admitted to show the relation between them, and that the jury should consider it, and the facts disclosed by it, as it has bearing upon the question being tried, is erroneous, because it leaves the jury to determine the guilt of the accused upon evidence of what occurred at another time and place. *Porath v. State*, 954.
17. REVERSAL.—MATTER IN AN ANSWER NOT DIRECTLY RESPONSIVE TO THE COMPLAINT, and put in issue by the replication, but not proved, is not ground for the reversal of a decree otherwise proper. *Leuders v. Thomas*, 255.
18. HARMLESS ERRORS.—If the result reached by the trial is correct, errors in giving or denying declarations of law, or in giving or denying instructions, must be treated as harmless on appeal. *Fox v. Windes*, 648.
19. INSTRUCTIONS—HARMLESS ERROR.—Error in giving instructions, if harmless, is not ground for reversal. *Macfarland v. Heim*, 629.
20. INSTRUCTIONS NOT OBJECTED TO in the court below will not be considered on appeal. *Riepe v. Elting*, 356.
21. JURY TRIAL—INSTRUCTIONS.—It is not error to refuse instructions which, so far as they are correct and applicable, have been substantially embraced in the charge given. *Riepe v. Elting*, 356.
22. INSTRUCTIONS—DISTINCTION BETWEEN CIRCUMSTANTIAL AND POSITIVE EVIDENCE.—It is misleading and erroneous to instruct, on behalf of the state, that the law makes no distinction between circumstantial and positive evidence in the absence of any caution as to the care to be used in applying circumstantial evidence. *Burt v. State*, 563.
23. INSTRUCTIONS—REASONABLE DOUBT.—It is error to instruct the jury that while they must, in order to convict, believe the accused guilty beyond a reasonable doubt, this requirement is met if they "conscientiously" believe him to be guilty. *Burt v. State*, 563.
24. JURY TRIAL—INSTRUCTIONS, HOW TO BE CONSTRUED.—A general charge of a trial court is to be construed as an entirety and in connection with

the evidence. It should be read and considered in regard to the connection between its several sentences and propositions, each declaration being shaded and interpreted in the light of the context. If any part so construed, limited, or expanded asserts the law correctly, it will not furnish ground for reversal, however faulty the clause may be, if its meaning were not controlled by a prior or subsequent passage. *McNeill v. State*, 17.

25. **APPEAL BY STATE IN CRIMINAL CASES—GENERAL RULE.**—As a general rule, the state has no right of appeal from a judgment in favor of the defendant in a criminal case, whether rendered upon a verdict of acquittal or upon the determination by the court of a question of law, unless expressly authorized by statute. *State v. Lee*, 202.
26. **PROPER PRACTICE, WHEN TAKEN BY STATE.**—The proper practice on an appeal in a criminal case, taken by the state, with the permission of the presiding judge, as authorized by statute, is to ask and secure his permission, and a formal record thereof should be made at the time of the judgment, and the accused, if in custody, should then be admitted to bail. *State v. Lee*, 202.
27. **APPEAL BY STATE IN CRIMINAL CASES UNDER STATUTE AUTHORIZING IT.**—Under a statute allowing an appeal, in criminal cases, to be taken by the state, with the permission of the presiding judge, "upon all questions of law arising on the trial," an appeal by the state in the nature of a motion for a new trial may be taken after a verdict of acquittal. *State v. Lee*, 202.
28. **APPEAL BY STATE—VALIDITY OF STATUTE AUTHORIZING.**—A statute authorizing an appeal to be taken by the state in criminal cases simply regulates the procedure by which the final determination of the questions involved in one prosecution may be had in accordance with law, is in full accord with the principle that no man shall twice be put in jeopardy for the same offense, and is therefore valid. *State v. Lee*, 202.

See FORMER JEOPARDY; JUDGMENTS, 9; NEW TRIAL, 2.

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See MECHANIC'S LIEN, 1.

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1. **JUDGMENTS.—IF A STATUTORY MODE OF ASSIGNMENT IS PROVIDED,** it is cumulative, in the absence of express words inhibiting other modes of assignment. *Gardner v. Mobile etc. R. R. Co.*, 84.
2. **JUDGMENTS.—THE ASSIGNMENT OF A JUDGMENT** may be by parol or in writing, and however made passes an equity which the courts will recognize. *Gardner v. Mobile etc. R. R. Co.*, 84.
3. **EXEMPT PERSONAL EARNINGS—RIGHTS OF ASSIGNEE.**—A debtor may lawfully assign his personal earnings within ninety days from the time the services were rendered, even to a nonresident of the state, and the debtor's right to have them exempt from seizure for the payment of his debts passes to the assignee. *Millington v. Lawrer*, 385.

See ATTORNEY AND CLIENT; JUDGMENTS, 18; LANDLORD AND TENANT, 2.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. **WHEN VOLUNTARY.**—Whether an assignment for the benefit of creditors is voluntary or involuntary must be decided from a consideration of the manner in which the transfer is made, and not what may be prescribed by statute as to the manner in which the property is to be disposed of by the assignee after the assignment. *Whitman v. Mast*, 874.
2. **EFFECT OF FOREIGN—WHEN VOLUNTARY.**—An assignment made by a debtor upon his own motion, for the benefit of his creditors, under the statute providing that an insolvent may make an assignment for the equal benefit of all of his creditors, is voluntary, and transfers his entire personal property wherever situate. *Whitman v. Mast*, 874.
3. **FOREIGN ASSIGNMENT.**—RECOVERERS APPOINTED IN ONE STATE, upon the removal of an assignee appointed therein under a voluntary assignment for the benefit of creditors made in that state, may maintain an action in relation to personal property of the assigned estate situate in another state, which the assignee could have there maintained, and may be substituted therefor in such action. *Whitman v. Mast*, 874.
4. **A JUDGMENT AGAINST A TRUSTEE BINDS THE CESTUI QUE TRUSTENT** in the absence of fraud or bad faith. Therefore, creditors are bound by a judgment against an assignee for the benefit of creditors. *Ray v. Hixon*, 899.

See APPEAL, 4.

ATTACHMENT.

1. **GARNISHMENT, WHAT SUBJECT TO.**—In the absence of fraud on the part of the debtor, or of fraudulent collusion between him and the garnishee, only such money demands can be subject to garnishment as the defendant in the judgment could in his own name and right recover in an appropriate action. *Nicrosi v. Irvine*, 92.
2. **CORPORATIONS—GARNISHMENT—SUBSCRIPTION TO STOCK PAID FOR IN PROPERTY.**—Though a subscription to the stock of a corporation is paid for in property of much less value than the amount of the stock, no action at law can be sustained by the corporation to recover the difference. Therefore such difference cannot be subjected to garnishment by a judgment creditor of the corporation. *Nicrosi v. Irvine*, 92.
3. **GARNISHMENT—NONRESIDENTS.**—Debts due a resident of one state by a resident of another may be garnished in the latter state. *Wyeth Hardware etc. Co. v. Lang*, 626.
4. **NONRESIDENTS.**—Wherever a creditor may maintain suit to recover his debt, it may be there attached as his property. *Wyeth Hardware etc. Co. v. Lang*, 626.

ATTORNEY AND CLIENT.

1. **JUDGMENT—ASSIGNMENT.**—THE AUTHORITY OF AN ATTORNEY AT LAW TO ASSIGN A JUDGMENT MAY BE INFERRED from the silent acquiescence of his client extending over many years. *Gardner v. Mobile etc. R. R. Co.*, 84.
2. **JUDGMENTS—ASSIGNMENT.**—AN ATTORNEY AT LAW CANNOT ASSIGN A JUDGMENT without special authority from his client, but the authority or a ratification may be inferred from circumstances. *Gardner v. Mobile etc. R. R. Co.*, 84.

See CHAMPERTY; JUDGMENTS, 12, 13.

BAILMENT.

1. **BAILER.—THE QUESTION WHETHER A BAILER HAD EXERCISED ORDINARY** care and diligence in the delivery of property to a person other than the bailor is a question for the jury. *Union Stockyard etc. Co. v. Mallory*, 341.
2. **BAILLES DELIVERING GOODS TO A WRONG PERSON**, though innocently and by mistake, are ordinarily answerable for a conversion. *Union Stockyard etc. Co. v. Mallory*, 341.
3. **BAILER AT STOCKYARDS., a stockyards company is only required to act with reasonable care and diligence, and in accordance with the usages and customs of the Union Stock Yards where the business was transacted. *Union Stockyard etc. Co. v. Mallory*, 341.**

BANKS.

See CHECKS; EVIDENCE, 2-7.

BASTARDY.

1. **CONFLICT OF LAWS.—LEGITIMATION** in a foreign country does not make lawful heirs in other countries of those born out of lawful marriage, if the common law or statute of Merton prevails in the latter countries, and for the purposes of descent the different states of the United States are foreign countries to each other. *Williams v. Kimball*, 238.
2. **CHILDREN, LEGITIMACY, PRESUMPTION OF. is presumed to be legitimate. This presumption cannot be rebutted by circumstances which only create doubt or suspicion, but may be removed by proper and sufficient evidence showing that the husband was incompetent or entirely absent, so as to have no intercourse with the mother at the period when the children must have been begotten, or only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse. *Scanlon v. Walsh*, 488.**
3. **CHILDREN, LEGITIMACY, ESTOPPEL OF PARENT TO TESTIFY TO., in divorce proceedings, and also in proceedings for the adoption of her children, testifies that they were the children of her husband, is estopped in a subsequent proceeding from testifying that they were the issue of meretricious relations between herself and a person not her husband, and whom, after being divorced from her husband, she marries. *Scanlon v. Walsh*, 488.**
4. **CHILDREN.—ACKNOWLEDGMENT OF CHILD BORN IN WEDLOCK** by a man not then the husband of its mother, made after his marriage to her, and after the dissolution of the marriage existing when the child was begotten and born, cannot operate to make such child his heir when the husband was not impotent, and had opportunity for sexual intercourse with the mother, and the only evidence of illegitimacy was the testimony of the mother and the acknowledgment of the supposed father. *Scanlon v. Walsh*, 488.
5. **CHILDREN—LEGITIMACY., nor of her alleged paramour, will be received to show that a child born during the marriage was illegitimate if the husband was not impotent and had opportunity for sexual intercourse with the wife. *Scanlon v. Walsh*, 488.**
6. **CHILDREN, LEGITIMACY, WHEN MAY NOT BE DISPROVED.**

there is no proof of his impotency, no evidence can be admitted to show that another may have been, or probably was, the father of the wife's children. *Scanlon v. Walshe*, 488.

7. **CHILDREN, ILLEGITIMACY, PROOF OF.**—Though the mother testifies that children begotten and born to her in wedlock are not the children of her then husband, where it appears that she was then living with her husband, who had opportunities for sexual intercourse with her, and who is not shown to have been incompetent, such testimony is not so satisfactory and conclusive as to overcome the presumption of legitimacy. *Scanlon v. Walshe*, 488.
8. **CHILDREN, ILLEGITIMATE, ACKNOWLEDGMENT OF.**—Though children are born to a married woman while living with her husband, still, if they are the fruits of her intercourse with another man, whom she subsequently marries, and who afterward acknowledges them, they are thereby, by virtue of the statutes of Maryland, legitimated and made capable of inheriting his property as if born to him in lawful wedlock. *Scanlon v. Walshe*, 488.
9. **DESCENT—RIGHT OF BASTARD TO INHERIT LAND.**—A bastard, made capable by statute of inheriting or of transmitting inheritance on the part of his mother as if lawfully begotten of such mother, is not thereby rendered capable of taking by inheritance from collateral kindred upon his mother's side. *Williams v. Kimball*, 238.

BAWDY-HOUSES.

See DISORDERLY HOUSES.

BEQUEST.

See DEVISE, 2.

BILL OF RIGHTS.

See CONSTITUTIONAL LAW, 2, 3; STATUTES, 4

BILLS OF EXCEPTIONS.

See APPEAL, 2, 3.

BILLS OF PARTICULARS.

See DISORDERLY HOUSES, 2.

BOARDS OF HEALTH.

1. **HEALTH LAWS.**—The power of the legislature to prevent the introduction and spread of infectious or contagious diseases cannot be questioned. All property in the state is held subject to the reasonable supervision of legislative authority, to the extent necessary to the reasonable preservation of the public health. *State v. Speyer*, 832.
2. **HEALTH LAWS—RIGHT TO QUARANTINE PERSONS.**—Under a statute authorizing the board of health to require the isolation of all persons and things infected or exposed to smallpox, no isolation can be required, unless there has been an infection or an actual exposure to the disease, and an order of such board that whenever any person shall refuse to be vaccinated, he shall be immediately quarantined, and continued in quarantine until he consents to such vaccination, cannot justify the quarantining of persons on the ground that they lived or were doing

- business in a part of the city in which this disease existed, and that such business was of a character likely to expose them to it, if, in fact, such exposure is not shown to have taken place. *Matter of Smith*, 769.
3. **HEALTH LAWS—VACCINATION—POWER TO COMPEL.**—Under a statute giving the board of health of a municipality power to guard against the introduction of infectious or contagious diseases, by the exercise of proper medical inspection and control over all persons and things arriving from infected places, and liable from any cause to communicate contagion, and to require the isolation of all persons infected with, or exposed to, such disease, such board has no power to declare that whenever any person shall refuse to be vaccinated he shall be immediately quarantined, and continued in quarantine until he consents to such vaccination. *Matter of Smith*, 769.
 4. **HEALTH LAWS VOID WHEN UNREASONABLE.**—Though a state board of health is, by statute, vested with authority to promulgate and enforce such regulations for the better preservation of the public health as it shall judge necessary, a regulation imposed by it that no pigpens shall be built or maintained within one hundred feet of any well or spring of water used for drinking purposes, nor within one hundred feet of any street or inhabited house, is unreasonable, and, therefore, void. It reaches beyond the scope of necessary protection and prevention into the domain of restraint of lawful business and use of property. *State v. Speyer*, 832.
 5. **HEALTH LAWS—JUDICIAL CONTROL OVER.**—While the necessity and propriety of particular regulations are primarily of legislative determination, their character, whether reasonable, impartial, and consistent with state policy, is a question for the court. *State v. Speyer*, 832.

BOARDS OF TRADE.

1. **JURISDICTION OF A COMMITTEE OF A BOARD OF TRADE IS SPECIAL AND LIMITED**, and it is bound to proceed in conformity to the rules under which it was selected. If it fails to conduct the investigation in accordance with the charter and by-laws of the board, its judgment is not binding. *Ryan v. Cudahy*, 305.
2. **ESTOPPEL TO DENY JURISDICTION OF BOARD OF TRADE.**—One who, in becoming a member of a board of trade, agrees to abide by its rules and regulations, and who voluntarily submits to the trial of a matter referred to a committee without in any manner calling into question the jurisdiction of the committee, is estopped from denying its jurisdiction over the person and subject matter. *Ryan v. Cudahy*, 305.
3. **REFUSAL OF COMMITTEE TO HEAR EVIDENCE.**—Where the rule of a board of trade requires its committee to hear such evidence under oath as either party may wish to submit touching their claims or disputes, a refusal of such committee to hear such evidence renders its action invalid. *Ryan v. Cudahy*, 305.
4. **JURISDICTION OF COURTS TO SUPERVISE.**—Where property rights are involved, courts have power to so far supervise the action of a board of trade as to determine whether it has proceeded according to the rules and regulations provided for its action, and if it has failed in a substantial manner, courts may correct abuses which may result from its unwarranted proceedings. *Ryan v. Cudahy*, 305.
5. **JURISDICTION OF COURTS OVER.**—A court of equity has jurisdiction to interfere with the action of a board of trade or one of its committees

appointed to settle a controversy submitted to it under the rules and regulations of the board when such board or committee has refused to receive evidence offered by one of the parties relevant to the issue submitted for decision. *Ryan v. Cudahy*, 305.

6. **WAIVER.**—The fact that the seller had put up margins when demanded does not deprive him of the right, when the title to the margins is put in issue, of proving, if he can, that the market value of the article sold was no higher on the day of delivery than when it was sold. *Ryan v. Cudahy*, 305.
7. **EVIDENCE OF THE PRICE OF ARTICLES.**—In a controversy between a person who has contracted to sell, and one who has agreed to buy, marketable articles at a designated day respecting the price which ought to be charged to the former for such articles that he is unable to deliver at the time indicated, the committee of the board of trade to whom the decision of the matter is committed should not confine the parties to the evidence of the difference between the contract price and a figure established by a committee of the board of trade on the day of delivery, regardless of the fact whether such figure is real, fictitious, or manipulated by collusion. Especially is this true when the rule of the board declares that in determining the value of the property its value in other markets, or for manufacturing or consumptive purposes in this market, together with such other facts as may justly enter into the determination of its value, shall be considered, irrespective of any fictitious price which it may at the time be selling for in this market. *Ryan v. Cudahy*, 305.

BOOKS.

See EVIDENCE, 12.

BURDEN OF PROOF.

See CARRIERS, 2; PROCESS, 2; USURY, 2.

CARRIERS.

1. **LIABILITY OF.**—In an unconditional common-law contract of carriage the carrier insures the safe carriage of the goods to the consignee and assumes liability for their loss or injury resulting from any cause, excepting only the act of God or of the public enemy, and the act or fault of the shipper of the goods. If they are not delivered, or are delivered in a damaged condition, the carrier cannot relieve himself from liability by proof of the highest possible care on his part. *McCarthy v. Louisville etc. R. R. Co.*, 29.
2. **BURDEN OF PROOF.**—If a carrier seeks to escape liability for the loss or injury of goods on the ground that such loss or injury occurred through the fault of the shipper, such carrier must assume the burden of proof by establishing that the loss or injury was not due to any contributing fault of his own. *McCarthy v. Louisville etc. R. R. Co.*, 29.
3. **CARRIER'S LIABILITY.**—THOUGH THE MODE IN WHICH THE GOODS ARE PACKED or put into the cars for shipment by their owner may be improper or negligent, yet this will not relieve the carrier from liability for their loss or injury, unless it was the sole cause thereof, unaided by the act or negligence of the carrier. *McCarthy v. Louisville etc. R. R. Co.*, 29.

4. **CARRIER'S LIABILITY, WHEN AFFECTED BY THE FAULT OF THE SHIPPER OF GOODS.**—The contributory negligence of the shipper of the goods cannot be pleaded to relieve a negligent carrier from liability. The carrier is liable for any injury done through the concurrent and contributory negligence of himself and the shipper. *McCarthy v. Louisville etc. R. R. Co.*, 29.
5. **IMPROPER LOADING OF GOODS.**—If goods are transported in closed cars, so that when received from one carrier by another the latter cannot, without opening the doors, see the condition of their contents, it is under no duty to open such doors, and is not answerable for a loss or injury to the goods resulting solely from their condition, and not from any fault of the carrier. *McCarthy v. Louisville etc. R. R. Co.*, 29.

See RAILROADS, 18-22; TELEGRAPH COMPANIES, 1.

CAVEAT EMPTOR

See GUARDIAN AND WARD.

CHAMPERTY.

1. **CHAMPERTY** is an agreement between the owner of a claim and a volunteer, that the latter may take the claim and collect it at his own expense, dividing the proceeds with the owner. It is not essential that the agreement should specially refer to, or provide for, the bringing of a suit. *Hamilton v. Gray*, 811.
2. **THE COMMON LAW OF CHAMPERTY IS IN FORCE IN VERMONT**, and, therefore, a champertous agreement is void in that state. *Hamilton v. Gray*, 811.

CHARACTER.

See EVIDENCE, 13; RAPE, 2.

CHATTEL MORTGAGES.

- A **MORTGAGE OF CHATTELS DESCRIBING THEM** as two two-year-old heifers and three one-year-old heifers is void for indefiniteness where it does not appear that the mortgagor did not own other heifers of the same age. *Huss v. Etabrooks*, 810.

CHECKS.

1. **THE BLANK INDORSEMENT** of a check which is in form a negotiable instrument, and delivery thereof, transfer the title to the indorsee, and the presumption, in the absence of a showing to the contrary, is that the transfer was for a valuable consideration. *Shaw v. Jacobs*, 411.
2. **BLANK INDORSEMENT AND CREDIT FOR AT BANK, EFFECT OF—CUSTOM OF BANKS.**—If a check upon a bank, payable to a payee named or bearer, is indorsed in blank by the payee, who delivers it to a bank with which he does business, and the bank gives him credit for it, the title to the check passes to the bank, and its ownership thereof cannot be negatived by proof of any custom of banks to treat such credit merely as a receipt. *Shaw v. Jacobs*, 411.

CHILDREN.

See BASTARDY, 6.

CIRCUMSTANTIAL EVIDENCE.

See **APPEAL**, 22; **EVIDENCE**, 15; **TRIAL**, 6, 7, 8.

CLAIMS.

See **MUNICIPAL CORPORATIONS**, 12.

COLLATERAL ATTACK.

See **JUDGMENTS**, 9.

COLOR OF TITLE.

See **ADVERSE POSSESSION.**

COMMON LAW.

See **CHAMPERTY**, 2; **WATERS**, 12.

CONDITIONS.

See **DEEDS**, 8-10; **DEVISE**, 2.

CONFESSIONS.

See **EVIDENCE**, 13-16.

CONFLICT OF LAWS.

A PENAL LAW of one state will not support a civil action in another.
Adams v. Fitchburg R. R. Co., 800.

See **ASSIGNMENT FOR THE BENEFIT OF CREDITORS**, 2, 3; **ATTACHMENT**, 3, 4; **BASTARDY**; **DESCENT**, 2; **USURY**, 3, 4.

CONSIDERATION.

See **CONTRACTS**, 1, 2; **GIFTS**; **GUARANTY**, 2; **SALES**, 5, 6.

CONSPIRACY.

1. **LIABILITY OF MEMBERS.**—Every one who enters into a conspiracy is deemed a party to every act connected therewith done by the others before that time, and a party to every act afterward done by any of the others in furtherance of such common design. *Jenkins v. State*, 267.
2. **EVIDENCE.**—**EVERY ACT AND DECLARATION** of each member of a conspiracy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is original evidence against each of them without reference to the time that any one of them entered into the conspiracy. *Jenkins v. State*, 267.
3. **EVIDENCE.**—Proof of overt acts or declarations by one in pursuance of a common purpose or design by several to commit a crime may be given in evidence against all of the conspirators. If such acts or declarations occur at a subsequent time after the accomplishment or abandonment of the crime, and are merely narrative of past occurrences, they are not admissible against any but the party making or uttering them. *Jenkins v. State*, 267.

CONSTITUTIONAL LAW.

1. **STATE AND FEDERAL.**—The constitution of the United States is in reality a part of the constitution of every state, and must be so regarded in determining the validity of any legislative act. *State v. Conlon*, 227.
2. **THE RIGHTS PROTECTED** by the bill of rights are those that inhere in "the great and essential principles of liberty and free government," recognized in the course of events that resulted in our independence, and established by the adoption of our constitution. *State v. Conlon*, 227.
3. **EQUALITY IS A PROTECTED RIGHT.**—Equality under the law in the rights to "life, liberty, and the pursuit of happiness," is one of the rights protected by constitutional guaranty, and "no man or set of men are entitled to exclusive public emoluments or privileges from the community." *State v. Conlon*, 227.

See **MARRIAGE AND DIVORCE; MUNICIPAL CORPORATIONS**, 19-25; **STATUTES**, 5, 6; **TELEGRAPH COMPANIES**.

CONTRACTS.

1. **CONSIDERATION.**—A subsequent agreement not forming any part of an original contract, nor supported by the original consideration thereof, nor by any new consideration, is void. *Macfarland v. Heim*, 629.
2. **CONSIDERATION.**—WHILE A PRE-EXISTING DEBT is a valuable consideration for the transfer of negotiable instruments, it should not be so held as to other personal property. *Reed v. Brown*, 406.
3. **ILLEGAL.**—WHEN THE PLAINTIFF CANNOT ESTABLISH his cause of action without relying upon an illegal contract, he cannot recover. *Bishop v. American Preservers' Co.*, 317.
4. **RATIFICATION.**—VOID ACTS are incapable of ratification. *Macfarland v. Heim*, 629.
5. **TRUSTS—RIGHT OF PERSON TO ATTACK HIS OWN TRANSFER BECAUSE MADE TO.**—Where a corporation sues to recover possession of property, the defendant may resist on the ground that the property being his was transferred to the plaintiff in pursuance of an illegal scheme to form a combination in restraint of trade. In such case, the vendor being left in possession, the court will not aid the vendee to recover it for the reason that the recovery must aid in the enforcement of an unlawful scheme. *Bishop v. American Preservers' Co.*, 317.

See **MONOPOLIES; MUNICIPAL CORPORATIONS**, 18, 26; **SALES; SUNDAY**, 2; **VENDOR AND PURCHASER**.

CONTRIBUTION.

See **GUARANTY**, 8.

CONVERSION

See **BAILMENT**, 2; **TROVER**.

CORPORATIONS.

1. **EVIDENCE.**—RESOLUTIONS of a corporation passed at an irregular and unlawful special meeting of its directors are not admissible in evidence against the corporation in support of notes which they attempt to authorize. *Pauly v. Pauly*, 98.

2. **SPECIAL MEETING—RATIFICATION OF UNAUTHORIZED ACTS.**—If corporation notes executed by its secretary without authority are ratified at a special meeting of the board of directors of which they are not all notified, the ratification is not made at a meeting duly assembled, and does not bind the corporation as a corporate act. *Pauly v. Pauly*, 98.
3. **IMPLIED PROMISE TO REPAY MONEY RECEIVED.**—If money is obtained by, and disbursed through, the proper financial officer of a corporation through the agency of another corporation, and is applied to a proper use, there arises an implied promise from the corporation so receiving and using such money to repay it to the other corporation. *Pauly v. Pauly*, 98.
4. **RECOVERY OF MONEY ADVANCED TO.**—If a bank furnishes money to a corporation, whether as loans upon unauthorized notes or upon account or for legitimate business, or in discharge of its legal liability, such money, so far as it is in fact applied to the benefit of the corporation, may be recovered to the extent to which it has not been repaid. *Pauly v. Pauly*, 98.
5. **CORPORATIONS MUST ACCOUNT FOR BENEFITS RECEIVED UNDER ULTRA VIRES CONTRACTS**, with interest on the amount found due. *Pauly v. Pauly*, 98.
6. **LIABILITIES OF STOCKHOLDERS AS BETWEEN THEMSELVES.**—A creditor stockholder in a corporation may maintain an action against other stockholders in the same corporation for their pro rata share of its debt, under a statute imposing liability on stockholders for their respective proportions of the debts of the corporation. *Brown v. Merrill*, 145.
7. **SEVERAL LIABILITY OF STOCKHOLDERS.**—If every stockholder in a corporation has a several liability for its debts, proportionate to the amount of his stock, he is freed of all liability by paying his portion of the corporate debts, and has no cause of action against any other stockholder for the money so paid. *Brown v. Merrill*, 145.
8. **DIVIDENDS, TO WHOM BELONG.**—If a testator by his will gives to his wife for her sole enjoyment and benefit during her life, without restraint, deduction, or interference in any manner, one-half of all the income of his property of every kind, and to his legal heirs the remainder of such income during the life of his wife, after payment of taxes, etc., and to his legal heirs the reversion and ownership of his estate at her death, and such testator has stock in corporations, the only income of which is from the sale of lands received by such corporations in payment of work upon railways constructed by them, dividends paid by the corporations out of the proceeds of such sale should be treated as income between the wife and the heir, and she is therefore entitled to one-half thereof. *Matter of James*, 774.
9. **NOTES EXECUTED BY SECRETARY—EVIDENCE.**—Notes executed in the name of a corporation by its secretary, to whom no general or special authority to so execute them has been delegated, do not bind the corporation. *Pauly v. Pauly*, 98.
10. **AGENT, MISFEASANCE FOR WHICH ANSWERABLE.**—An agent of a corporation charged with the duty of providing safe machines with which its employees were required to work, and who, knowing a machine to be defective and dangerous, put an employee to work therewith, is guilty of misfeasance, for which he is answerable to such employee, if injured thereby. *Greenberg v. Whitcomb Lumber Co.*, 911.

11. **EVIDENCE—DOUBLE AGENCY.**—Acts and admissions of corporation officers are admissible in evidence against it, in relation to matters entrusted to them, although they are also officers in another corporation in whose interest the evidence is offered. *Pauly v. Pauly*, 98.
 12. **CONTRACTS BETWEEN.**—ALTHOUGH SOME DIRECTORS IN ONE CORPORATION ARE ALSO DIRECTORS in another corporation, this does not prevent the corporations from contracting with each other. If in so contracting there is no abuse of trust relations, it is no bar to a recovery by one of the corporations for money advanced to and used by the other. *Pauly v. Pauly*, 98.
 13. **FOREIGN—RIGHT TO DO BUSINESS WITHIN STATE.**—A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law and by force of the law. Where that law ceases to operate the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty and do business therein as a corporation without reincorporation under its laws. *Taylor v. Bramham*, 249.
 14. **FOREIGN—DOING BUSINESS WITHIN ANOTHER STATE—LIABILITIES AS PARTNERS.**—If a number of individuals assume to act in a corporate capacity in a state where they have not been clothed with corporate authority, they cannot there be recognized as a legally constituted corporation, though they may have been duly incorporated in another state, and such persons are to be treated as, and held to the responsibility of, partners, both in courts of law and equity in the state where they assume corporate capacity without reincorporation. *Taylor v. Bramham*, 249.
- See ATTACHMENT, 2; EVIDENCE, 3-8; EXECUTION, 7, 8; LIMITATIONS OF ACTIONS, 1; PARTNERSHIP, 2; RECEIVERS, 1.**

COTENANCY.

1. **A COTENANT IS ENTITLED TO BE REIMBURSED** for moneys expended in payment of taxes and extinguishing liens upon the common property, when called upon for an accounting by his fellow-tenant. *Stewart v. Stewart*, 949.
2. **A TENANT IN COMMON SUED IN EJECTMENT** may be allowed to set off the value of necessary repairs and permanent improvements as against the claim of his fellow-tenant for rents and profits. *Stewart v. Stewart*, 949.

COUNTERCLAIM.

See SETOFF.

COURTS.

See STIPULATIONS.

CRIMINAL LAW.

See APPEAL, 9, 16, 25-28; CONFLICT OF LAWS; DISORDERLY HOUSES; EMBEZZLEMENT; EVIDENCE, 13-16; HOMICIDE; RAPE; SEDUCTION.

CROPS.

1. **RIGHT OF TENANT TO.**—If a tenancy is so uncertain that the tenant cannot know that his estate is to terminate before a crop planted by him

can ripen, he is entitled to re-enter and harvest the crop when it matures. *Monday v. O'Neil*, 760.

2. **RIGHT OF TENANT TO CROP ON MORTGAGED PREMISES.**—A crop planted by a tenant for years after the rendition of a decree, to which he is a party, foreclosing a mortgage on the land, belongs to the tenant and not to the purchaser, provided the former is permitted to retain possession until after the crop matures, although the foreclosure sale has been confirmed in the meantime, and notice given by the purchaser to the tenant that he is expected to pay rent to him in money or in kind. *Monday v. O'Neil*, 760.

See EXECUTION, 12.

CROSS-EXAMINATION.

See WITNESSES, 5.

CUSTOM.

1. **USAGE—CONTRACTS MADE UNDER.**—If a known usage or custom of trade or business exists, persons carrying on that trade or business are held to have contracted in reference thereto, unless the contrary appears, and such custom or usage forms part of the contract. *Union Ins. Co. v. American etc. Ins. Co.*, 140.
2. **AGENT—USAGE AS AFFECTING POWERS.**—The usages of a particular trade or business are properly admissible for the purpose of interpreting the powers given to an agent. *Union Stockyard etc. Co. v. Mallory*, 341.

See AGENCY, 3; BAILMENT, 3; CHECKS, 2.

DAMAGES.

See ACTIONS; APPEAL, 14; EMINENT DOMAIN, 2-5; RAILROADS, 1-4; SALES, 11; WATERS, 20.

DAMS.

See WATERS, 5, 26.

DEBRIS.

See WATERS, 21.

DEBTOR AND CREDITOR.

See GUARANTY; PARTNERSHIP, 9-15; SUREBAGATION, 2.

DEBTS.

See DEVISE.

DECLARATIONS.

See CONSPIRACY.

DEEDS.

1. **PRESUMPTION.**—One who has sold land is presumed to have made a deed to the purchaser. *Fox v. Windes*, 648.
2. **ESCROW, DELIVERY OF DEED TO AGENT OF GRANTER.**—The mere delivery of the manual possession of a deed is not necessarily a delivery of the deed. In cases where the acceptance of an agency from both involves no violation of duty to either, it is competent for the releasor to make

- the agent of the releasee his own agent for the purpose of holding the deed as an escrow and returning it to him, the releasor, in case of non-performance of a stipulated condition. There is no such personal identity between the grantee and his agent as to exclude the latter from becoming the depository of the escrow. *Ashford v. Prewitt*, 37.
3. A DEED DELIVERED IN ESCROW BECOMES OPERATIVE ONLY FROM THE PERFORMANCE of the condition and the actual delivery to the grantor. *Ashford v. Prewitt*, 37.
 4. DELIVERY TO THIRD PERSON. — If a grantor, together with his wife, executes a deed to his son, and the grantor delivers the deed in an envelope to a cashier of a bank stating to him that the contents of the envelope are for his son if anything happens to him, such delivery is a conveyance in presenti to the son, and takes effect upon the death of the grantor by relation from the delivery to the cashier of the bank. *Trask v. Trask*, 446.
 5. DELIVERY OF DEED TO A STRANGER, to be delivered to the grantee at the direction of the grantor, or with a reservation of a right in him to countermand it, does not pass the title, nor raise a presumption that the delivery is made with that intention. To pass the title, the facts and circumstances attending the transaction must be such as to show that the grantor intended that the deeds should be delivered by the custodian to the grantee. *Trask v. Trask*, 446.
 6. DEEDS MAY BE DELIVERED TO A THIRD PERSON for the grantee, and, if subsequently assented to by the latter, the delivery is as effective to pass the title as if made directly to him. *Trask v. Trask*, 446.
 7. ELECTION. — ONE WHO ACCEPTS BENEFITS under an instrument must adopt the whole of it, conforming with all its provisions and renouncing all rights inconsistent therewith. *Fox v. Windes*, 648.
 8. CONDITIONS SUBSEQUENT ARE NOT FAVORED IN LAW, because on the breach thereof there is a forfeiture, and the law is adverse to forfeiture. *Kilpatrick v. Mayor*, 509.
 9. A CONDITION SUBSEQUENT WILL NOT BE RAISED IN A DEED BY IMPLICATION from a mere declaration therein that the grant is made for a special and particular purpose. *Kilpatrick v. Mayor*, 509.
 10. CONDITION SUBSEQUENT, WHAT IS NOT. — A deed of land to a municipality which in the habendum adds the words, "as and for a street to be kept as a public highway," does not create a condition subsequent, and the property does not revert to the grantor because of the failure to use it as a street. *Kilpatrick v. Mayor*, 509.
 11. CORRECTORY—ADVERSE POSSESSION. — After the acceptance by grantees of a deed of correction from their grantor in lieu of a prior deed from him, misdescribing the land intended to be conveyed, the grantor's possession of the land first conveyed to such grantees is adverse to them. *Fox v. Windes*, 648.
 12. CORRECTORY—ELECTION. — The acceptance by grantees of a deed of correction from their grantor in lieu of a prior deed executed by him, misdescribing the land intended to be conveyed, constitutes an election by the grantees to take the land conveyed by the deed of correction and a relinquishment of title to the land conveyed by the prior deed. *Fox v. Windes*, 648.
 13. DEEDS OF CORRECTION—ELECTION—ADVERSE POSSESSION. — If grantees accept a deed of correction from their grantor, conveying different land from that conveyed to them by a prior deed, misdescribing the

land intended to be conveyed, and sell the land conveyed to them by the deed of correction, the fact that the original grantor does not remit to them all of the purchase money received by him from their grantee does not affect their election to take the land conveyed to them by the deed of correction, nor does it affect the original grantor's adverse possession of the land described in the prior deed containing the misdescription. *Fox v. Windes*, 648.

See ESTOPPEL, 1; JUDGMENTS, 4.

DEFINITIONS.

"Between." *Weir v. Thomas*, 741.

THE WORDS "COLLECT" AND "FOR COLLECTION," as applied to an indebtedness, mean that which may lawfully be done by the holder of the obligation to secure its payment or liquidation after its maturity. *Shenandoah Nat. Bank v. Marsh*, 381.

Color of title. *Stewart v. Stewart*, 949.

Conversion. *Union Stockyard Co. v. Mallory*, 341.

Guaranty. *Hooper v. Hooper*, 496.

"LEGAL REPRESENTATIVE," in the broadest sense, means one who lawfully represents another in any matter whatever. *Estate of Conrad*, 396.

NONFEASANCE is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person may lawfully do; malfeasance is the doing of an act which a person ought not to do at all. *Greenberg v. Whitcomb Lumber Co.*, 911.

A "ridgling" is "the male of any beast, half gelt." *Douglas v. Moses*, 353.

Residence. *Berry v. Wilcox*, 706.

Subrogation. *Heuser v. Sharman*, 390.

DEMURRER.

See APPEAL, 15; INDICTMENT, 6, 9; PLEADING, 1.

DESCENT.

1. OFFSPRING OF SLAVE MARRIAGES terminating before emancipation or never recognized by the parties thereto after their emancipation have no inheritable blood, and cannot inherit property acquired by their ancestors after their emancipation. *Williams v. Kimball*, 233.

2. CONFLICT OF LAWS.—DESCENT AND HEIRSHIP OF REAL ESTATE are exclusively governed by the law of the country within which it is actually situate. No person can take, except those who are recognized as legitimate heirs by the laws of that country. *Williams v. Kimball*, 233.

See BASTARDY, 9; INSURANCE, 27, 28.

DEVISE.

1. DEVISES AND LEGACIES, CHARGING DEBTS UPON.—A devise of property on condition that the beneficiary pay certain legacies, and declaring that the property is charged with the payment of the same, does not operate to charge the debts of the decedent upon such property, though the testator in his will first directs the payment of his debts and expenses by his executor. *Cunningham v. Parker*, 765.

2. CONDITION SUBSEQUENT.—A DEVISE OR BEQUEST OF PROPERTY ON CONDITION or proviso that the beneficiary shall pay certain legacies within four years after the decease of the testator, adding that the property

so devised is charged with payment of the same, does not involve a forfeiture as a consequence of a failure to pay within the time designated. *Cunningham v. Parker*, 765.

3. **REVOCATION BY MISTAKE.**—The revocation of a devise or legacy is altogether a matter of intent, and the general rule that such revocation by mistake will not be permitted to annul the gift has no application if it appears from the instrument of revocation that the testator intended to determine for himself the existence or nonexistence of the grounds of revocation. *Giddings v. Giddings*, 192.

See WILLS.

DIRECTING VERDICT.

See TRIAL, 1, 2.

DISCRIMINATION.

See TELEGRAPH COMPANIES, 10-14.

DISEASE.

See BOARDS OF HEALTH.

DISORDERLY HOUSES.

1. **CRIMINAL LAW.—A HOUSE OF ILL-FAME** is one resorted to for the purpose of prostitution or lewdness. It is not necessary to warrant a conviction that the house had the reputation of being a house of ill-fame, if it is one in fact. *State v. Plant*, 821.
2. **CRIMINAL LAW—INFORMATION—BILL OF PARTICULARS.**—A defendant, charged in an information with having kept a certain house of ill-fame commonly called a bawdy-house, open to the public night and day, for common bawdry, then and there situate on Sixth street, in a city, county, and state named, is not entitled to a bill of particulars. The information is sufficiently specific in its facts. *State v. Hendricks*, 666.
3. **INFORMATION—IMMATERIAL VARIANCE.**—If an information charges the keeping of a house of ill-fame on Sixth street, and the evidence tends to prove that it was kept on North Sixth street, the variance is immaterial. *State v. Hendricks*, 666.
4. **CRIMINAL LAW.—UPON THE CHARGE OF KEEPING A HOUSE OF ILL-FAME**, if the prosecution offers evidence of the keeping at different places within the same town of different houses of ill-fame, it should be compelled to elect upon which offense it would go, and it is error to receive under one count evidence of these different offenses. *State v. Plant*, 821.
5. **EVIDENCE—REPUTATION.**—IN A PROSECUTION FOR KEEPING A HOUSE OF ILL-FAME, evidence of common reputation is not admissible, and its reception warrants a reversal of a judgment of conviction. *State v. Plant*, 821.
6. **EVIDENCE.—THE GENERAL REPUTATION OF A HOUSE, AS BEING A HOUSE OF ILL-FAME**, is admissible in evidence in a prosecution of a person charged with keeping such house. Such reputation is not alone sufficient to sustain a conviction. There must be some evidence of the actual use of the house as a house of ill-fame. *State v. Hendricks*, 666.
7. **EVIDENCE.—GENERAL REPUTATION FOR LEWDNESS OF WOMEN** who live in a house is admissible in a prosecution for keeping a house of ill-fame. *State v. Hendricks*, 666.

8. **EVIDENCE.—THE REPUTATION FOR LEWDNESS OF A DEFENDANT** charged with keeping a house of ill-fame is admissible in evidence on the trial of such charge. *State v. Hendricks, 666.*
9. **CRIMINAL LAW.—THE KEEPING OF A HOUSE OF ILL-FAME MAY BE ESTABLISHED BY EVIDENCE** of its general reputation, and of the gathering there of men and women for illicit intercourse, and of their lewd conduct, and profane and obscene language, and from other facts and circumstances which may induce the conclusion that the house was in fact used for purposes of prostitution. *State v. Hendricks, 666.*
10. **JURY TRIAL.—INSTRUCTIONS.—IMMATERIAL ERROR.—**An incomplete and wholly inapplicable statement of the law, on the trial of a prosecution for keeping a house of ill-fame, does not entitle the accused to a reversal of a judgment of conviction, when the essential elements of the offense were properly stated in other instructions. *State v. Hendricks, 666.*

DIVIDENDS.

See CORPORATIONS, 2.

DIVORCE.

See MARRIAGE AND DIVORCE.

DYING DECLARATIONS.

See HOMICIDE, 9, 10.

EASEMENTS.

1. **IF THE OWNER OF LANDS SO USES THEM** that one parcel has an easement and the other is subject to a corresponding servitude, and such parcels are afterward distributed among his heirs, they are respectively subject to the same servitude and entitled to the same easement as before. *Mason v. Horton, 817.*
2. **EXTINGUISHMENT OF BY NONUSER.—**If a person having an easement to discharge water at a certain place on the lands of another does not exercise this right for twenty-six years, during which time the water is used by the other, this does not extinguish the right, if the use so made of the water did not interfere with any use which the holder of the easement desired to make of it during the same period. *Mason v. Horton, 817.*
3. **MERE NONUSER FOR ANY LENGTH OF TIME** does not destroy or extinguish an easement, unless it is so conducted on the part of the owner of the servient estate as to be adverse to it, or in defiance of the easement, and the nonuser must be the result of it, or the nonuse must originate in, or be accompanied by, some unequivocal acts of the owner inconsistent with the continued existence of the easement, and showing an intent on his part to abandon it, and the owner of the servient estate must have relied upon, or acted upon, such manifest intention, to abandon the right, so that it would work harm to him if the easement was thereafter asserted. *Mason v. Horton, 817.*

EJECTMENT.

See COTENANCY, 2.

ELECTION.

See DEEDS, 7, 12, 13; INDICTMENT, 5.

ELECTIONS.

1. RESIDENCE OF A VOTER is the place in which his habitation is fixed, without any present intention of removing therefrom. *Berry v. Wilcox*, 706.
2. ONE'S RESIDENCE FOR THE PURPOSE OF VOTING is where he has his established home, the place where he is habitually present, and to which, when he departs, he intends to return, and the fact that he intends to remove at a future time does not necessarily defeat his residence before he actually does remove. *Berry v. Wilcox*, 706.
3. RESIDENCE OF STUDENTS.—Students at a college, living where it is located, and otherwise qualified to vote, who support themselves, and are emancipated from their father's families, with no intention of returning to their former homes, who seek employment away from the college during vacations, returning there when the term opens, regarding that as their home, and having no formed intention as to their residence after the completion of their course of study, are entitled to vote at the place where the college is located. *Berry v. Wilcox*, 706.

ELECTRIC WIRES.

See NEGLIGENCE, 16-21.

EMBEZZLEMENT.

1. AN INDICTMENT for embezzlement describing the property alleged to have been fraudulently converted as "the proceeds" of a sale of lumber mentioned is insufficient for vagueness and indefiniteness. *Grant v. State*, 263.
2. AN INDICTMENT for embezzlement must state the description of the property embezzled with the same particularity as is required in an indictment for larceny. *Grant v. State*, 263.
3. An indictment for embezzlement which fails to allege the value or ownership of the property embezzled is void. *Grant v. State*, 263.
4. INDICTMENT.—Omission to describe, in an indictment charging embezzlement, the property embezzled is a fatal objection at any stage of the case, including a motion in arrest of judgment.—*Grant v. State*, 263.
5. INDICTMENT.—THE OWNERSHIP AND VALUE OF PROPERTY EMBEZZLED must be stated in the indictment with the same particularity as is required in an indictment for larceny. *Grant v. State*, 263.
6. INDICTMENT.—If it is impossible to give an exact description of property embezzled in an indictment charging the crime, the best description practicable should be given, and if the description given is indefinite, a reason for not giving a better description should be stated. *Grant v. State*, 263.
7. INDICTMENT.—An allegation in an indictment for embezzlement that the fraudulent conversion of the proceeds of certain property by the defendant injured the bailors in a certain sum of money is not an allegation of the value of the property embezzled. *Grant v. State*, 263.
8. IN AN INDICTMENT FOR EMBEZZLEMENT THE RECEIPT BY DEFENDANT OF THE PROPERTY EMBEZZLED must be directly and positively alleged. An allegation that defendant sold certain lumber and converted the pro-

ceeds to his own use is not equivalent to an averment that the proceeds to the sale came into his hands. *Grant v. State*, 263.

EMINENT DOMAIN.

1. **POLICE POWER.**—The legislature cannot in the exercise of the police power take private property for a public use without compensation when such property can be condemned and paid for under the power of eminent domain. *People v. Elk River Mill etc. Co.*, 125.
2. **DAMAGES.**—In determining the compensation to be made for property sought to be taken in the exercise of the right of eminent domain, the proper inquiry is, What is its value for the most advantageous use to which it may be applied? *Northern Pac. etc. Ry. Co. v. Forbis*, 692.
3. **LESSEE, DAMAGES TO BE AWARDED TO.**—In determining damages to be awarded to a lessee when part of the demised premises are to be taken in the exercise of the right of eminent domain, he should be compensated for the diminution in value of the property to him during his term, without taking into consideration the fact that he has not yet paid his rent for such term. *Gluck v. Mayor*, 515.
4. **LEASEHOLD PREMISES—REPAIRING INJURIES.**—If part of a building is taken in the exercise of the right of eminent domain, the landlord is under no obligation to rebuild or repair it. Hence, in determining the damages to be awarded the lessee, consideration should be given to the fact that before he can continue in the use of the premises he must make alterations and repairs so as to fit them for use after the part has been taken from him. *Gluck v. Mayor*, 515.
5. **DAMAGES—VALUE OF LAND FOR TWO OR MORE USES.**—If land sought to be taken in the exercise of the right of eminent domain can be used for two or more purposes which do not interfere with each other, and is valuable for each purpose, its value for both may be proved, and the court cannot compel the owner to elect upon which of these purposes he will rely in seeking to show damages which should be awarded to him. *Northern Pac. etc. Ry. Co. v. Forbis*, 692.

See LANDLORD AND TENANT, 6, 7; RAILROADS, 1, 2

EQUITY.

1. **EQUITY AND PROBATE JURISDICTION.**—Though the settlement of estates of decedents is committed to probate courts by statute, equity has jurisdiction whenever its aid is required and the powers of the probate courts are not sufficient to deal with the question at issue. *Bailey v. Bailey*, 826.
2. **EXECUTIONS—EQUITABLE JURISDICTION.**—A court of equity will not interfere to vacate a sale made under a lawful process on account of irregularity in its issue or its execution if the party might have sought redress in the court wherein the writ issued. *Gardner v. Mobile etc. R. R. Co.*, 84.
3. **EXECUTION SALE WILL NOT BE VACATED IN EQUITY** unless there is accident, surprise, mistake, or fraud in some fact or circumstance affecting the sale itself, and not resting on an irregularity of process or irregularity in its execution. *Gardner v. Mobile etc. R. R. Co.*, 84.
4. **TRUSTEES AND GUARDIANS DE SON TORT.**—If two or more persons assume the control or management of the estate of an insane person, and receive its income and profits, they make themselves trustees by construc-

tion, or guardians de son tort. As such, a court of equity has jurisdiction to compel them to account. *Bailey v. Bailey*, 826.

5. GUARDIANS DE SON TORT—JURISDICTION OF EQUITY.—A probate court has no power to cite before it persons who have been acting as trustees by construction, or as guardians de son tort, for the purpose of settling their accounts. Therefore a court of equity may exercise such jurisdiction. *Bailey v. Bailey*, 826.

See **BOARDS OF TRADE**, 5; **EVIDENCE**, 10, 11; **EXECUTION**, 4; **JUDGMENTS**, 8; **PARTNERSHIP**, 9; **VENDOR AND PURCHASER**, 2.

ESCROW.

See **DEEDS**, 2.

ESTOPPEL.

1. **DEEDS, CORRECTORY.**—The acceptance by grantees of a deed of correction from their grantor in lieu of a prior deed executed by him, misdescribing the land intended to be conveyed, and the sale by such grantees of the land conveyed to them by the subsequent deed, estop them from claiming title to the land conveyed by the first deed. *Fox v. Windes*, 648.
2. **ESTOPPEL BY JUDGMENT—SAME PARTIES.**—If the plaintiff and defendant were such respective parties in a former suit begun by a third person, but in which the plaintiff, as assignee, was substituted sole plaintiff by order of court, and in which action one question material to the present one was apparently adjudicated, the record in the former case is admissible in evidence to support a claim of estoppel by judgment. *Curtis v. Bradley*, 177.

See **AGENCY**, 7-9; **ALTERATION OF INSTRUMENTS**, 2; **JUDGMENTS**, 1-3; **TRUSTS**, 2.

EVIDENCE.

1. **DECLARATION OR OPINION OF HUSBAND** while living on his wife's land, as to the nature of her title, is inadmissible in evidence to bind her or the land. *Fox v. Windes*, 648.
2. **JUDGMENT AND EXECUTION, EVIDENCE TO CONNECT.**—PAROL EVIDENCE is admissible to explain any mere immaterial variations between an execution and a judgment, and an execution docket is admissible to identify and unite the judgment and execution issued upon it. *De Loach v. Robbins*, 46.
3. **VOUCHERS AND STATEMENTS OF ACCOUNT** delivered by a bank to a corporation doing business with it are prima facie evidence of the payment by the bank of the sum of money named therein, and, when the payments are made on bills certified by the general manager of the corporation, are satisfactory evidence that the money was applied to the use and benefit of the corporation. *Pauly v. Pauly*, 98.
4. **BANK-BOOKS, VOUCHERS, AND STATEMENTS OF ACCOUNT** returned by a bank to the book-keeper of a corporation with which it is doing business are admissible and prima facie evidence of the way the accounts stood at the time of the last balance. *Pauly v. Pauly*, 98.
5. **BANK-BOOKS ARE ADMISSIBLE** in evidence to show the state of accounts between the bank and a corporation with which it has done business, and such books are not rendered inadmissible by the fact that

- the corporation has no pass-book, and that payments to it by the bank have been made upon bills instead of checks. *Pauly v. Pauly*, 98.
6. **BANK-BOOKS—INTEREST OF PARTIES.**—Although officers of a corporation are also directors in a bank furnishing it money, this fact does not render the bank-books of account inadmissible against the corporation. Such fact may invite scrutiny of the account, but goes only to the weight of the testimony and not to its admissibility. *Pauly v. Pauly*, 98.
 7. **STATEMENTS OF ACCOUNT** furnished by a bank to a corporation doing business with it, and to which no objection is made, are *prima facie* evidence that the account is correct. *Pauly v. Pauly*, 98.
 8. **CORPORATION NOTES NOT EXECUTED BY PROPER AUTHORITY** are not evidence of a liability upon the express contract appearing upon their face, but if the money represented by and named in them has been actually furnished to, received by, and applied to the proper use and benefit of the corporation, the notes are admissible to show that the money represented by them was actually furnished to the corporation, and the fact that officers in such corporation are also officers in the corporation furnishing the money does not render the notes inadmissible. *Pauly v. Pauly*, 98.
 9. **ADMISSIBILITY OF ORIGINAL MEMORANDUM—ILLUSTRATION.**—Upon the issue as to whether money paid by the plaintiff was paid for labor and material used in building a house for the defendant, the testimony of witnesses who furnished labor and material for several houses erected by the plaintiff, that certain items in their original bills marked "Bradley house" were for labor and material ordered for that house by the defendant's agent, together with such bills and the written memoranda made by them at the time that such agent ordered the materials specified, is clearly admissible. *Curtis v. Bradley*, 177.
 10. **SECONDARY EVIDENCE OF A WRITTEN AGREEMENT** may be received where it is in the possession of the adverse party who withholds it at the trial after notice to produce the original has been served, or when it is out of the power of the party offering evidence to produce the original, as where the paper is beyond the jurisdiction of the court. The notice to produce the original may be given either to the adverse party or to his attorney. *Bishop v. American Preservers' Co.*, 317.
 11. **SECONDARY, OF THE CONTENTS OF A WRITING.**—Where a witness testifies that the copy of a trust agreement set out in a bill in equity is a true copy as near as he can tell, he being a party thereto and having signed it, and the adverse party admits having a copy in his possession during the trial which he declines to produce, the trial court is justified in receiving evidence of the copy set out in such bill in equity where it further appears that the original has been lost or is beyond the jurisdiction of the court. *Bishop v. American Preservers' Co.*, 317.
 12. **BOOKS OF SCIENCE** treating of mechanical appliances for stopping trains, and the distance required therefor, which do not give the size of the train, the pressure applied to the brakes, nor the character of the grade, are not admissible to establish a presumption of negligence in the management of the train in question when no negligence is claimed in the equipment of such train. *Burg v. Chicago etc. Ry. Co.*, 419.
 13. **EVIDENCE OF CHARACTER IN CRIMINAL CASES.**—Evidence of good character on the part of the accused should be confined to a time not very

remote from the date of the commission of the crime. It is not error to reject such evidence on the part of an adult defendant extending from his boyhood days to the time of the commission of the crime. *State v. Barr*, 890.

14. **EVIDENCE IN CRIMINAL CASES—DECLARATIONS BEFORE GRAND JURY.**—A statement made by a party under oath before a grand jury concerning a crime then under investigation, prior to his indictment or arrest therefor, and after he has been warned that he is under suspicion and need not testify unless willing to do so, and that he cannot be compelled to criminate himself, is voluntary and admissible against him on his subsequent trial for such crime. *Jenkins v. State*, 267.
 15. **EVIDENCE IN CRIMINAL CASES.**—In cases of circumstantial evidence, testimony that does not tend to prove motive or establish some other material fact essential to the crime charged should not be admitted, especially when it may tend to produce an erroneous impression on the minds of the jurors to the prejudice of the accused. *Jenkins v. State*, 267.
 16. **EVIDENCE IN CRIMINAL CASES.—TESTIMONY VOLUNTARILY GIVEN BEFORE A CORONER** by one not then under arrest nor accused of the crime under investigation is competent evidence against him on his subsequent trial for such crime, or, if reduced to writing and signed by him the writing is evidence against him. If not reduced to writing it may be shown by witnesses who can testify of their recollection what it was. *Jenkins v. State*, 267.
- See **APPEAL**, 1, 5, 7, 8, 11, 16; **BASTARDY**; **CONSPIRACY**, 2, 3; **CORPORATIONS**, 1; **PLEADING**, 2; **RAILROADS**, 6; **TRIAL**, 8, 10; **WILLS**, 2; **WITNESSES**.

EXCAVATION.

See **MUNICIPAL CORPORATIONS**, 8.

EXCESSIVE VERDICT.

See **APPEAL**, 14.

EXECUTION.

1. **AN EXECUTION PREMATURELY ISSUED** on a valid judgment is not on that account void. *De Louch v. Robbins*, 46.
2. **AN EXECUTION ISSUED ON A DORMANT JUDGMENT** before revivor is not void, and if not set aside a sale under it must be sustained. *De Louch v. Robbins*, 46.
3. **EXECUTION ISSUED UPON A DORMANT JUDGMENT WITHOUT REVIVAL**, though irregular, is not void. While it may be quashed on an application made with reasonable diligence, unexplained laches are fatal to the application. *Gardner v. Mobile etc. R. R. Co.*, 84.
4. **AN ERROR IN THE MANDATE OF AN EXECUTION** is at most a mere irregularity, and cannot justify a court of equity in vacating a sale made under it. *Gardner v. Mobile etc. R. R. Co.*, 84.
5. **MERE CLERICAL ERRORS** and failure to recite the judgment with strictness do not avoid the execution. If from the whole writ, taken in connection with other facts, the court feels assured that the execution offered in evidence was intended, issued, and enforced as an execution upon the judgment shown to the court, the writ should be received and respected. *De Louch v. Robbins*, 46.

6. A SHERIFF'S SALE MADE UNDER TWO EXECUTIONS is good if either is valid. *De Loach v. Robbins*, 48.
7. EXECUTIONS AGAINST CORPORATIONS.—If a RAILWAY CORPORATION HAS CEASED to discharge its duties and has for a long time not used its franchise and right of way for any purpose, and has abandoned all further work, the land procured for a right of way and all the title of the corporation therein are subject to sale under execution. *Gardner v. Mobile etc. R. R. Co.*, 84.
8. EXECUTIONS AGAINST CORPORATIONS.—As a general rule the property of a private corporation is subject to execution. An exception obtains, however, when the corporation is charged with public duties and is in the exercise of its franchise and in the performance of its duties, in which event such property as is necessary to enable it to discharge its duties to the public and effect the objects of its incorporation is not subject to execution at law, and the only remedy of the judgment creditor is the appointment of a receiver and the sequestration of its income and earnings. *Gardner v. Mobile etc. R. R. Co.*, 84.
9. EXEMPTIONS.—PROCEEDS OF INSURANCE received by the insured for the destruction of exempt personal property are also exempt if the insured intends to invest them in property similar to that destroyed. *Puget Sound etc. Packing Co. v. Jeffs*, 885.
10. EXEMPTION—PERSONAL EARNINGS OF ARTIST.—Under a statute exempting from execution the earnings of a resident debtor who is the head of a family, the personal earnings of an artist for painting pictures are exempt from execution. *Millington v. Laurer*, 385.
11. EXEMPTION LAWS SHOULD BE LIBERALLY CONSTRUED.—THE PRIMARY OBJECT OF EXEMPTION LAWS is not merely to protect the earnings of the debtor from seizure by means of attachment and execution, but to preserve them for the benefit of his family against any appropriation for the payment of his debts not authorized by law to which he does not consent. *Millington v. Laurer*, 385.
12. EXEMPTIONS.—CROPS GROWN ON LAND PURCHASED WITH PENSION MONEY are not exempt from execution, unless the land is a homestead, when the statute exempts money received as a pension, whether in the actual possession of the pensioner, or deposited, loaned, or invested by him. The money or investment is alone exempt. *Haefser v. Mullison*, 451.

See EQUITY, 2, 3; EVIDENCE, 2; HOMESTEAD, 2-4.

EXECUTORS AND ADMINISTRATORS.

- CLAIM FOR EXPENDITURES DURING EXISTENCE OF RELATION AS HUSBAND AND WIFE.**—A man living with a woman in the relation of husband and wife, whether legally married to her or not, has no claim on the woman's estate, after her death, for the value of shelter, food, and clothing given her during the continuance of that relation, in the absence of any express agreement to that effect. *Payne's Appeal*, 215.

See ABATEMENT.

EXEMPTION.

See EXECUTION, 9-12; PARTNERSHIP, 21.

EXHIBITS.

See TRIAL, 11.

EXPERTS.

See WITNESSES, 10, 11.

EXPLOSIONS.

See NEGLIGENCE, 5, 7, 8.

FLOODS.

See WATERS, 17, 18.

FORFEITURE.

See DEEDS, 8.

FORGERY.

1. **FORGERY IS THE FALSE MAKING OR MATERIALLY ALTERING**, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. *State v. Sherwood*, 461.
2. **WHEN A WRITING IS INVALID ON ITS FACE**, it cannot be the subject of forgery, because it has no tendency to effect a fraud. *State v. Evans*, 701.
3. **A FORGED INSTRUMENT MUST BE ONE WHICH**, if genuine, would injure another, and it must appear from the indictment that such is its legal character, either from the recital or the description of the instrument itself, or, if that does not show it to be so, then by the averment aliunde which will show it to be of that character. *State v. Evans*, 701.
4. **UTTERING FALSE INSTRUMENT**.—If one, knowing that an instrument is forged, offers to sell it, and the sale is prevented by the discovery of the forgery, the crime of uttering and publishing a false and forged instrument is complete. *State v. Sherwood*, 461.
5. **INSTRUMENT EXECUTED ON SUNDAY**.—The making of a false and fraudulent note or other instrument purporting to create an obligation or legal liability, though bearing date on Sunday, is a forgery if in fact made on another day of the week. *State v. Sherwood*, 461.
6. **INSTRUMENT WHICH CANNOT BE THE SUBJECT OF**.—An order to pay to W. L. Evans an amount specified, and charge him at my office, will not sustain a conviction of forgery, because it is invalid on its face, and, if used as genuine, it could not do any damage to the alleged signer. *State v. Evans*, 701.
7. **AN INFORMATION CHARGING A FORGERY BY THE UTTERING AND PASSING AS TRUE AND GENUINE OF CERTAIN PAPER** known to be false, forged, and counterfeit, is sufficient under the statutes, because, by them, it is one of the methods by which that crime may be committed. *State v. Evans*, 701.

FORMER JEOPARDY.

TWICE IN JEOPARDY ATTACHES, WHEN.—A person is not put in jeopardy twice for the same offense until both the facts and the law applicable to the facts are finally determined. Putting in jeopardy means a jeopardy which is real and has continued through every stage of one prosecution, as fixed by existing laws relating to procedure, and while such prosecution remains, as where an authorized appeal is taken by the state, the one jeopardy has not been exhausted. *State v. Lee*, 202.

FRAUD.

SALE, FRAUDULENT PROCEEDS OF.—WHEN GOODS HAVE BEEN PURCHASED BY FRAUD and without intention to pay therefor, moneys derived from their sale may be followed into the hands of the sheriff, or of an assignee for the benefit of creditors. *Converse v. Sickles*, 790.

See ATTACHMENT, 1; NEGOTIABLE INSTRUMENTS, 6; REPLEVIN, 2; SALES, 7-9; VENDOR AND PURCHASER, 3.

FRAUDULENT CONVEYANCES.

1. **HOMESTEAD.**—The rule that a person cannot convey his property in consideration of an obligation for support for life, without retaining sufficient to satisfy his creditors, has no application to homesteads. *Bank v. Guthrey*, 621.

2. A deed of trust given to an administrator to secure a debt to the estate, and made upon a secret trust that part of the proceeds of the sale of the property on foreclosure shall be turned over to the grantor by such administrator, is fraudulent and void as against other creditors of the grantor. *Roberts v. Barnes*, 640.

3. A conveyance to secure a bona fide indebtedness, which creates a secret trust in favor of the grantor for the purpose of concealing from his other creditors a portion of his property, and ultimately depriving them of any benefits to be derived therefrom, is fraudulent and void as to them. *Roberts v. Barnes*, 640.

FRAUDULENT REPRESENTATIONS.

See SALES, 8.

GARNISHMENT.

See ATTACHMENT, 1, 2; INJUNCTIONS, 1.

GIFTS.

A PROMISE MADE OR A BOND GIVEN WITHOUT ANY CONSIDERATION cannot be enforced against the donor, nor against his executors or administrators. This rule remains applicable, however meritorious the consideration, as where the donor and the donee are husband and wife or parent and child. *Matter of James*, 774.

See SERVICES, 1.

GRAND JURY.

See WITNESSES, 1-3.

GUARANTY.

1. **INTERPRETING CONTRACT OF.**—A guaranty is a commercial instrument, to be construed according to what is fairly presumed to have been the understanding of the parties, without any strict technical accuracy, but in furtherance of its spirit and liberally to promote the use and convenience of commercial intercourse. *Hooper v. Hooper*, 496.

2. **CONSIDERATION—VALIDITY—RECOGNITION BY GUARANTOR.**—A guaranty of payment of rent, made subsequent to the execution and delivery of a lease, not based on the consideration thereof, nor upon a new consideration, is void, although the guarantor recognizes himself bound thereby. *Macfarland v. Heim*, 629.

3. **LACHES.—THE MERE FAILURE OF A CREDITOR TO DEMAND PAYMENT OF** indebtedness due to him, and the payment of which has been guaranteed by another, does not release the guarantors, particularly when delay in making such demand did not place them in a worse position than if it had been made earlier. *Hooper v. Hooper*, 496.
4. **GUARANTORS, PAYMENT BY, WHAT IS.—**If persons liable as guarantors are themselves creditors of the holder of the indebtedness whose payment they have guaranteed, and he and they agree that the sum due them from him shall be applied in satisfaction of the indebtedness they have guaranteed, this effectually passes such indebtedness, and entitles them to maintain a suit for contribution from other guarantors. *Hooper v. Hooper*, 496.
5. **INTEREST.—**If persons guarantee the payment of indebtedness which may become due from one person to another for goods sold and advances made, not exceeding thirty-five thousand dollars, their liability is not limited to that sum, but includes interest thereon, and also interest upon interest, where it is the custom to compound interest, and the guarantors know of its being charged and do not object thereto. *Hooper v. Hooper*, 496.
6. **THE STATUTE OF LIMITATIONS COMMENCES** running in favor of a guarantor from the time he is liable to suit, and this may or not be the same time his principal becomes so liable. *Hooper v. Hooper*, 496.
7. **STATUTE OF LIMITATIONS.—**The liability of a guarantor is coextensive with the liability of his principal, and cannot be defeated by the statute of limitations when the debt of the principal cannot be so defeated. *Hooper v. Hooper*, 496.
8. **GUARANTORS—CONTRIBUTION BETWEEN—STATUTE OF LIMITATIONS.—**If a guarantor discharges the debt of his principal before the statute of limitations has operated against it, a right of action on such payment accrues in his favor and against his coguarantors, and the statute of limitations does not commence to run until such payment. *Hooper v. Hooper*, 496.
9. **COMMENCEMENT OF LIABILITY—STATUTE OF LIMITATIONS.—**If guarantors agree to pay on thirty days' notice any sum due at the making of the guaranty or thereafter to become due, not exceeding an amount specified, and from the person named in the guaranty, they are not liable to pay anything until given the notice stipulated for. Therefore, the statute of limitations does not commence to run in their favor until such notice has been given. *Hooper v. Hooper*, 496.

GUARDIAN AND WARD.

1. **A GUARDIAN MAY MORTGAGE THE ESTATE OF HIS WARD** under an order of court directing him to do so, when the purpose of the mortgage is to raise moneys to discharge a pre-existing mortgage and prevent the foreclosure thereof, and the statute of the state authorizes the guardian to safely keep the property of his ward to maintain the same, and deliver it to his ward at the close of the guardianship in as good condition as he received it. *Northwestern etc. Loan Co. v. Smith*, 662.
2. **JUDICIAL SALES OF WARD'S ESTATE.—**Under a statute empowering county judges to authorize a guardian to sell the estate of his ward "under such conditions as the interests of such infant may, in the opinion of said judge, seem to require," a general unconditional order issued by such judge permitting the guardian to sell does not author-

ise a sale of the ward's property at private sale and such sale is void. In the absence of a special order for a private sale, the sale must be public, and after due advertisement. *Leuders v. Thomas*, 255.

3. SALES OF WARD'S PROPERTY. — Statutory proceedings by a guardian to divest his ward of his real estate by sale must be strictly pursued. *Leuders v. Thomas*, 255.
4. SALES OF WARD'S PROPERTY—CAVEAT EMPTOR. — Parties who purchase from a guardian the real estate of his ward must ascertain whether he has full legal authority to make a valid title thereto before they deal with him. In such case the doctrine of caveat emptor applies. *Leuders v. Thomas*, 255.

See EQUITY, 4, 5.

HEALTH LAWS.

See BOARDS OF HEALTH.

HIGHWAYS.

1. EVIDENCE OF CARE ON PART OF TRAVELER. — If a traveler on a highway yields the way for the benefit of another, it is evidence of care, rather than of negligence, though he turns to the left instead of to the right. *Riepe v. Elting*, 356.
2. RIGHT OF TRAVELERS TO USE PART OF. — A person has a right to use a public highway in a lawful manner for lawful purposes, but one not desiring a given part of it for his own use cannot prevent others from making a proper use of it. *Riepe v. Elting*, 356.
3. COLLISION — TRAVELER'S BEING ON WRONG SIDE OF ROAD IS PRIMA FACIE NOT CONCLUSIVE EVIDENCE OF NEGLIGENCE. — The fact that a horseman traveling on a public highway on a dark night turns to the left to avoid a collision with a vehicle rapidly approaching him from the opposite direction is, in an action by him to recover the value of his horse killed by such collision, merely prima facie evidence of negligence on his part, and not conclusive, though the statute provides that persons meeting each other on public highways shall give one-half of the same by turning to the right, and that any one who violates such provision shall be liable for all damages resulting therefrom. *Riepe v. Elting*, 356.
4. PRESUMPTION OF NEGLIGENCE FROM TRAVELER BEING ON WRONG SIDE. — If a collision occurs between the horse or vehicle of a person on the wrong side of the road and that of a person coming toward him, the presumption is that it was caused by the negligence of the person who was on the wrong side of the road, but his presence there may be explained and justified. *Riepe v. Elting*, 356.

See APPEAL, 6; REAL PROPERTY, 2.

HOMESTEAD.

1. HEAD OF FAMILY. — A man, living on land with his children, who make it their home, and work for him until their marriage, and consider him the head of the family, may hold the land as his homestead. *Bank v. Guthrey*, 621.
2. THE OWNER OF A LOT UPON WHICH A DWELLING-HOUSE IS IN PROCESS OF ERECTION for the purpose of being occupied as his home is entitled under the homestead laws to hold it exempt from execution. *Woodbury v. Warren*, 815.

3. A HOMESTEAD IS SUBJECT TO A NOTE GIVEN AFTER ITS ACQUISITION, BUT IN RENEWAL of a debt existing before that time, under a statute declaring a homestead to be subject to attachment and execution upon causes of action existing at the time it was acquired. *Robinson v. Leach*, 807.
4. CREDITORS HAVE NO INTEREST IN THE HOMESTEAD of their debtor; they cannot sell it under execution subject to the homestead right, nor subject it to the payment of their debts by a proceeding in equity. *Bent v. Guthrey*, 621.

See FRAUDULENT CONVEYANCES, 1; PAYMENTS.

HOMICIDE.

1. A PARTY MAY BE GUILTY OF MURDER, though he kills his adversary on a sudden quarrel or provocation, if he acts upon a formed design to take life. *Sullivan v. State*, 22.
2. IF LIFE IS TAKEN BY A DIRECT STROKE OF A DEADLY WEAPON, the presumption is that the killing was pursuant to a formed design. Malice may be inferred from the use of an instrument known to be liable to produce death. *Sullivan v. State*, 22.
3. KILLING ADULTEROUS WIFE.—If a man finds his wife in the act of adultery, and, provoked by the wrong done him, and moved by the passion naturally engendered, he immediately kills her, he is not guilty of murder, but of manslaughter only. If, on the other hand, he does not strike and kill her until after there has been time for his passion to cool and for reason to assert itself, or, if he strikes and kills immediately, not moved thereto by heat of passion, but by prior malice, hatred, or desire to revenge the wrong done him, or by any other motive, or upon any design whatever except such as is presently engendered by the paroxysm of rage into which he is thrown by the extreme provocation, he is guilty of murder. *McNeill v. State*, 17.
4. MANSLAUGHTER.—THE UNINTENTIONAL TAKING OF A HUMAN LIFE is a higher offense than manslaughter if the act producing the death was done intentionally, and was likely to kill, as where the blow was with a deadly weapon directly aimed at the decedent. From the use of such weapon malice may be inferred. *Sullivan v. State*, 22.
5. SPRING GUNS—QUESTION OF FACT.—The right and necessity of a person to defend his vacant dwelling-house from intrusion, during his absence, by means of spring guns or other engines calculated to destroy human life or inflict great bodily harm, and which have produced death, as well as the intention of the owner in setting such engines, are questions for the jury to determine under the facts of each particular case. *State v. Barr*, 890.
6. USE OF SPRING GUNS TO PREVENT BURGLARY.—An owner of a dwelling-house, vacant during his absence, has no absolute right in order to prevent a burglary to employ spring guns, or other means which might be expected to, and do, destroy the life of a human being. The employment of such means is evidence of a vindictive desire to take the life of whomever should interfere with the dwelling, rather than the prevention of a burglary thereto, and, if they result in death, justify a verdict of murder in the second degree against the person employing them. *State v. Barr*, 890. e
7. DUTY TO RETREAT.—WHEN AN ASSAULT IS MADE IN A SUDDEN QUARREL and a mutual combat ensues, retreat, if possible, to avoid further

danger is a duty. In such a case, to establish excusable homicide in self-defense it must appear that the party killing had retreated; that he made a real effort to avoid the necessity of taking life. *Sullivan v. State*, 22.

2. INCOMPETENT EVIDENCE.—A witness for the state, after testifying to a threat made by the accused against the deceased, should not be permitted to testify that he remonstrated with the accused therefor, if the remonstrance evoked no reply. *Burt v. State*, 563.
2. EVIDENCE.—DYING DECLARATIONS MUST BE CONFINED TO THE RES GESTA, and cannot be received as evidence of any prior transaction out of which the difficulty grew. It is only such acts or statements done or uttered at the time of the final fatal encounter, and which tend to throw light upon it as a part of the res gesta, which can be proved by dying declarations. *Sullivan v. State*, 22.
20. EVIDENCE.—A DYING DECLARATION THAT "Jim Sullivan cut me; he cut me for nothing; I never did anything to him," is admissible in evidence, but if such declaration include the farther words: "I pray God to forgive him," this part should be excluded because it does not in any way relate to, or shed light upon, the killing or what had apparently led to it. *Sullivan v. State*, 22.
11. INDICTMENT—SUFFICIENCY.—An indictment or information charging the accused with an intent to kill the deceased is sufficient, when supported by proof showing a general intent to kill, without an intent to kill any particular person. *State v. Barr*, 890.

See NEW TRIAL, 3; TRIAL, 1.

HOUSES OF ILL-FAME.

See DISORDERLY HOUSES.

HUSBAND AND WIFE.

1. MARRIED WOMEN—AGENTS FOR.—A married woman is incapable of appointing an agent for property, except such as is held by her as her equitable separate estate. *Macfarland v. Heim*, 629.
2. MARRIED WOMEN'S CONTRACTS.—A married woman is incapable of contracting, unless power is expressly given her by statute. *Macfarland v. Heim*, 629.

See ABATMENT; EVIDENCE, 1; EXECUTORS AND ADMINISTRATORS; GIFTS; SERVICES, 2.

IMPEACHMENT.

See WITNESSES, 5.

IMPROVEMENTS.

See COTENANCY, 2.

INCEST.

ACCOMPLICE.—If, in the commission of an incestuous act, the female is the victim of force, fraud, or undue influence, so that she did not willfully join therein with the same intent as the accused, she ought not to be regarded as an accomplice. *Porath v. State*, 954.

See INDICTMENT, 4.

INDEBTEDNESS.

See MUNICIPAL CORPORATIONS, 19-23.

INDICTMENT.

1. **IF THE DESCRIPTION OF THE OFFENSE** charged in an indictment, taking into consideration its nature and the natural and legal import of the terms used in designating it, is such as to convey a certain, clear, and full idea of the offense charged, it is sufficient. *Norton v. State*, 538.
2. **CRIMINAL PRACTICE.—AN INFORMATION OR INDICTMENT MAY INCLUDE A CRIME IN ADDITION** to, or different from, that with which the accused was charged before his preliminary examination, if such examination showed his probable guilt of such additional or different crime. *Porath v. State*, 954.
3. **JOINDER.**—Several counts may be included in one information or indictment for the purpose of meeting the evidence as it may develop at the trial, where all the counts are substantially for the same offense and founded on the same transaction. *Porath v. State*, 954.
4. **CRIMINAL PRACTICE.—JOINDER OF COUNTS.—THE CRIME OF INCEST AND THAT OF RAPE** may be joined in the same information, where both charges are founded on the same criminal act, under a statute declaring that different offenses and different degrees of the same offense may be joined in one information, in all cases where the same might be joined by different counts in the same indictment. *Porath v. State*, 954.
5. **CRIMINAL PRACTICE.—ELECTION BETWEEN COUNTS.**—Where the same information contains two counts, both founded on the same transaction, and intended to meet the different legal aspects which the evidence may give the cause, the trial court may, in the exercise of its discretion, decline to compel the prosecution to elect upon which it will proceed. *Porath v. State*, 954.
6. **FORMAL DEFECTS, HOW REACHED.**—A defect apparent on the face of an indictment, but which does not go to the substance thereof, may be reached by demurrer, but not by a motion to quash. *Norton v. State*, 538.
7. **DEFECTIVE ALLEGATIONS CURED BY VERDICT.**—Though an allegation in an indictment is defective, it is sufficient, after verdict, if it was not demurred to, and its meaning is made to appear by necessary implication. *Norton v. State*, 538.
8. **PLEAS IN ABATEMENT** of an indictment setting up simple irregularities in the selection of jurors must be framed with the greatest strictness as to accuracy and precision, and be certain to every intent. *Jenkins v. State*, 267.
9. **PLEA IN ABATEMENT** of an indictment alleging simply that the indictment was found by a grand jury not drawn according to a certain named statute, but was summoned from the body of the county at large, is bad on demurrer, in failing to state wherein such statute has not been complied with. *Jenkins v. State*, 267.

See EMBEZZLEMENT; HOMICIDE, 11; SEDUCTION.

INDORSEMENT.

See CHECKS.

INFORMATION.

See DISORDERLY HOUSES, 2, 3; INDIGNEITY.

INHERITANCE.

See DESCENT.

INJUNCTIONS.

1. GARNISHMENT—NONRESIDENTS.—INJUNCTION does not lie to restrain a resident creditor from maintaining garnishment in another state of debts due there to a resident debtor. *Wyeth Hardware etc. Co. v. Lang*, 626.
2. ALTERATION OF INSTRUMENTS—INJUNCTION TO PREVENT TRANSFER.—The maker of a note materially altered after its execution, and void as to him, is not entitled to an injunction to prevent its transfer or collection, as he has an adequate remedy at law. *Erickson v. First Nat. Bank*, 753.
3. ALTERATION OF INSTRUMENTS—ENJOINING TRANSFER.—The fact that the maker of a note materially altered after its execution, and void as to him, is apprehensive that witnesses by whom he expects to establish a defense against the note may die or move away, does not entitle him to an injunction restraining the negotiation of the note. *Erickson v. First Nat. Bank*, 753.
4. NEGOTIABLE INSTRUMENTS—ENJOINING TRANSFER.—If a negotiable instrument is about to be transferred before due, so as to cut off defenses of the maker, he may enjoin its transfer and have it delivered up for cancellation, but it is otherwise if the instrument is non-negotiable. *Erickson v. First Nat. Bank*, 753.

INSOLVENCY.

See PARTNERSHIP, 11.

INSTRUCTIONS.

See APPEAL, 12, 18-24; DISORDERLY HOUSES, 10; NEW TRIAL, 2; SALES, 2; TRIAL, 5-7.

INSURANCE.

1. TITLE TO PROPERTY—INSURABLE INTEREST.—Although the insured premises have been conveyed to the insured without consideration, and for the fraudulent purpose of placing them beyond the reach of the grantor's creditors, this is not any defense for the insurer under a policy providing that it shall be void if the interest of the insured in the premises is other than unconditional and sole ownership. *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 745.
2. AN INTEREST IN PROPERTY TO BE INSURABLE does not necessarily depend upon the sole ownership of the property. It may be a special or limited ownership disconnected from any title, lien, or possession. *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 745.
3. INSURABLE INTEREST.—If, by a loss, the holder of an interest in property is deprived of its possession, enjoyment, or profit, or a security or lien resting thereon, or other certain benefits growing out of, or dependent upon it, he has an insurable interest therein. *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 745.

4. **INSURABLE INTEREST IN PERSONALTY.**—Possession with claim of ownership of personal property invests one with an insurable interest therein, and, if an insurance company insures such property, and loss occurs, it cannot defend against payment on the ground that the insurer holds the property in trust for another, even to enable such other to consummate a fraud, if it affects the insurance without inquiry as to the title, and without express and positive false representations as to the ownership of the title believed in and acted upon by the insurer. *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 745.
5. **INSURABLE INTEREST IN REAL ESTATE.**—If a policy of insurance is issued to one who holds the legal title to real estate, without inquiry by the insurer as to whether any other person is interested in such property, and no representations are made by the insured further than that he is the owner of the property, it is no defense to an action on the policy that the insured, though holding the legal title, is a mere trustee for an undisclosed beneficiary. *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 745.
6. **AN INCREASE OF RISK**, by the unauthorized addition to the building in which a business is conducted, is not shown by evidence that the addition brought the building a few feet nearer certain houses, if it is not shown how far distant these houses were, and that their proximity increased the danger of fire. *Mitchell v. Mississippi etc. Ins. Co.*, 535.
7. **IRON-SAFE CLAUSE—DIVISIBILITY OF CONTRACT.**—In a policy of insurance covering a stock of goods, as well as store fixtures and furniture, separately valued, an "iron-safe" clause requiring the books of account and last inventory of the business to be kept in a fire-proof safe does not apply to the furniture and fixtures. The contract is, therefore, divisible, and, in the absence of fraud, is good as to the furniture and fixtures, though it may be avoided as to the goods by a failure to observe such clause. *Mitchell v. Mississippi etc. Ins. Co.*, 535.
8. **IRON-SAFE CLAUSE—ESTOPPEL.**—An insurance company, having insured a stock of goods, cannot set up a breach of an "iron-safe clause" in its policy, requiring the books of account and last inventory of the business to be kept in a fire-proof safe, if its agent, when he issued the policy and collected the premium, knew that the insured had no safe, and did not intend to have one, but intended to keep the books of account at the store, as he had been doing. *Mitchell v. Mississippi etc. Ins. Co.*, 535.
9. **ESTOPPEL—FRAUD.**—An insurer is not permitted to collect premiums with full knowledge of the existence of facts which might avoid the policy, and of the purpose of the insured to continue to conduct the business in disregard of a provision working a forfeiture, and then to deny the validity of the policy should a loss occur. *Mitchell v. Mississippi etc. Ins. Co.*, 535.
10. **WAIVER.**—AGENTS OF INSURERS POSSESSING LIMITED POWER to solicit insurance, deliver policies, and receive premiums cannot waive conditions and forfeitures. *Kirkman v. Farmers' Ins. Co.*, 454.
11. **PROOF OF LOSS—WAIVER.**—An acknowledgment in writing by an insurer of notice of loss, together with a statement that the claim will receive prompt attention, is not a waiver of a condition in the policy requiring proof of loss within sixty days thereafter. *Kirkman v. Farmers' Ins. Co.*, 454.

12. **PROOF OF LOSS—WAIVER.**—Under a policy of fire insurance stipulating that none of its conditions can be waived except in writing by the secretary of the company, an adjuster cannot orally waive proofs of loss. *Kirkman v. Farmers' Ins. Co.*, 454.
13. **PROOF OF LOSS—WAIVER.**—If, under a policy of fire insurance requiring proof of loss within sixty days thereafter, the insured, after the expiration of such sixty days, writes the insurer stating the amount of loss, that notice thereof has been given to and acknowledged by him, that the policy is burned, asking for a copy thereof, and "if the loss will be settled without suit, please inform me; if not, we desire to commence suit at once," to which the insurer replies by inclosing a copy of the policy, together with a statement that no proof of loss has been received, this does not constitute a waiver of such proof, although formal proof is thereafter sent with an inquiry if the loss would be paid, to which no reply is given. *Kirkman v. Farmers' Ins. Co.*, 454.
14. **WAIVER OF PROOF OF LOSS.**—An insurance company by refusing to pay a loss, and defending on the ground that the policy in suit was not in force at the time of the loss, thereby waives the right to be furnished with any proof of loss as required by the policy. *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 745.
15. **PROOF OF LOSS.**—An affidavit by the insured describing the premises insured, stating their loss and the date thereof, the amount of damage and of the insurance, and that the cause of the fire is unknown, is a substantial compliance with the terms of a policy requiring the insured to furnish the insurer with proof of loss. *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 745.
16. **OCCUPANCY.**—The words "vacant and unoccupied" in an insurance policy must be construed with reference to the kind and adaptability of the structure or building insured. *Limburg v. German etc. Ins. Co.*, 468.
17. **OCCUPANCY IMPLIES ACTUAL USE** of a dwelling-house as such, and an insurer has a right, under a policy employing such word, to the care and supervision of the insured premises involved in such an occupancy. *Limburg v. German etc. Ins. Co.* 468.
18. **OCCUPANCY.**—The mere use of a store building as a place in which to store a few articles of personal property, no other business being carried on therein, renders the building "vacant and unoccupied" within the meaning of those words as used in an insurance policy. *Limburg v. German etc. Ins. Co.*, 468.
19. **OCCUPANCY OF PREMISES.**—An insured building used by a tenant as a store and cigar factory is rendered "vacant and unoccupied" within the meaning of those words as used as a condition in the policy of insurance, when the tenant, upon the expiration of his lease, removes himself and most of his stock from the building, leaving therein only a counter for sale and a few articles belonging to himself, and another stored there without the knowledge or consent of the landlord, and retains a key to the premises in order to show intending purchasers the counter while the landlord is seeking another tenant. *Limburg v. German etc. Ins. Co.*, 468.
20. **OCCUPANCY OF PREMISES.**—Altering and repairing an unoccupied building does not constitute an occupancy under an insurance policy providing that the premises shall not become vacant and unoccupied,

- and that mechanics may be employed for a certain number of days for the purpose of making alterations and repairs in the insured premises. *Limburg v. German etc. Ins. Co.*, 468.
21. **VACANT PROPERTY—WAIVER.**—A provision in a policy of insurance rendering it void if the insured property is, at the date of the policy, or shall afterward become, vacant and unoccupied, is for the benefit of the insurer, and may be waived by him, and the existence of the vacancy at the date of the policy, or afterward, does not render it void, but only voidable at the election of the insurer. *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 745.
22. **VACANT PREMISES—WAIVER—ESTOPPEL.**—If an insurer issues a policy on property with actual knowledge on the part of himself or his agent that the insured premises are at the time vacant and unoccupied, he thereby waives a condition in the policy that it shall be void if the property is, at the time insurance is issued thereon, vacant and unoccupied, and he is estopped from alleging such vacancy as a defense to an action to recover for a loss under the policy. *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 745.
23. **REINSURANCE—EFFECT OF PRIOR LOSS.**—If a contract for reinsurance is made where a custom exists among insurers to charge and collect premiums as and from the date of reinsurance and to write policies so as to cover the reinsured risk from the date of reinsurance, and there is nothing indicating a mutual intention of the parties to give the contract of reinsurance in suit a retroactive effect, the reinsurer is not liable if the property is destroyed prior to the execution of the contract of reinsurance without the knowledge of either party of the loss at that time. *Union Ins. Co. v. American etc. Ins. Co.*, 140.
24. **REINSURANCE—DATE OF.**—A policy of insurance or reinsurance, if delivered, takes effect from its date, unless otherwise stated therein, or unless there is evidence of a contrary intent, and if the premium is paid and the policy is not delivered until afterward, the policy takes effect by relation as to its date, though a loss intervenes. *Union Ins. Co. v. American etc. Ins. Co.*, 140.
25. **VALIDITY OF POLICY ISSUED BY AGENT AND RECEIVER TO HIMSELF.**—If an insurance agent is appointed a receiver of a stock of merchandise, and issues a policy of insurance thereon to himself without the consent of his principal, it is void. *Wildberger v. Hartford etc. Ins. Co.*, 558.
26. **NOTICE TO AGENT AS NOTICE TO INSURER.**—Notice to an insurance agent who issues a policy of facts relating to the subject matter of the insurance is notice to the company, and if he fails to properly state them in the policy, when relied upon and trusted to do so, the company is not permitted to escape liability on that ground. *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 745.
27. **PROCEEDS OF POLICY—ASSETS OF ESTATE—DESCENT.**—If a policy of life insurance is payable to a beneficiary named therein, or to her "legal representatives" upon the death of the insured; or, if the beneficiary is not then living, to her children, or to their guardian, and the only child of the beneficiary dies, leaving two children, and thereafter, but before the death of the insured, the beneficiary dies, the insurance, upon the death of the insured, is not a part of the beneficiary's estate, and, therefore, not liable for her debts, but, by the law of descent, goes to the grandchildren. *Estate of Conrad*, 396.

23. **CONSTRUCTION OF CLAUSE AS TO PAYMENT.**—A clause in a policy of life insurance, authorizing payment to the beneficiary's legal representatives, does not authorize payment to his administrator. It contemplates payment to some legal representative appointed by him to receive the money. *Estate of Conrad*, 396.

See **EXECUTION**, 9.

INTEREST.

See **GUARANTY**, 5; **USURY**.

JOINDER.

See **INDICTMENT**, 3, 4.

JUDGMENTS.

1. **JUDGMENT ESTOPPEL.**—THOUGH UPON A PLEA IN ABATEMENT interposed by the defendant, a judgment is entered in favor of the plaintiff for the full amount of his claim, such judgment is in the nature of a punishment for delay, and its operation is limited to the plaintiff's claim in that case, and it is not admissible in a subsequent controversy between the same parties as evidence of the facts necessary to support the plaintiff's claim. *Jericho v. Underhill*, 804.
2. **RES JUDICATA**—BY WHAT DETERMINED.—The questions of estoppel, res judicata, or bar cannot be decided from the judgment alone, but must be determined by the aid of the judgment-roll and the clerk's minutes of the trial. *Converse v. Sickles*, 790.
3. **ESTOPPEL.**—IN ORDER TO BAR A SECOND ACTION the circumstances of the first action must have been such that the plaintiff might have recovered for the same cause of action alleged in the second. An adjudication made on grounds purely technical, and where the merits could not come into question, is limited to the point actually decided, and will not preclude a subsequent action brought in a way to avoid the objection which proved fatal in the first. *Converse v. Sickles*, 790.
4. **RES JUDICATA.**—JUDGMENT against a defendant rendered after a deed to him for the plaintiff has been placed in escrow, but before the happening of the condition upon which its delivery is authorized, does not affect title subsequently acquired by the actual delivery of such deed to the grantee therein. *Ashford v. Prewitt*, 37.
5. **RES JUDICATA**—RIGHT TO DEFICIENCY JUDGMENT.—If a judgment is entered directing the sale of premises, and that the defendant shall pay any deficiency that may arise from such sale, it is an adjudication of the rights of the parties, and, while it remains in force, the court has no authority to set aside a deficiency judgment, on the ground that it was agreed between the parties before the judgment was entered that the plaintiff would bid the full amount of the judgment, and that the defendant should not be liable for any deficiency. *Mutual Life Ins. Co. v. O'Donnell*, 796.
6. **INDEFINITENESS**—AIDED BY RECORD.—Every judgment may be construed and aided by the entire record, and while the judgment should be so complete within itself as that the officer issuing process to enforce it can see at a glance the parties for and against whom the process is to be issued, yet, if the parties for and against whom the judgment is rendered are so referred to therein as that a reference to its caption

or to the pleadings, process, and proceedings in the action makes certain the names of the parties thus referred to, it is sufficient. *Taylor v. Branham*, 249.

7. A JUDGMENT ON MOTION MAY BE VACATED OR MODIFIED ON THE GROUND THAT IT WAS ENTERED CONTRARY TO AN ORAL AGREEMENT BETWEEN THE PARTIES, though a rule of the court declares that no private agreement or consent between the parties or their attorneys in respect to the proceedings in a cause shall be binding, unless reduced to the form of an order, or unless evidence thereof exists in writing. Hence, if in a suit to foreclose mortgages, an oral agreement is made between the parties or their counsel that the defendant shall not be liable for any deficiency, and, because of such agreement, the defendant consents to the entry of judgment, and does not attend the sale of the property, and such judgment as entered makes the defendant liable for a deficiency resulting from a resale, he may obtain relief from such judgment by a motion in the court wherein it was entered, and may there have it modified so as not to conflict with the oral agreement. *Mutual Life Ins. Co. v. O'Donnell*, 796.
 8. ATTACK IN EQUITY.—A suit in equity to set aside a judgment at law, although not a collateral, is always an indirect attack, and does not question or dispute the effect of the judgment as an adjudication, but seeks relief from its operation upon equitable grounds. *Eichhoff v. Eichhoff*, 110.
 9. JUDGMENTS BY DEFAULT—DIRECT ATTACK—PRESUMPTIONS.—In a direct attack by appeal from a judgment by default there is no presumption in favor of the existence of any fact essential to the jurisdiction of the court over the defendant, but in all matters of which the judgment contains a record its verity is presumed as fully as upon a collateral attack. *Eichhoff v. Eichhoff*, 110.
 10. SALE UNDER A JUDGMENT IN FACT PAID, though not satisfied of record, is void, and conveys no title, even though the purchaser has no knowledge that the judgment has been paid. *Shaffer v. McCrackin*, 465.
 11. PROOF OF PAYMENT.—The payment of a judgment to the attorney who obtained it may be proved by parol evidence. *Shaffer v. McCrackin*, 465.
 12. PROOF OF PAYMENT.—The account-book of an attorney, to whom a judgment obtained by him is shown to have been paid, is incompetent, as evidence, to show nonpayment without first laying a proper foundation for its introduction, and a showing that it is the only account-book kept by him. *Shaffer v. McCrackin*, 465.
 13. PAYMENT—ASSIGNMENT.—Payment made to the attorney of record who procures a judgment before his authority is revoked, or before notice thereof to the judgment defendant, is binding on the judgment plaintiff, and an assignee of such judgment takes it subject to all equities and defenses. *Shaffer v. McCrackin*, 465.
- See APPEAL, 10; ASSIGNMENT, 1, 2; ATTORNEY AND CLIENT; ECTOPPEL, 2; EVIDENCE, 2; EXECUTION, 1-5; FORMER JEOPARDY; MUNICIPAL CORPORATIONS, 23-25; PROCESS; SETOFF.

JUDICIAL SALES.

See GUARDIAN AND WARD, 2-4.

JURISDICTION.

See BOARDS OF TRADE; PROCESS.

JURY AND JURORS.

See NEW TRIAL, 4, 5; TRIAL, 4.

LANDLORD AND TENANT.

1. **SATISFACTORY LEASE.**—Under a contract to pay a commission to an agent for obtaining a "satisfactory lease," the landlord cannot arbitrarily refuse to accept the lease negotiated. *Mullally v. Greenwood*, 613.
2. **ASSIGNMENT OF LEASE**, if made voluntarily and without the knowledge or acceptance of the assignee, does not bind him. *Macfarland v. Heim*, 629.
3. **CONSENT TO THE SURRENDER OR ABANDONMENT OF LEASED PREMISES** is not implied from the failure of the landlord to return a key which the tenant had left with a clerk authorized to collect rents. *Blake v. Dick*, 671.
4. **AUTHORITY TO ACCEPT A SURRENDER** of leased premises, which the tenant leaves without lawful justification, is not implied from authority to collect the rents thereof. *Blake v. Dick*, 671.
5. **WAIVER.**—IF A TENANT LEAVES THE DEMISED PREMISES, BUT AFTERWARD RETURNS AND REMAINS THEREIN for some months, he waives any right he may have had to set up fraud, deceit, or eviction. *Blake v. Dick*, 671.
6. **EMINENT DOMAIN.**—THE RENT COLLECTIBLE after part of the premises have been taken in the exercise of the right of eminent domain is the same as before. Such taking does not relieve the tenant from the obligation to pay rent as stipulated in the lease. *Gluck v. Mayor*, 515.
7. **NO EVICTION TAKES PLACE** where part of the premises under lease are appropriated to a public use in the exercise of the right of eminent domain. *Gluck v. Mayor*, 515.
8. **THERE IS NO IMPLIED WARRANTY** that a dwelling-house is in a tenantable condition, or that it will be kept in such a condition. *Blake v. Dick*, 671.
9. **A TENANT ASSUMES THE RISKS OF THE CONDITION** of premises if he inspects them before accepting a lease and the landlord is not guilty of any concealment. *Blake v. Dick*, 671.
10. **AN AGREEMENT OR PROMISE, AFTER A LEASE OF PREMISES HAD BEEN ACCEPTED**, to repair defects in them, or to put them in a better condition, is without consideration and void. *Blake v. Dick*, 671.
11. **WHERE A LANDLORD CANNOT BE HELD LIABLE** for the creation of a nuisance, he cannot be held responsible for any act not negligent or wrongful in trying to abandon it at the request of the tenant. *Blake v. Dick*, 671.
12. **DEFECTIVE CONDITION OF PREMISES.**—The fact that the premises were so situate that rain was liable to flow into the basement and render it unfit for use, and that this defect at the time of leasing was not apparent, because the weather was warm and dry, does not entitle the tenant, after accepting a lease, to surrender and abandon the premises, when he had an opportunity for inspecting them and no fraud or concealment was practiced upon him. *Blake v. Dick*, 671.
13. **NEGLIGENCE—UNPROTECTED MACHINERY.**—If a landlord after leasing premises for business purposes enters and erects thereon, without the consent of the tenant, an uninclosed and unprotected revolving shaft, for transmitting power to other buildings, and such shaft is operated for

the sole use of the landlord under his absolute control, he is liable to an employee of the tenant, who, though knowing of the location of the shaft and of its apparent dangers, has no knowledge of its invisible dangers, and is injured by coming in contact with it while necessarily in its locality and engaged in the line of duty to his employer. *Davis v. Pacific Co.*, 156.

14. **NEGLIGENCE—UNINCLOSED AND DANGEROUS MACHINERY ON LEASED PREMISES.**—A landlord of a building leased for business purposes is a trespasser or mere licensee in placing in the leased premises without the consent of the tenant a revolving shaft for transmitting power to other buildings, and cannot relieve himself from liability to an employee of the tenant, injured by contact with the shaft, on the ground that such employee was not properly in the vicinity of the shaft at the time the injury was inflicted. *Davis v. Pacific Power Co.*, 156.
15. **NEGLIGENCE—UNINCLOSED MACHINERY ON LEASED PREMISES.**—A landlord of a leased building who puts therein, without the consent of the tenant, a revolving shaft for the transmission of power to other buildings is bound to inclose it or use other means to protect the employees of the tenant necessarily in its vicinity. The tenant and his employees do not assume any of the risks incident to its maintenance, and the landlord is liable for injury to them caused by its unprotected condition. *Davis v. Pacific Power Co.*, 156.
16. **NEGLIGENCE—UNPROTECTED MACHINERY ON LEASED PREMISES—LIABILITY OF LANDLORD.**—If a landlord retains or has control of a portion of leased premises, the responsibility rests with him to see that no injury results to those having rights there by reason of the manner in which such portion of the premises is occupied or used, and if he puts dangerous machinery thereon he must fence or use other proper means to protect those rightly in its vicinity. *Davis v. Pacific Power Co.*, 156.
17. **NEGLIGENCE—UNPROTECTED MACHINERY—CONTRIBUTORY NEGLIGENCE.** If a landlord erects an uninclosed and dangerous shaft in a leased building without the consent of his tenant, an employee of the latter who has knowledge of the location of the shaft but not of its invisible dangers is not guilty of contributory negligence in going near to it and standing at what he considers a safe distance from it while performing a necessary act in the line of his duty to his employer. *Davis v. Pacific Power Co.*, 156.

See CROPS; EMINENT DOMAIN, 3, 4; MECHANICS' LIENS, 2.

LEADING QUESTIONS.

See WITNESSES, 6.

LEASE.

See LANDLORD AND TENANT.

LEGACY.

See DEVISE.

LEGISLATURE.

See BOARDS OF HEALTH; EMINENT DOMAIN; MARRIAGE AND DIVORCE, 1-3; WATERS.

LEWDNESS.

See DISORDERLY HOUSES.

LICENSE.

See RAILROADS, 10; REAL PROPERTY, 3; STATUTES, 6.

LIMITATIONS OF ACTIONS.

1. **STATUTE OF LIMITATIONS IN ACTIONS BETWEEN NONRESIDENTS.**—A statute providing that "if any person liable to an action shall be absent out of the state at the time when the cause of action may arise or accrue against him, he shall have no benefit of the limitations herein contained, if the person who has the cause of action shall commence the same after the presence in this state of the person liable thereto within the times herein limited," applies when both parties have not been residents of the state. Hence, a foreign corporation sued in this state by another foreign corporation, whether the cause of action arose in this state or not, is not entitled to the benefit of the statute of limitations, neither having been a resident of the state. *Mason v. Union Mills etc. Co.*, 524.

2. **EXCEPTIONS IN THE STATUTE OF LIMITATIONS IN FAVOR OR AGAINST PERSONS ABSENT FROM THE STATE** apply against and in favor of foreigners who have never been therein, though the cause of action also arose in a foreign state or country. *Mason v. Union Mills etc. Co.*, 524.

See GUARANTY, 6-9.

LIS PENDENS.

PURCHASERS'—NOTICE.—In a suit in reference to specific property well described in the pleadings all persons purchasing while the suit is in full prosecution do so at their own peril. They take the risk of the result of the suit, and are concluded by the decree therein. *Lenders v. Thomas*, 255.

MACHINERY.

See LANDLORD AND TENANT, 13-17.

MAINTENANCE.

See CHAMPERTY.

MALFEASANCE.

See DEFINITIONS.

MALICE.

See HOMICIDE, 2.

MANSLAUGHTER.

See HOMICIDE, 4.

MARGINS.

See BOARDS OF TRADE, 6.

MARRIAGE AND DIVORCE.

1. **MARRIAGE, LEGISLATIVE IMPAIRMENT OF OBLIGATION OF.**—Legislation affecting or annulling the marriage relation is not within the protection

of constitutional provisions against the impairment of contracts. *State v. Duket*, 928.

2. **CONSTITUTIONAL LAW—DIVORCE.**—Though a constitution forbids the legislature from granting any divorce, it is not thereby forbidden from enacting a statute declaring that, on the sentence to imprisonment of either spouse for life, the marriage shall be thereby absolutely dissolved. *State v. Duket*, 928.
3. **CONSTITUTIONAL LAW.**—A statute providing that when either party shall be sentenced to imprisonment for life, the marriage shall be thereby absolutely dissolved, without any judgment of divorce or other legal proceedings, is not unconstitutional. *State v. Duket*, 928.
4. **REVERSAL OF JUDGMENT.**—The dissolution of marriage consequent upon the sentence of either spouse for life is absolute, and the reversal of the sentence does not restore the parties to their marital relations, where the court announcing the sentence had jurisdiction of the accused and of the offense. *State v. Duket*, 928.
See DEBENT.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. **ASSUMPTION OF RISKS.**—A person, when he enters the service of another, assumes only such risks and dangers as are usually incident thereto. *Settle v. St. Louis etc. R. R. Co.*, 633.
2. **AN EMPLOYEE DOES NOT ASSUME** the risks of dangers which are known to, and can be avoided by, the exercise of reasonable care on the part of his employer. *Promer v. Milwaukee etc. Ry. Co.*, 905.
3. **ASSUMPTION OF RISK.**—A servant who has been employed in a dangerous position, or to work with unsafe appliances, who asks to be retained in such position, does not thereby represent himself as competent therefor, nor does he assume the risks thereof. *Guinard v. Knapp-Stow etc. Co.*, 901.
4. **NEGLIGENCE—ASSUMPTION OF RISK.**—An employer is charged with the continuing duty of not subjecting his servants to risks by his own negligence in not keeping instrumentalities used by them in a sound and secure condition, and the servants do not assume the risk arising from such neglect. *Settle v. St. Louis etc. R. R. Co.*, 633.
5. **DEFECTIVE APPLIANCES—ASSUMPTION OF RISKS.**—Although a servant is advised of defects in the appliances used by him, and of the neglect of the master to repair them, he does not, by electing to remain in the service and to use the defective appliances, thereby assume the risks of injury therefrom, unless the defect is so glaring and the danger so obvious, that a man of common prudence would refuse to use such instrumentalities. *Settle v. St. Louis etc. R. R. Co.*, 633.
6. **DEFECTIVE APPLIANCES—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE.**—Although a servant cannot wholly ignore a known defect in an appliance provided for him, and is required to exercise care and caution in its use, he is not guilty of contributory negligence in thereafter using it, unless the defect is so manifestly and glaringly hazardous that a person of ordinary prudence would not use it. *Settle v. St. Louis etc. R. R. Co.*, 633.

7. THE DELEGATION TO AN EMPLOYEE OR SERVANT of the duty of taking such measures as are within the power of the master to protect employees against dangers while at work cannot relieve the master from liability, if the employee to whom such duty is deputed does not exercise reasonable care in its discharge. *Promer v. Milwaukee etc. Ry. Co.*, 908.
8. MASTER AND SERVANT MAY BE JOINED in one action to recover compensation for injuries suffered from the same act of negligence. *Greenberg v. Whitcomb Lumber Co.*, 911.

See NEGLIGENCE, 3, 18; RAILROADS, 12-17.

MAXIMS.

One cannot accomplish by indirect means what he is prohibited from doing directly. *Millington v. Lawrer*, 385.

Volenti non fit injuria. *Judson v. Giant Powder Co.*, 148.

MECHANIC'S LIEN.

1. PROPERTY COVERED—APPORTIONMENT.—If, under a contract to furnish material to erect a building upon each of several lots, the material furnished is used indiscriminately in erecting each of the buildings on each lot, the whole debt may be charged to all of the lots, but all of the debt for all of the material cannot be charged to part of the lots. *Badger Lumber Co. v. Holmes*, 726.
2. APPORTIONMENT.—If it is sought to charge part only of certain lots for material furnished to erect buildings upon each of such lots, the amount of material furnished must be apportioned so that the part of the real estate charged with the mechanic's lien shall bear no greater amount of the expense than the value of the material actually used in the construction of the improvement made on such part. *Badger Lumber Co. v. Holmes*, 726.
3. BUILDING ON LEASED LAND.—If a lessee causes a building to be erected on leased premises, under an agreement between himself and the lessor that the former is to pay for the building, and the latter is to pay him therefor by allowing him to retain rents, the interest of both the lessor and lessee is subject to mechanics' liens growing out of the erection of the building. *Kremer v. Walton*, 870.

See MORTGAGES.

MEETINGS.

See CORPORATIONS, 1, 2.

MILLS.

See WATERS, 22, 24, 25.

MISFEASANCE.

See AGENCY, 11; CORPORATIONS, 10; DEFINITIONS.

MISTAKE.

See DEVISE, 3; WILLS, 4.

MONOPOLIES.

TRADE RESTRAINT—TRUSTS.—An agreement reciting that its signers design to form a trust for the purpose of securing co-operation in the business of manufacturing preserves, and of selling and dealing in the same in home and foreign markets, and which provides that this co-operation shall be secured through the powers conferred upon trustees named in the agreement, to whom are to be assigned all shares of stock held by the signers in various corporations, and who are to purchase stock in other corporations, and the property or business of any firm or individual connected with a similar business, is an illegal contract, because it provides for a combination in restraint of trade. *Bishop v. American Preservers' Co.*, 317.

See AGENCY, 6.

MORTGAGES.

MECHANICS' LIENS.—AS BETWEEN A MORTGAGE recorded on a certain date, and claim for a mechanic's lien, in which the material is alleged to have been delivered "between" that date and a subsequent day, the lien of the mortgage is senior and superior to that of the materialman. *Webb v. Thomas*, 741.

See APPEAL, 4; CROPS, 2; GUARDIAN AND WARD, 1; SUBROGATION, 4, 5.

MUNICIPAL CORPORATIONS.

1. **ORDINANCES—PASSAGE.**—The fact that an ordinance is not signed by the mayor of a city after its passage does not render it invalid if the statute requiring it to be so signed also provides that, if the mayor shall "neglect or refuse to sign any ordinance, or return the same with his objections in writing at the next meeting of the board of aldermen, the same shall become a law without his signature." *Saleno v. City of Neosho*, 553.
2. **ORDINANCES—APPROVAL.**—The approval of an ordinance by the acting president of a board of city aldermen, made during the absence of the president of the board, is valid. *Saleno v. City of Neosho*, 553.
3. **REASONABLENESS—SPEED OF TRAINS.**—A city ordinance limiting the speed of railroad trains to six miles per hour is unreasonable and void when applied to that part of the city added to, and included in, its boundaries after the ordinance was passed, and at a point where no platted streets are open across the track, and where the right of way is fenced on both sides. *Burg v. Chicago etc. Ry. Co.*, 419.
4. **MUNICIPAL ORDINANCES PASSED EITHER BY VIRTUE OF EXPRESS OR IMPLIED POWER** must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state. *Burg v. Chicago etc. Ry. Co.*, 419.
5. **LIABILITY FOR DEFECTIVE STREETS.**—The duty to keep streets in repair is a ministerial duty devolving upon the municipality, for a breach of which an action lies in favor of a party injured by reason of a neglect of such duty. *Sutton v. Snohomish*, 847.
6. **LIABILITY FOR DEFECTIVE STREETS—NOTICE.**—If a dangerous hole or defect in a street has existed for such length of time that the city authorities, by the exercise of ordinary diligence, would have discovered it in time to prevent an accident, the city cannot escape liability therefor for want of actual notice. In such case it is deemed to have con-

- structive notice, which is sufficient without proof of actual notice. *Sutton v. Snohomish*, 847.
7. DEFECTIVE STREETS—NEGLIGENCE.—Failure on the part of city authorities to discover and remedy a dangerous defect in a public street, within a reasonable time, is negligence on the part of the city. *Sutton v. Snohomish*, 847.
 8. PERMIT TO EXCAVATE STREET—NOTICE.—The fact that a city has granted a permit to make a dangerous excavation in a street is notice to the city authorities that the work is in progress, and charges them with the duty of seeing that it is properly conducted, so as to prevent accidents to third persons rightfully upon the street. *Sutton v. Snohomish*, 847.
 9. LIABILITY FOR DEFECTIVE STREETS—NOTICE—NEGLIGENCE.—Whether want of notice of the removal of a guard or barrier around a dangerous excavation in a street is such as to exempt the city from liability for injury to a traveler depends upon whether a sufficient protection was provided in the first instance, as well as the contributory negligence of the traveler, and these questions are for the jury to decide from the evidence. *Sutton v. Snohomish*, 847.
 10. NEGLIGENCE—DEFECTIVE SIDEWALK—PLAYING WITH DOG.—It is the duty of a city to keep its streets and sidewalks in repair only for those who use them for the purposes of their creation. Hence, an adult who uses a sidewalk for the sole purpose of playing with a dog cannot recover of the city for injuries occasioned by a defect in the sidewalk while he is so engaged. The street or sidewalk is not to be used as a playground. *Jackson v. Greenville*, 553.
 11. LIABILITY FOR DEFECTIVE STREETS.—If a city has exclusive control of its streets, with power to raise money for their construction and repair, a duty arises to the public to keep its streets in a reasonably safe condition for use in the ordinary modes of travel, and it is liable to respond in damages to those injured by a neglect to perform such duty. *Sutton v. Snohomish*, 847.
 12. LIABILITY FOR DEFECTIVE STREETS—PRESENTATION OF DEMAND.—A claim for damages for injury arising from defective streets need not be presented to the city council prior to suit, within the meaning of a statute providing that all demands against a city must be presented to and audited by the city council. *Sutton v. Snohomish*, 847.
 13. LIABILITY OF CITIES FOR INJURIES SUSTAINED BY INDIVIDUALS from the use of defective streets is a question of law, which can be properly raised only by demurrer, and not by motion for a nonsuit. *Sutton v. Snohomish*, 847.
 14. ANIMALS RUNNING AT LARGE.—A municipality having power to ordain and enforce ordinances necessary for the peace, good order, health, and safety of the town, and of the people and property therein, can, by ordinance, restrain domestic animals from running at large. The withholding of this power from the municipality is not inferable from the fact that in the charter of other municipalities it is granted in express terms. *Cochrane v. Mayor*, 479.
 15. LIABILITY OF FOR FAILING TO EXERCISE ITS POWERS.—A municipality having power to restrain the running of domestic animals at large in its streets, and which fails to exercise its power, is answerable in damages to a person attacked and injured, while walking along such streets, by a cow, which is on the streets by the fault of its owner, and which the

- municipality could have prevented from running at large by the use of ordinary care and diligence. *Cochrane v. Mayor*, 479.
16. A MUNICIPALITY IS NOT ANSWERABLE FOR INJURY TO A HUMAN BEING INFLICTED BY A DOMESTIC ANIMAL running at large on the public streets, if such animal was at the place where it inflicted the injury for so short a time that it could not have been discovered by the municipal officers by the use of reasonable care and diligence before inflicting the injury. *Cochrane v. Mayor*, 479.
 17. LIABILITY.—A municipality having powers to be exercised for the public good is liable for its failure to exercise them to any person who has received substantial damages therefrom, and who is not himself in fault. *Cochrane v. Mayor*, 479.
 18. CONTRACTS.—Failure to make a contract in duplicate, and to file it with the proper city officer as required by statute, does not make a contract entered into with the city void, if the statute does not make such filing of the contract a condition precedent to its validity. *Saleno v. City of Neosho*, 653.
 19. INDEBTEDNESS—CONSTITUTIONAL LIMIT.—A contract by a city to pay a fixed price annually for a supply of water for twenty years, payment to be contingent on the water being supplied, does not create a debt on the part of the city for the aggregate amount which may ultimately become payable, within the meaning of a constitutional provision limiting the yearly indebtedness which may be incurred by the city. *Saleno v. City of Neosho*, 653.
 20. INDEBTEDNESS — CONSTITUTIONAL LIMIT.—Contracts for the annual supply of municipalities with such necessities as light and water, and contracts for the payment therefor, do not create a debt for the aggregate amount which may become due upon a compliance with the terms of the contract, within the meaning of a constitutional provision limiting the yearly indebtedness which may be incurred by a city. *Saleno v. City of Neosho*, 653.
 21. MUNICIPAL INDEBTEDNESS — CONSTITUTIONAL LAW.—A constitutional provision that "no city or county shall incur any indebtedness or liability exceeding in any year the income and revenue provided for it for such year," means that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year. *Smith v. Broderick*, 167.
 22. MUNICIPAL INDEBTEDNESS.—WHOEVER DEALS WITH MUNICIPALITIES is bound to know of constitutional limitations placed upon their power to incur indebtedness in any particular year. *Smith v. Broderick*, 167.
 23. MUNICIPAL INDEBTEDNESS — CONSTITUTIONAL LAW — JUDGMENTS.—A constitutional provision that "no city or county shall incur any indebtedness or liability exceeding in any year the income and revenue provided for it for such year," cannot be evaded by a consent on the part of the officers of a municipality that a judgment may be entered against it upon an open demand accruing in one year, and paid out of its general fund for the next year. *Smith v. Broderick*, 167.
 24. MUNICIPAL INDEBTEDNESS — REVENUE OF SUBSEQUENT YEAR—EFFECT OF REDUCING CLAIM TO JUDGMENT.—Under a constitutional provision that no city or county shall incur any indebtedness or liability exceeding in any year the income and revenue provided for it for such year, a claim against a city incurred in one year cannot be paid out of its reve-

nue for a subsequent year, although such claim has been reduced to judgment and a special tax levied, collected, and paid into the general fund for that year, with which to pay it. *Smith v. Broderick*, 167.

25. **MUNICIPAL INDEBTEDNESS—PAYMENT OF JUDGMENT FOR—CONSTITUTIONAL LAW.**—A statute empowering a board of supervisors to "order paid any final judgment against said city and county" does not authorize the payment of a judgment for a debt incurred in one year out of the revenue collected for a subsequent year, when the constitution limits the power of the municipality in incurring liability to the income and revenue provided for it in the year in which the liability is incurred. *Smith v. Broderick*, 167.
26. **MUNICIPAL CORPORATIONS—LIMITATION UPON POWER TO CONTRACT.**—If, at the time of entering into an obligation with a municipality, there is a constitutional or statutory limitation upon the extent to which it may obligate itself, or upon the extent of taxation for the payment of its liability, or upon the mode in which such payment is to be made, the party dealing with it is bound by the terms of the law as they existed at the time that the obligation was incurred. *Smith v. Broderick*, 167.

NAVIGATION.

See **WATERS**, 1-4.

NEGLIGENCE.

1. **FORGETFULNESS.**—To forget a danger is not negligence unless it shows want of ordinary care, and that is a question for the jury. *Giraudi v. Electric Improvement Co.*, 114.
2. **GROSS NEGLIGENCE IS AN ENTIRE FAILURE TO EXERCISE CARE**, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the interest and welfare of others. *Redington v. Pacific Postal Tel. etc. Co.*, 132.
3. **PRESUMPTION OF.**—When a thing is under the exclusive management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care. *Hart v. Washington Park Club*, 298.
4. **NEGLIGENCE IS NOT PRESUMED AS AGAINST THE OWNER OF A RACECOURSE** who is giving thereon a public exhibition of racing, from the allegation that a horse ran away and inflicted an injury upon a spectator, where it does not appear that the horse was the property of, or under the control of, the defendant, nor at what place plaintiff was when he received his injury. *Hart v. Washington Park Club*, 298.
5. **EXPLOSION — PRESUMPTION — EXPERT EVIDENCE.** — An explosion in a dynamite factory raises a presumption of negligence, and, unexplained, makes a prima facie case for recovery for injury to person or property. Such case is strengthened and completed by expert evidence to the effect that, if the correct process of manufacturing and handling dynamite was carefully carried out, an explosion would not occur. *Judson v. Giant Powder Co.*, 146.
6. **ACCIDENT—PRESUMPTION.**—If the cause of an injury to person or property is shown to be under the management of defendant, and the accident is such as in the ordinary course of events does not happen if those

having the management use proper care, it affords *prima facie* evidence, in the absence of explanation, that the accident arose from negligence, and no question of contractual relation forms an element in such case. *Judson v. Giant Powder Co.*, 146.

7. **EXPLOSION—PRESUMPTION.**—Proof of an explosion raises a presumption of negligence sufficient to establish a *prima facie* case for a recovery for injury or loss occasioned thereby without the existence of contractual relations between the parties. *Judson v. Giant Powder Co.*, 146.
8. **EXPLOSION—ASSUMPTION OF RISK BY GRANTOR.**—In making a grant of premises for the purpose of a dynamite factory, the grantor has a right to assume that due care is to be exercised in the conduct of the business, and has the right to demand it. He does not, by continuing to do business near that locality, after notice of the danger attending the manufacture of dynamite, assume the risks of explosions thereof caused by the negligent acts of his grantee in conducting his business. The maxim, *Volenti non fit injuria*, does not apply. *Judson v. Giant Powder Co.*, 146.
9. **WHEN QUESTION FOR JURY.**—If different minds may draw different conclusions from the facts in evidence to support a charge of negligence, it is a question of fact to be determined by the jury, and not of law for the court to decide. *Pray v. Omaha etc. Ry. Co.*, 717.
10. **WHEN QUESTION FOR JURY.**—If, in an action to recover for negligence upon the facts disclosed, there is room for a reasonable deduction of proper care on the part of the party injured, the question of negligence is for the jury, and it is only when the undisputed facts are such as to leave but one reasonable inference, and that of contributory negligence on the part of the plaintiff, that the court is justified in taking the question from the jury. *Davis v. Pacific Power Co.*, 156.
11. **WHEN FOR THE JURY.**—Negligence is a question of law and fact, and if there is room for difference of opinion between reasonable men as to the existence of facts from which it is proposed to infer negligence, or as to the inferences which might fairly be drawn from conceded facts, the question of negligence is for the jury to determine, and the court should not grant a nonsuit. *Redington v. Pacific Postal Tel. etc. Co.*, 132.
12. **JURY TRIAL—NEGLECT, WHEN A QUESTION FOR THE JURY.**—In an action for personal injuries, the questions whether defendant was guilty of negligence in providing unsafe machinery, or in failing to instruct the plaintiff of its dangerous character, and whether plaintiff on his part was guilty of contributory negligence, are for the jury. *Guinard v. Knapp-Stout etc. Co.*, 901.
13. **WHEN A QUESTION FOR THE JURY.**—The question of contributory negligence is for the jury, and when the evidence does not clearly and indisputably show such negligence and want of care on the part of the plaintiff so as to leave nothing to submit to the jury on the opposite theory, a nonsuit should not be granted. *Promer v. Milwaukee etc. Ry. Co.*, 905.
14. **NEGLECT MUST BE THE PROXIMATE CAUSE OF AN INJURY** to entitle the plaintiff to recover. An instruction to the jury that if they find from the evidence that the defendant was guilty of a lack of ordinary care, they should find for the plaintiff, is therefore erroneous, because it does not require them to find further that such want of care was the cause of the injury. *Guinard v. Knapp-Stout etc. Co.*, 901.

15. **PROXIMATE CAUSE—EVIDENCE.**—To recover damages on account of negligence, the plaintiff must prove not only the negligence but also that it was the proximate cause of the accident. No direct proof of such fact is, however, required, and it is sufficient if the facts proved are of such nature, and so connected and related to each other, that the conclusion that the negligence was the cause of the damage may be fairly inferred. *Settle v. St. Louis etc. R. R. Co.*, 633.
16. **ELECTRIC WIRES.**—A company or person using wires to convey electricity is required to use very great care to prevent injury to person or property. A failure to raise such wires so high above a roof that those having occasion to go there will not come in contact with them is negligence. *Giraudi v. Electric Improvement Co.*, 114.
17. **INJURY FROM ELECTRIC WIRES.**—One who has no knowledge of the fact that an electric wire being wet destroys the insulation for the time is not guilty of contributory negligence in grasping such wire with his hands when he comes in contact with it. *Giraudi v. Electric Improvement Co.*, 114.
18. **ELECTRIC WIRES—INJURY TO SERVANT.**—A person whose employment does not require or give him opportunity to know that electric wires are stretched above the roof of the building in which he is employed, or if he had ever known might reasonably have forgotten about such wires, and who is injured by coming in contact with such wires while performing a service required by his master, is not guilty of contributory negligence as a matter of law, on the ground that he ought to have known the location and have taken care to avoid such wires. *Giraudi v. Electric Improvement Co.*, 114.
19. **ELECTRIC WIRES—CARE REQUIRED TO AVOID.**—Of one ignorant of the danger that may result from contact with electric wires a less degree of care is demanded to avoid injury than is required if he had been informed of such danger. What is reasonable care under the circumstances is for the jury to determine. *Giraudi v. Electric Improvement Co.*, 114.
20. **USE OF DANGEROUS ELEMENT—CARE REQUIRED.**—A person brought in contact with electric wires or other dangerous commodity is not required to exercise more care to avoid injury than is usual under similar circumstances among careful and prudent persons of the class to which he belongs. A common laborer is not required to use as much care and prudence as is exacted of a better educated person. *Giraudi v. Electric Improvement Co.*, 114.
21. **USE OF DANGEROUS AGENCY—ELECTRICITY—PRESUMPTION—DUTY TO PROTECT PUBLIC.**—The fact that a dangerous agency, such as electricity, is used as a commodity, raises no presumption that the public know enough of its nature to avoid the danger arising from its use, and the public, aside from consumers, owe no duty to those introducing it. On the other hand, it is the duty of those making a profit from the use of such a dangerous element to use the utmost care to prevent injury to all classes of persons, and they must protect those possessing less than ordinary knowledge of the character of the commodity. *Giraudi v. Electric Improvement Co.*, 114.

See CARRIERS, 3, 4; HIGHWAYS, 4; LANDLORD AND TENANT, 13-17; MASTER AND SERVANT; RAILROADS, 12-17; TELEGRAPH COMPANIES, 6, 7.

NEGOTIABLE INSTRUMENTS.

1. A PROMISSORY NOTE IS NEGOTIABLE, though it contains a provision for the payment of an attorney's fee, if the note is placed in the hands of an attorney for collection. *Shenandoah Nat. Bank v. Marsh*, 381.
 2. PRESUMPTION OF TITLE FROM POSSESSION—UNNECESSARY ALLEGATION. Possession of a note payable to bearer and properly delivered authorizes the holder to sue thereon, and raises a presumption of ownership without an allegation or proof of title, and, if such allegation is unnecessary made, it need not be proved until such presumption is overcome. *Bigelow v. Burnham*, 442.
 3. NOTE PAYABLE AT PARTICULAR PLACE.—In an action against the maker of a note payable at a particular place, it is not necessary to allege a presentation of the note for payment at the time and place designated, or to prove such presentation, in order to entitle the plaintiff to recover. *Greeley v. Whitehead*, 258.
 4. PLACE OF PAYMENT—PRESENTATION—DEFENSE.—The maker of a note payable at a particular time and place is liable thereon, though it is not presented at the time and place named, but he may avoid the payment of future interest, damages, and costs of suit by plea therein alleging both a readiness and ability to pay at the time and place designated and ever since, and that he brings the money into court for that purpose. The plea to be sufficient must set up all of these facts. *Greeley v. Whitehead*, 258.
 5. PLACE OF PAYMENT—PRESENTATION—WAIVER OF DEFENSE.—If a note is made payable at a particular time and place the payment of interest thereon long after its maturity is a waiver of any defense by the maker for the failure of the holder to present the note for payment at the time and place named therein. *Greeley v. Whitehead*, 258.
 6. DEFENSES.—A negotiable promissory note purchased by the plaintiff before due, for value, and without notice of defendant's equities, is not open to the defense of fraud in procuring the note, or that it was without consideration. *Shenandoah Nat. Bank v. Marsh*, 381.
- See ALTERATION OF INSTRUMENTS; CHECKS; CONTRACTS, 2; CORPORATIONS, 9; EVIDENCE, 8; INJUNCTIONS, 4.

NEW TRIAL.

1. VERDICT.—IF THE JURY IGNORE AND DISREGARD PROPER INSTRUCTIONS given, the verdict may be set aside. *Limburg v. German etc. Ins. Co.*, 468.
2. JURY TRIAL—INSTRUCTIONS—DUTY OF COURT.—A judge who is asked to give, and does give, an instruction to the jury correctly stating the propositions of law applicable to the case, but who adds that they may use it as far as they find it applicable, commits error for which the losing litigant is entitled to a new trial. It is for the judge to determine whether an instruction is applicable, and he cannot submit its applicability to the jury. *Guinard v. Knapp-Stout etc. Co.*, 901.
3. HOMICIDE—APPEAL BY STATE—REVERSIBLE ERROR IN EXCLUSION OF EVIDENCE.—If, upon the trial of a physician for causing the death of a woman by a lacerated wound in the uterus, made by some instrument used in the production of an abortion shortly prior to her death, the accused offers evidence tending to prove that the wound was inflicted by the woman herself, the state, in rebuttal, may inquire of a medical

and surgical expert who had performed an autopsy on the body of the deceased, examined the uterus, and described its condition to the jury, whether, in his opinion, from his examination of the body and uterus, the wound described was self-inflicted, and the exclusion of such evidence is an error which entitles the state to a new trial. *State v. Lee*, 202.

4. JURY TRIAL—MISCONDUCT OF JURORS.—THE ACCEPTANCE OF DRINK by a juror, furnished at the expense of the prevailing party or his attorney, will turn the scale against the verdict, unless it is shown that it was not intended to influence his action and had no influence on his mind. The burden of proving that the treating was not done with the desire to influence the juror, and did not have that effect, must be assumed by the party who paid for the refreshments. *Bradshaw v. Degenhart*, 677.
5. JURY TRIAL—MISCONDUCT OF JURORS—WAIVER OF.—If some of the jurors accept drink at the expense of a party to the action, whose adversary is also included in and accepts the invitation to drink, he thereby contributes to the misconduct of the jurors, and cannot, after failing to object until a verdict against him, avail himself of the irregularity as a means of escape from the verdict. Especially is this true in a chancery case, where the verdict is advisory only, and has been adopted by the chancellor who made special findings in harmony therewith. *Bradshaw v. Degenhart*, 677.

See RAPE, 4.

NONFEASANCE.

See AGENCY, 11; DEFINITIONS.

NONUSER.

See EASEMENTS, 2, 3.

NOTICE.

See INSURANCE, 26.

NUISANCE.

See LANDLORD AND TENANT, 11; WATERS, 27-32.

OPINION EVIDENCE.

See WITNESSES, 12.

ORDINANCES.

See MUNICIPAL CORPORATIONS, 1.

PARENT AND CHILD.

See BASTARDY; GIFTS.

PARTNERSHIP.

1. CONSTRUCTION OF CONTRACT.—An agreement between parties to carry on a business "for one year, and as much longer as the parties may mutually desire," providing for the erection of a building, and putting a large sum of money into the business, and, "when the stock is sold, the original investment shall be deducted and the balance divided," creates a partnership for a continuing business, and, in the absence of restric-

- tions in the contract, each partner may exercise the powers usually possessed by partners in binding the firm. *Baxter v. Rollins*, 432.
2. CORPORATIONS.—THE FORMATION OF A PARTNERSHIP BETWEEN CORPORATIONS is illegal, whether they are domestic or foreign. *Bishop v. American Preservers' Co.*, 317.
 3. CONTRACTS BETWEEN—WHO BOUND BY.—All who deal with a partnership are bound by a contract between the partners of which they have knowledge at the time of so contracting, and they are equally bound, if they have been informed of facts that should have led a reasonably prudent and cautious man to make inquiry. *Baxter v. Rollins*, 432.
 4. LIABILITY OF FOR LOAN MADE BY ONE PARTNER.—If one member of a partnership has authority to bind the firm for borrowed money, and it is loaned upon his signature, to the credit and for the benefit of the partnership, the firm is liable therefor. *Baxter v. Rollins*, 432.
 5. LIABILITY OF, FOR CONTRACT MADE BY ONE PARTNER.—To bind a partnership, it is not necessary that the contract should be signed by all of the partners, nor, if there is a firm name, that it be used. If the contract is signed by one partner having authority, with intent to bind the firm and so accepted and credit extended thereto, it is binding on the firm. *Baxter v. Rollins*, 432.
 6. LIABILITY OF, FOR LOAN MADE BY ONE PARTNER.—If, under a partnership agreement, two of the partners are to furnish all of the money to a certain amount to be used in the business, and a third partner obtains a loan upon a statement that the others have failed to furnish the amount agreed upon, the party advancing the money with knowledge of the original agreement is put upon inquiry as to a subsequent agreement between the partners, by which the two are to furnish but half the amount originally agreed upon, and the partnership is not liable for the loan. *Baxter v. Rollins*, 432.
 7. FUNDS UNLAWFULLY APPLIED TO THE PURPOSES OF, LIEN UPON.—If one holding money as receiver lends it to the firm of which he is a member, he is guilty of a breach of trust, but this does not create any lien against the property of the firm in favor of the persons entitled to the moneys so misappropriated by the receiver. *Goldthwaite v. Janney*, 56.
 8. DEPOSIT OF FIRM FUNDS—LIABILITY OF BANK.—If a firm business is carried on in the name of one partner having general control, deposits made by him in bank are partnership funds until after a partnership settlement, and the bank cannot be made to account to the other partners making advances for money paid out on the checks of the depositing partner, in the absence of proof that the bank has misappropriated the funds to pay his individual debts. *Baxter v. Rollins*, 432.
 9. APPLICATION OF ASSETS IN EQUITY TO PAYMENT OF DEBTS.—Equity, in applying partnership property to the payment of debts, will first liquidate the debts of the partnership and surrender the surplus only to the individual partners. *Jackson Bank v. Durfey*, 596.
 10. INSOLVENCY—APPROPRIATION OF ASSETS TO PAYMENT OF INDIVIDUAL DEBTS.—It is unlawful for the members of an insolvent partnership, or of one contemplating insolvency, to convert the joint estate into severalty and appropriate it to the payment of the individual debts of its members, leaving the firm debts unpaid, though they may lawfully

do so if the partnership is a solvent and going concern. *Jackson Bank v. Durfey*, 596.

11. **INSOLVENCY—APPROPRIATION OF ASSETS TO PAYMENT OF INDIVIDUAL DEBTS—ILLUSTRATION.**—Trust deeds executed by the members of an insolvent partnership conveying their respective interests in certain firm assets to secure their individual debts are fraudulent and void as to existing firm creditors, especially where the partners are themselves insolvent. *Jackson Bank v. Durfey*, 596.
12. **RIGHT OF PARTNERS AS TO PAYMENT OF DEBTS.**—The members of a partnership, as against each other, have an equitable right to have the partnership property applied to the payment of partnership debts, but they may waive it. *Jackson Bank v. Durfey*, 596.
13. **RIGHT OF CREDITORS AS TO PAYMENT OF DEBTS.**—Partnership creditors have an equitable right to have the partnership property applied to the payment of partnership debts, and it cannot be impaired by any alienation of the partnership property with intent to hinder, delay, or defraud them, unless it shall have passed into the hands of those whom the law protects. *Jackson Bank v. Durfey*, 596.
14. **CREDITORS AS SUCH HAVE NO LIEN ON THE PARTNERSHIP ASSETS,** and the creditors of an individual partner cannot acquire any greater interest in such effects than the partner himself is entitled to. *Goldthwaite v. Janney*, 56.
15. **PARTNERSHIP REALTY—PRIORITIES BETWEEN PARTNERSHIP AND INDIVIDUAL CREDITORS.**—If a partnership becomes insolvent, a creditor of one of the partners cannot diminish the partnership assets to the prejudice of those who are creditors of the firm only. *Goldthwaite v. Janney*, 56.
16. **REAL ESTATE ACQUIRED WITH PARTNERSHIP FUNDS OR CREDIT AND FOR PARTNERSHIP PURPOSES** is regarded in equity as partnership property and as such it is subject to the payment of the partnership obligations in preference to the individual debts of the partners. It is not material in whom the legal title stands. *Goldthwaite v. Janney*, 56.
17. **REAL ESTATE.**—PRIMA FACIE the ownership of lands standing in the name of the partners is vested in them as tenants in common. This presumption may be rebutted by evidence, whether parol or not, that in the intention of the parties it was purchased for and used as partnership property. *Goldthwaite v. Janney*, 56.
18. **WHETHER REAL ESTATE BELONGS TO THE FIRM** or to the individuals composing it depends on the intention of the parties. *Goldthwaite v. Janney*, 56.
19. **PARTNERSHIP REAL ESTATE.**—A PARTNERSHIP IS NOT ESTOPPED from proving that real property purchased with firm funds by one of the partners who took a conveyance thereof in his own name and placed it on record is partnership assets, except as against bona fide purchasers without notice. Creditors of the partner in whose name the property stands of record are not entitled to protection as bona fide purchasers, though he and the firm have become insolvent, and the assets are subject to distribution in a court of insolvency. *Goldthwaite v. Janney*, 56.
20. **REAL ESTATE PURCHASED FOR PARTNERSHIP PURPOSES AND WITH INTENT TO MAKE IT PARTNERSHIP PROPERTY,** though the title is taken in the name of one partner only, is not his individual property to the extent of his claims against his firm for advancements made by him to it, and therefore his individual creditors are not entitled to a lien on such

real property to the extent of the advances so made. *Goldfingers v. Janney*, 56.

21. **EXEMPTIONS—RIGHT OF PARTNER TO.**—A partner in possession of the firm property during the pendency of a suit to dissolve the partnership is entitled to an exemption out of the partnership property, as against an execution upon a judgment against him for his individual debt, provided the partnership debts are paid. *Dennis v. Kass*, 890.

See CORPORATIONS, 14.

PAYMENT.

THE GIVING OF A NOTE IN RENEWAL of a pre-existing indebtedness does not pay or extinguish it, nor deprive the party of his right to levy upon the homestead if such right existed anterior to such renewal. *Balderson v. Leach*, 807.

See GUARANTY, 3, 4; JUDGMENTS, 11-12.

PEDDLERS.

See STATUTES, 6.

PENSIONS.

See EXECUTION, 12.

PLEADING.

1. **PRACTICE.**—A GENERAL DEMURRER DOES NOT ADMIT MERE CONCLUSIONS OF LAW. An allegation in a complaint that it was the duty of the defendant to erect and maintain certain guards, etc., about an elevator shaft must, therefore, be regarded as the pleader's conclusions of law from other things alleged. *Peake v. Buell*, 946.
2. **GENUINENESS OF SIGNATURE—EVIDENCE—BURDEN OF PROOF.**—The genuineness of a signature to a written instrument may be put in issue by a denial in writing, under oath, not made by the person whose signature it purports to be, and the burden, as to that issue, is upon the party making the denial. Evidence to show that the signature in question is not genuine is, therefore, material and admissible. *Shaw v. Jacobs*, 411.

POLICE POWER.

See EMINENT DOMAIN, 1.

POLLUTION.

See WATERS, 19-25, 28-32.

PRESUMPTIONS.

See AGENCY, 5; DEEDS, 1; HIGHWAYS, 4; NEGLIGENCE, 4-7; PROBATE.

PRETERMITTED HEIRS.

See WILLS, 2, 3.

PRINCIPAL AND AGENT.

See AGENCY.

PROBATE COURTS.

See EQUITY, 1.

PROCESS.

1. JUDGMENTS—SERVICE OF PROCESS—PRESUMPTION.—It is presumed in favor of the jurisdiction of the court and in support of the judgment that service of process was duly made, although no evidence thereof appears from the record. *Eickhoff v. Eickhoff*, 110.
2. JUDGMENTS—SERVICE OF PROCESS—PRESUMPTION—BURDEN OF PROOF.—In an action to set aside a judgment on the ground that the defendant therein was not served with summons, had no notice, and never appeared in the action, and that the judgment was obtained by fraud, the production of the judgment-roll showing that summons was issued but containing no proof of service, no memorandum of default, no appearance by defendant except by guardian ad litem, and no recital that summons was served, does not overcome the presumption that the defendant was duly served, and that the court had jurisdiction of his person. The burden of proof is still on the party attacking the judgment to show by other evidence that the summons was not served in fact. *Eickhoff v. Eickhoff*, 110.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PROOFS OF LOSS.

See INSURANCE, 11-15.

PROSTITUTION.

See DISORDERLY HOUSES.

PROXIMATE CAUSE.

See NEGLIGENCE, 14, 15.

PUBLIC GROUNDS.

See REAL PROPERTY, 4.

PUBLIC POLICY.

See REPLEVIN, 1.

PURPRESTURE.

See WATERS, 25.

QUARANTINE.

See BOARDS OF HEALTH; STATUTES, 2.

RAILROADS.

1. EMINENT DOMAIN—DAMAGES.—If land over which a railway corporation seeks to acquire a right of way is valuable for mining purposes, the court, in determining the damages to be awarded, should take into consideration the fact that the use of the surface for railway purposes would be no more injurious to the owner than would be a grant of the lands, reserving to himself the mines therein. *Northern Pac. etc. Ry. Co. v. Forbis*, 692.
2. EMINENT DOMAIN—COMPENSATION FOR CONSTRUCTION DOES NOT INCLUDE SUBSEQUENT DAMAGES.—Compensation made by a railroad com-

- pany when its road is built includes simply damages arising from the proper construction of the road, and does not relieve it from subsequent damages occasioned by its cutting the embankment of its road, and putting in a narrow trestle through which accumulated water flows to the injury of a landowner who has been thus compensated. *Kansas City etc. R. R. Co. v. Lackey*, 589.
2. **SURFACE WATERS—DISCHARGE OF, BY RAILROAD COMPANY, THROUGH NARROW TRESTLE, ON ANOTHER'S LAND.**—A railroad company is liable for damages occasioned by cutting the embankment of its road running through a valley, and putting in a narrow trestle through which water, accumulated for a long distance along one side of its track, pours upon adjoining land, thereby causing the water thereon in times of overflow to be deeper, and to run more swiftly than it otherwise would, to the injury of crops. *Kansas City etc. R. R. Co. v. Lackey*, 589.
 4. **WATERS—RAILROAD EMBANKMENT—EXTRAORDINARY FLOOD—NONLIABILITY OF COMPANY FOR INJURY.**—If a railroad, properly constructed, is built about three-fourths of a mile from, and parallel with, the channel of a creek, leaving a valley over a mile wide for the flow of water, and there is no trouble from ordinary recurring floods, but injury is caused by an extraordinary flood, which would, however, have resulted even if the railroad had not been built, a recovery will be denied where no improper construction of the roadway, or no causal connection between the act of the company and the injury resulting from the flood, is shown. *Kansas City etc. R. R. Co. v. Smith*, 579.
 5. **WATERS—RAILROAD EMBANKMENT AS AN OBSTRUCTION OF STREAM OR WATERCOURSE—NONLIABILITY OF COMPANY.**—If a railroad properly constructed is built about three-fourths of a mile from, and parallel with, the channel, leaving a valley for the flow of the water over a mile wide, it does not obstruct a running stream or watercourse, and the company is not liable to one owning land on the other side of the channel, upon which the overflow water is made deeper and the current stronger, by reason of the railroad embankment. *Kansas City etc. R. R. Co. v. Smith*, 579.
 6. **NEGLECT—EX PARTE TESTS AS EVIDENCE.**—On the issue as to whether an accident could have been avoided by stopping the train after the party injured could have been seen by the engineer in charge, tests made with similar trains under similar circumstances without notice to the injured party are admissible in evidence. *Burg v. Chicago etc. Ry. Co.*, 419.
 7. **DUTY TO TRESPASSING CHILDREN.**—An engineer in charge of a railroad train is not bound to exercise any care for the safety of children trespassing on the track until he actually sees them. After he discovers them he is bound to assume that they will remain, and must then exercise the highest degree of care to avoid injuring them. *Burg v. Chicago etc. Ry. Co.*, 419.
 8. **RULES—APPLICATION TO TRESPASSERS.**—A rule of a railroad company that the men in charge of extra or delayed trains must keep a sharp lookout for work trains, section men, and others who may be obstructing the track does not apply to trespassers thereon. *Burg v. Chicago etc. Ry. Co.*, 419.
 9. **RULES—APPLICATION TO TRESPASSERS.**—Rules and regulations adopted by railroad companies for the preservation of its passengers, employees, and trains do not apply to trespassers on the track whom

- wrongful and negligent acts place them in danger, and the only obligation of the company in such case is, when made aware of the danger, to avoid inflicting injury avoidable by the exercise of ordinary diligence. *Burg v. Chicago etc. Ry. Co.*, 419.
10. **LICENSE TO USE TRACK.**—The fact that persons have used a railroad track as a thoroughfare for years without the invitation or consent, but with the knowledge, of the company, does not establish a license in their favor to so use it. *Burg v. Chicago etc. Ry. Co.*, 419.
11. **PERSON ON TRACK—DUTY TO STOP TRAIN.**—A railroad engineer has a right to presume that a person on the track will leave it on the approach of the train, and he is under no obligation to stop until he has reason to believe that an object seen by him is a human being, and that it does not intend to leave the track. *Burg v. Chicago etc. Ry. Co.*, 419.
12. **NEGLIGENCE OF EMPLOYEES.**—The pushing or driving of cars through a station yard, the engine being detached, and no light being kept on the front of such car, and without providing any signal of danger or giving any notice of its approach, is, as respects employees whose duties require them to be in such yard, negligence entitling them to recover of the corporation if injured without contributory negligence on their part. *Promer v. Milwaukee etc. Ry. Co.*, 905.
13. **MASTER AND SERVANT—NEGLIGENCE—VICE-PRINCIPAL.**—If a railway car, while moving in the yard of the corporation, is cut loose from the engine and left in the charge of an employee, and he, while riding on it down the track, at night and in the dark, places himself on its rear instead of its front, with no signal or other means of warning upon or near its front, his negligence in this respect is a neglect of the duty which the corporation owed to its employees, and, therefore, any of them, if injured, may recover compensation therefor. *Promer v. Milwaukee etc. Ry. Co.*, 905.
14. **MASTER AND SERVANT.—THE RISK CONSEQUENT ON THE FAILURE OF A RAILWAY CORPORATION** to adopt proper precautions for the safety of its employees while working in its yard at night, in the dark, from dangers to them resulting from a car being put in motion in such yard without any light or danger signal in front thereof, is not assumed by persons accepting and entering upon work in such yard, unless such dangers are open and obvious, or the plaintiff, in the exercise of ordinary care, ought to have observed and apprehended the damage likely to result. *Promer v. Milwaukee etc. Ry. Co.*, 905.
15. **NEGLIGENCE—HANDHOLDS.**—It is negligence on the part of a railroad company toward its brakeman to send out box-cars with handholds so bent as to render them dangerous and unfit for use by him in discharging his duties. *Settle v. St. Louis etc. R. R. Co.*, 633.
16. **NEGLIGENCE—DEFECTIVE APPLIANCES.**—A railroad company is guilty of negligence in failing to keep appliances used by its servants in repair, and such servants knowing of defects in such appliances do not assume the risk of injury arising from their use unless the danger is glaring and obvious. *Settle v. St. Louis etc. R. R. Co.*, 633.
17. **DEFECTIVE APPLIANCES—CONTRIBUTORY NEGLIGENCE.**—If a defective handhold on a box-car under ordinary circumstances, and by the exercise of reasonable care, can be used for the purposes for which it is designed, and is not so dangerous as to threaten immediate injury by its use, a brakeman is not guilty of contributory negligence in

using it, though he has a knowledge of its defects, and the railroad company is liable for an injury sustained by him arising from its use. *Settle v. St. Louis etc. R. R. Co.*, 633.

38. **STREET RAILROADS—NEGLIGENCE**—Street railway companies are common carriers, and as such answerable for the negligence of their servants upon the principles of the common law. In providing for the safety of passengers they are bound to exercise the highest degree of care and diligence consistent with their undertaking, and are responsible for the slightest negligence on the part of their employees. *Pray v. Omaha etc. Ry. Co.*, 717.
39. **STREET RAILROADS—NEGLIGENCE—OVERCROWDED CARS**—If the employees of a street railway company in charge of its cars undertake to carry a number of persons greatly in excess of the seating capacity of such cars, so that passengers are compelled to stand on the platforms and steps, and the injury complained of is the direct result of such overcrowded condition, that fact is evidence of negligence on the part of the company. *Pray v. Omaha etc. Ry. Co.*, 717.
40. **STREET RAILROADS—NEGLIGENCE—OVERCROWDED CARS**—The fact that a passenger stands or rides on the platform or steps of a crowded street-car, on which there are no vacant seats, is not such contributory negligence per se as bars a recovery for injuries received through the negligence of the railway company or its employees. *Pray v. Omaha etc. Ry. Co.*, 717.
41. **STREET RAILROADS—NEGLIGENCE—OVERCROWDED CARS**—It is negligence on the part of a street railway company to carry passengers greatly in excess of the seating capacity of its cars, and permit such passengers to ride on the platforms and footboards thereof, so as to expose them to danger. *Pray v. Omaha etc. Ry. Co.*, 717.
42. **STREET RAILROADS—NEGLIGENCE**—A passenger standing on the steps of a moving street-car, unable to secure a seat or standing room within, is presumed to be there with the knowledge and consent of the conductor, and is not guilty of negligence, so as to bar a recovery for injury received by being crowded off of the car, through the concurrent negligence of the car conductor and third persons. *Pray v. Omaha etc. Ry. Co.*, 717.

See EXECUTION, 7; MUNICIPAL CORPORATIONS, 3; STATUTES, 2.

RAPE.

1. **RAPE INDUCED BY FEAR**—If, at the time a man has carnal knowledge of a female, her mind is so overpowered by fear induced by him as to cause her to make no resistance, it is rape. *Rice v. State*, 245.
2. **PHYSICAL FORCE**—Though a man lays no hands on a woman, yet, if by an array of physical force he so overpowers her that she dares not resist, his carnal intercourse with her is rape. *Rice v. State*, 245. -
3. **CHARACTER OF PROSECUTRIX—PROOF OF SPECIFIC ACTS OF LEWDNESS**—On a trial for rape the character of the prosecutrix for chastity or the want of it, is competent evidence, as bearing upon the probability of her consent to the defendant's act. The impeachment of her character in this respect cannot be brought about by proof of specific acts of lewdness with others than the defendant. It must be confined to evidence of her general reputation, except that she may be interrogated as to her previous intercourse with the defendant, or as to pre-

miscuous intercourse with men, or common prostitution. *Rice v. State*, 245.

4. **REASONABLE DOUBT—NEW TRIAL.**—If, on a trial for rape the guilt of the defendant is not shown beyond a reasonable doubt, he is entitled to a new trial. *Rice v. State*, 245.

See INDICTMENT, 4.

RATIFICATION.

See ALTERATION OF INSTRUMENTS, 2; ATTACHMENT, 2; CONTRACTS, 4; CORPORATIONS, 2.

REAL PROPERTY.

1. **LANDOWNERS, LIABILITY OF.**—If the owner or occupier of land, either directly or by implication, induces persons to come upon his premises, he thereby assumes an obligation that such premises are in a reasonably safe condition, so that persons there by his invitation shall not be injured by them or in their use for the purpose for which the invitation was extended. *Hart v. Washington Park Club*, 298.
2. **NEGLIGENCE—DANGEROUS PREMISES.**—If a store on a lot burns, leaving a cistern under the store open and in dangerous proximity to paths across the lot, which the owner has, both before and after the fire, allowed the public to use as a highway, and the owner removes all guards and protection from the cistern, he is liable to one who, using reasonable care, strays in the dark from one of the paths and is injured by falling into the cistern. *Lepnick v. Gaddis*, 547.
3. **LANDOWNER'S DUTY TO LICENSEE ON PREMISES.**—The owner of a building who invites a person to enter a hallway therein upon business does not thereby invite him to thrust his head through the window of an elevator shaft, and, therefore, is not liable for an injury received from such thrusting, though the elevator was at the time concealed, it not being then under the control of such owner. *Peaks v. Buell*, 946.
4. **PUBLIC GROUNDS AND RACECOURSE, LIABILITY OF KEEPER OF.**—One in possession of a racecourse and conducting an exhibition of horseracing thereon, inviting the public to attend and charging an admission fee, is under the duty of keeping the grounds in a reasonably safe condition for spectators. *Hart v. Washington Park Club*, 298.

See PARTNERSHIP, 16-20.

REASONABLE DOUBT.

See APPEAL, 23; RAPE, 4; TRIAL,

RECEIVERS.

1. **CORPORATIONS.—A RECEIVER OF A CORPORATION PENDENTE LITE MAY BE APPOINTED BY A COURT OF EQUITY** when the complaint alleges that certain shareholders have obtained control and management of the stock of the corporation and elected their own officers; that they are taking all the profits of the corporation for their own use instead of paying them out in dividends; have kept false books to deceive stockholders; have pretended to buy a worthless franchise, and mortgage the property of the corporation in payment therefor, for the purpose of having such mortgage foreclosed and the property interests of the stockholders thereunder destroyed. The appointment of a receiver in

such a case is justified, because it is not to dissolve the corporation, but to preserve its assets from being wasted and misappropriated in pursuance of a fraudulent conspiracy. *State v. Second Judicial District*, 682.

2. **RECEIVER IS NOT AN AGENT.**—A receiver of property appointed by court is not an agent. He is an indifferent person holding the property for those ultimately entitled to it, and his possession is that of the court. *Wildberger v. Hartford etc. Ins. Co.*, 558.

See **INSURANCE**, 25; **PARTNERSHIP**, 7.

RECORD.

See **JUDGMENTS**, 6.

REGULATIONS.

See **TELEGRAPH COMPANIES**, 3, 9.

REINSURANCE.

See **INSURANCE**, 23, 24.

REMAINDERS.

See **WILLS**, 5.

RENTS.

See **COTENANCY**, 2; **CROPS**, 2; **LANDLORD AND TENANT**, 6.

REPLEVIN.

1. **REPLEVIN CANNOT BE SUSTAINED** if the plaintiff must rely upon a sale on a contract void as against public policy. *Bishop v. American Presses & Co.*, 317.
2. **A JUDGMENT IN REPLEVIN BASED UPON AN ADMISSION THAT NO DEMAND FOR THE RETURN** of the goods replevied had been made, when such demand was necessary to sustain an action, is no more than an adjudication that the action was prematurely brought, and does not estop the plaintiff, after paying to the defendant the value of the goods which were the subject of the action of replevin, from maintaining an action against the defendant to recover the sum so paid on the ground that such goods were procured from the plaintiff by means of a fraudulent sale, which, after the discovery of the fraud, he rescinded. *Conover v. Stibles*, 790.

REPUTATION.

See **DISORDERLY HOUSES**, 6.

RESCISSION.

See **SALES**, 13; **VENDOR AND PURCHASER**, 3, 4.

RES GESTÆ.

See **HOMICIDE**, 9.

RESIDENCE.

See **ELECTIONS**.

RES JUDICATA.

See **JUDGMENTS**, 2-5.

RESOLUTIONS.

See CORPORATIONS, 1.

RESTRAINT OF TRADE

See CONTRACTS, 5; MONOPOLIES.

REVOCATION.

See DEVISE, 3; WILLS, 4.

RIPARIAN RIGHTS.

See WATERS.

SALES.

1. **CONTRACT TO SELL PARTICULAR THING—RIGHT TO SUBSTITUTE ANOTHER.**—Under a contract to purchase a particular selected monument represented to be flawless, the seller cannot, without the consent of the buyer, who has refused to accept the monument selected because of an alleged flaw therein, substitute another perfect monument of like value and character, and then recover therefor on the contract. *Webster-Gruber Marble Co. v. Dryden*, 417.
2. **DELIVERY SUFFICIENT TO COMPLETE.**—When a vendor delivers to a purchaser, or a purchaser's authorized agent, an order upon the vendor's bailee to deliver the goods sold to such purchaser or agent, this is a delivery having the same effect in transferring title as an actual delivery. *Union Stockyard etc. Co. v. Mallory*, 341.
3. **SALE OF PROPERTY TO BE SHIPPED—TITLE, WHEN PASSED.**—If a vendor, when shipping, takes a bill of lading in his own name, this fact, if not rebutted by evidence to the contrary, is very strong proof of the intention of the vendor to receive title in himself, and is almost decisive to prove his intention to retain the *jus disponendi* of the property, and to prevent a delivery of it to the vendee. *Willman Mercantile Co. v. Fussy*, 698.
4. **SUBSEQUENT LOSS OF PROPERTY—WHO MUST BEAR.**—Where a car-load of apples is shipped by the vendor in good order, but frozen on the road, the vendor taking a bill of lading, with a sight draft attached, it will be presumed that he retained title and that the loss must be borne by him. *Willman Mercantile Co. v. Fussy*, 698.
5. **CONSIDERATION.**—A PRE-EXISTING DEBT is not a valuable or sufficient consideration for the purchase of goods as against a third person from whom the vendor fraudulently obtained them. Such a purchase is not one for value. *Reed v. Brown*, 406.
6. **CONSIDERATION.**—A PROMISE TO PAY for goods fraudulently obtained by the vendor from a third person is not a valuable or sufficient consideration for the transfer as against the real owner. *Reed v. Brown*, 406.
7. **POSSESSION—TITLE.**—The mere possession of chattels, without other evidence of property or authority from the true owner to sell, does not enable the possessor to pass title, though he is a dealer in that class of property. *Gilman etc. Oil Co. v. Norton*, 400.
8. **FRAUDULENT—EFFECT OF.**—When a sale of goods is made through the fraudulent representations of the purchaser, or where the fraud in the sale arises from the intention of the purchaser not to pay for the goods, the sale is voidable only and not absolutely void. *Union Stockyard etc. Co. v. Mallory*, 341.

9. **WHAT IS NOT EVIDENCE OF FRAUD.**—In an action upon a check given for the purchase price of hogs, there is no evidence of fraud in the sale, though it appears that the payee warranted the hogs to be sound, and that some of them died soon after their removal, if it is not shown that the hogs were infected when sold, of what disease they died, or that the payee knew they were diseased at the time of the sale. *Shaw v. Jacobs*, 411.
 10. **TIME AT WHICH EXPRESS WARRANTY MAY BE MADE.**—An express and binding warranty of personal property may be made after payment of part of the purchase money and before the delivery of the property and payment of the remainder of the purchase price. *Douglas v. Moses*, 353.
 11. **THE MEASURE OF DAMAGES FOR THE BREACH OF AN EXPRESS WARRANTY** in the sale of a horse is the difference between the actual value of the horse at the time of the sale and what he would have been worth if he had been as represented or warranted. *Douglas v. Moses*, 353.
 12. **EXPRESS WARRANTY—INSTRUCTION.**—It is proper to instruct the jury in an action upon an express warranty in the sale of a horse that the plaintiff cannot recover, and that the verdict must be for the defendant, if no representations were made by the defendant at the time of the sale, and the plaintiff looked the horse over, and took him upon his own judgment, without asking any questions. *Douglas v. Moses*, 353.
 13. **THE RESCISSION OF A FRAUDULENT SALE** by the vendor must be made before other rights acquired in good faith have intervened. *Union Stockyard etc. Co. v. Mallory*, 341.
- See **AGENCY**, 8-10; **CONTRACTS**, 5; **FRAUD**; **REFLEVIN**; **STATUTES**, 6; **TROVER**, 2.

SEDUCTION.

1. **SEDUCTION UNDER PROMISE OF MARRIAGE.**—IN AN INDICTMENT for the statutory offense of seducing a female over sixteen, under promise of marriage, it is not necessary to allege that the man was unmarried, though, if married, and the woman knew it, no conviction can be had. Neither is it necessary to allege that the woman was unmarried, though it is the better practice to make the averment. *Norton v. State*, 538.
2. **SEDUCTION UNDER PROMISE OF MARRIAGE—ESSENTIALS OF OFFENSE.**—It is essential to the statutory offense of seducing a female over sixteen, under promise of marriage, that the woman seduced be unmarried and of chaste character at the time of the intercourse, though it is not so expressed in the statute. *Norton v. State*, 538.
3. **SEDUCTION UNDER PROMISE OF MARRIAGE—INDICTMENT.**—Under a statute making the seduction of females over sixteen, under promise of marriage, punishable, an indictment alleging that defendant obtained carnal knowledge of a woman or female child over the age of sixteen years "by virtue of a false or feigned promise of marriage," though it fails to make expressly the necessary averment that the promise was made to her, is sufficient after verdict, if no demurrer was interposed, and such averment appears by necessary implication. *Norton v. State*, 538.

SERVICES.

1. **SERVICES OR MATERIALS FURNISHED AS A FREE GIFT—ACTION FOR.**—If two persons are in the habit of furnishing materials or service to each other under the mutual understanding that such reciprocal favors are a free gift, no cause of action can exist in favor of one against the other for the value of such services or materials. *Payne's Appeal*, 215.
2. **SERVICES AND EXPENDITURES—ACTION FOR—RELATION OF HUSBAND AND WIFE.**—A man living with a woman in the relation of husband and wife, whether legally married to her or not, does not have a right of action against the woman for the value of shelter, food, and clothing given her during the continuance of that relation, unless by virtue of some express agreement, as such relation implies a free interchange of support and service. *Payne's Appeal*, 215.

SERVITUDES.

See EASEMENTS.

SETOFF.

- SETOFF OF JUDGMENT AGAINST ASSIGNED CLAIM FOR PERSONAL SERVICES NOT ALLOWED.**—A judgment existing against a debtor when he assigned his claim for personal services, and held by the defendant in an action upon the assigned claim, cannot be pleaded by way of setoff or counterclaim against the assigned demand. *Millington v. Lawver*, 385.

See COTENANCY, 2.

SHERIFFS.

See EXECUTION, 6.

SLANDER.

1. **JUDICIAL PROCEEDINGS.**—If words spoken by a litigant during the course of a judicial proceeding are neither pertinent nor material to the subject under investigation, and are actionable, they are not within his privilege, and he is answerable therefor. He may, however, show that he spoke the words in good faith, with probable grounds to believe, and an honest belief, that they were true and were pertinent and material to the subject matter under investigation. *Olemmons v. Danforth*, 834.
2. **JUDICIAL PROCEEDINGS.**—If a person interested in resisting a claim preferred by a physician against an estate appears before a commissioner having jurisdiction to investigate such claim, and, in addition to denying the claim, asserts that it is not the first time that the claimant made up an account—that claimant had made up a claim for forty or fifty dollars when he had not made a visit, which had been paid—these remarks, not being pertinent to the subject of inquiry, are not privileged. *Olemmons v. Danforth*, 836.

SLAVES.

See DESCENT, 1.

SPRING GUNS.

See HOMICIDE, 5, 6.

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

STATUTES.

1. **STATUTORY CONSTRUCTION—PENAL LAWS, WHAT ARE.**—The test to determine whether a statute is penal is to inquire whether its main purpose is to give compensation for an injury or to punish a wrongdoer. *Adams v. Fitchburg R. R. Co.*, 800.
2. **STATUTORY CONSTRUCTION.—A STATUTE IS PENAL, AND, THEREFORE, NOT ENFORCEABLE IN ANOTHER STATE**, if it provides that a railway corporation which, by reason of its negligence or carelessness, or of the unfitness, negligence, or carelessness of its servants, has caused the life of a passenger to be lost, shall be subject to a fine of not less than five hundred dollars, and not more than five thousand dollars, to be recovered by indictment, and to be paid to the use of the widow and children of the decedent, or, if there are neither, to the use of the next of kin; and also that the corporation shall be liable for other damages to be assessed with reference to the degree of its culpability, or that of its servants or agents. *Adams v. Fitchburg etc. R. R. Co.*, 800.
3. **STATUTES INVOLVING RESTRAINT OF PERSONAL LIBERTY, INTERPRETATION OF.**—Where a right to quarantine and restrain a person is claimed, it must satisfactorily appear not only that it has been conferred by law, but also that the facts were present to justify its exercise. *Matter of Smith*, 769.
4. **CONSTITUTIONAL LAW—EQUALITY IN RIGHTS.**—No legislative act is valid that is clearly obnoxious to the principle of equality in rights guaranteed by the bill of rights. *State v. Conlon*, 227.
5. **CONSTITUTIONAL LAW—REGULATION OF BUSINESS.**—While the legislature has power to regulate business harmless in its nature, as well as that which is in its nature injurious to the public, the exercise of that power in the two cases is governed by different principles. The vital difference is that in the former all citizens have the right, and an equal right to engage, while no citizen has an absolute right to engage in the latter. *State v. Conlon*, 227.
6. **CONSTITUTIONAL LAW—SALES OF MERCHANDISE BY ITINERANT PEDDLERS.** A statute providing that no person shall engage in any "temporary or transient business" for the sale of goods, wares, and merchandise, without obtaining a license therefor, and that the mayor of any city, the warden of any borough, and the selectmen of any town, "may issue a license to such persons as they find proper persons to engage in such business," upon receipt of a stated fee, and affixing a punishment for its violation, is unconstitutional and void, as the legal effect of it is to authorize the local officers of each municipality to grant exclusive privileges to such persons as they please in the transaction of an ordinary lawful business, in which all have the right to engage. There is, in respect to its validity, no distinction between such a law and one authorizing such privileges to be granted by subordinate officers in the exercise of a mere arbitrary discretion wholly uncontrolled by law, and a conviction under it cannot be sustained. *State v. Conlon*, 227.
7. **CONSTRUCTION—ESSENCE AND FORM.**—In determining whether any law invades a right secured by constitutional enactment, the courts look at the essence as well as the form. *State v. Conlon*, 227.

2. CONSTRUCTION. — "MAY" SHOULD BE CONSTRUED AS "SHALL," if necessary to give effect to an act and the context will permit of such construction. *State v. Conlon*, 227.

See APPEAL, 25-28; CONFLICT OF LAWS; CONSTITUTIONAL LAW, 1; MARRIAGE AND DIVORCE, 1-3.

STIPULATIONS.

ORAL.—Though a rule of court requires stipulations to be in writing, still the court will not permit a party to be misled, deceived, or defrauded by means of an oral stipulation, and, where such a stipulation has been acted upon, the party making it will not be permitted to retract or take advantage of the actions and omissions of his adversary induced thereby. *Mutual Life Ins. Co. v. O'Donnell*, 796.

STOCKHOLDERS.

See CORPORATIONS, 6, 7.

STOCKYARDS.

See BAILMENT, 3.

STREETS.

See MUNICIPAL CORPORATIONS, 5-13.

STREET RAILWAYS.

See RAILROADS, 18-22.

SUBROGATION.

1. SUBROGATION IS THE ACT of putting one person in the place of another, or the substitution of another person in the place of the creditor, to whose rights he succeeds in relation to the debt. *Heuser v. Sharman*, 390.
2. THE RIGHT TO SUBROGATION was formerly limited to transactions between principal and surety, but this rule has been modified, and the right is now considered, not as founded on contract, but as the creation of equity, and is enforced solely for the protection of persons who, by paying the debts of others, should in good conscience be substituted in the place of the original creditor. *Heuser v. Sharman*, 390.
3. WHEN THIRD PERSON IS ENTITLED TO. — If a third person pays a debt at the instance of the debtor, upon an agreement with the latter that he shall be entitled to the benefit of the security held by the creditor, equity will compel the debtor to do justice, and will substitute such third person to all the rights of the creditor whose claim he has discharged. *Heuser v. Sharman*, 390.
4. Persons in possession of land believing themselves to be the owners thereof, and who therefore discharge a mortgage thereon, are, on the conveyance under which they claim title being adjudged void for want of delivery, entitled to be subrogated to the rights of the mortgagees. *Stewart v. Stewart*, 949.
5. MONEY ADVANCED BY THIRD PARTY TO PAY MORTGAGE ON HOMESTEAD LIEN.—If a third person advances money to take up a homestead mortgage, made by a husband and wife to secure their joint indebtedness, upon an agreement with the husband that it shall be

assigned to him as security, and the husband, instead of purchasing the mortgage and so assigning it, inadvertently makes, in form, a payment thereof, and it is satisfied and discharged of record, and the wife refuses to join in a new mortgage which the husband offers to execute, a court of equity will decree that such third party's claim be established as a lien upon the mortgaged property, and that the same be foreclosed with the same effect as if the mortgage had been assigned according to agreement. *Heuser v. Sharman*, 390.

SUMMONS.

See PROCESS.

SUNDAY.

1. A DEED OF TRUST executed and acknowledged on Sunday is not valid under a statute simply prohibiting the performance of work and labor on that day. *Roberts v. Barnes*, 640.
2. CONTRACTS made on Sunday in matters of business, other than such as are prohibited by statute, are valid. *Roberts v. Barnes*, 640.

See FORGERY, 5.

SURETYSHIP.

See SUBROGATION, 2.

SURVIVAL.

See ABATEMENT.

TAXES.

See COTENANCY, 1.

TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANIES ARE COMMON CARRIERS OF INTELLIGENCE with rights and duties analogous to those of public carriers of goods and passengers. *Western Union Tel. Co. v. Call Pub. Co.*, 729.
2. A TELEGRAPH COMPANY, as a transmitter of intelligence, is not an agent either for the sender or sendee of messages, but is an independent principal, owing a public duty. *Shingleur v. Western Union Tel. Co.*, 604.
3. A TELEGRAPH COMPANY, as a transmitter of intelligence, is liable as principal to the sender of a message in contract or in tort, but to the sendee only in tort. *Shingleur v. Western Union Tel. Co.*, 604.
4. ALTERATION OF MESSAGE.—If a telegram is materially altered in transmission the sendee cannot hold the sender to its terms. *Shingleur v. Western Union Tel. Co.*, 604.
5. MISTAKE IN MESSAGE—EFFECT OF VOLUNTARY PAYMENT AFTER KNOWLEDGE OF ERROR.—If a broker is directed by telegraph to sell cotton for the sender of the message, on the latter's account, at a designated price, and the company makes a mistake in sending the telegram, whereby the sender contracts to sell for a less price, the sender is under no obligation to deliver the cotton; but, if he does so, constrained by a desire to maintain his business credit, or other reasons, he cannot recover of the telegraph company, for his payment of the loss is purely voluntary and gratuitous. *Shingleur v. Western Union Tel. Co.*, 604.

6. **NEGLIGENCE—EVIDENCE.**—If a telegraph corporation to avoid liability for negligence in transmitting a message presents evidence to show that the receiving office is unimportant and third class, not calling for an operator of high capacity, and shows the number of dispatches sent and received per day, it cannot be permitted to show the monthly receipts and expenditures of such office by an account not showing the amounts collected upon individual messages. *Redington v. Pacific Postal Tel. etc. Co.*, 132.
7. **STIPULATION AGAINST LIABILITY—GROSS NEGLIGENCE—BURDEN OF PROOF.**—A stipulation in the message blank of a telegraph company that its liability for any mistake or delay in the transmission or delivery of a message shall not extend beyond the sum received for sending it unless the sender orders the message repeated, is a reasonable regulation and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated, for any cause except willful misconduct or gross negligence on its part. In an action to recover beyond the amount stipulated for a mistake in the transmission of a message, such conduct or negligence is not presumed from the mere fact of a mistake, and the burden of proof is on the sender of the message to show such willful misconduct or gross negligence by independent facts, or by circumstances connected with the principal fact. *Redington v. Pacific Postal Tel. etc. Co.*, 132.
8. **STATUTORY REGULATIONS—LIMITATION OF LIABILITY.**—A statutory provision that "Any telegraph company is hereby declared to be liable for the nondelivery of dispatches intrusted to its care, and for all mistakes in transmitting messages made by any person in its employ, . . . and any such telegraph company shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks," is equitable, fair, and obligatory on all telegraph companies doing business in the state, and applies to such company when contracting to correctly send a message to another state. *Western Union Tel. Co. v. Kemp*, 723.
9. **STATUTORY REGULATION—LIMITATION OF LIABILITY.**—A stipulation in the blanks of a telegraph company that it "will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message," is void as an attempt to limit its liability when such limitation is in conflict with a statutory provision. *Western Union Tel. Co. v. Kemp*, 723.
10. **DISCRIMINATION.**—Telegraph companies are bound to charge no more for their services than is reasonable, and, under like conditions, they must render services to all patrons on equal terms. They must not so discriminate in rates between different patrons as to give to one an undue preference over another, but it is not an undue preference to make to one patron a less rate than to another, when there exist differences in conditions as to the expense or difficulty of the services rendered, which fairly justify such a difference in rates. *Western Union Tel. Co. v. Call Pub. Co.*, 729.
11. **TO CONSTITUTE AN UNJUST DISCRIMINATION** in rates by a telegraph company, there must be a difference in rates to patrons under substantially similar conditions as to service. *Western Union Tel. Co. v. Call Pub. Co.*, 729.
12. **DISCRIMINATION.**—A CONSTITUTIONAL PROVISION simply and expressly granting the right to prevent by legislation "unjust discrimination" by

telegraph companies must be construed as establishing the limits of legislative authority upon this subject, and not as giving authority to declare all discriminations as unjust. *Western Union Tel. Co. v. Call Pub. Co.*, 729.

23. **DISCRIMINATION—STATUTORY REGULATION.**—A statute regulating telegraph companies and prohibiting all partiality or discrimination between patrons in the handling of business, or in rates for similar services, or as to terms of payment or delivery, or in favor of persons transmitting messages to the greater distance, is valid and merely declaratory of the common law, and cannot be construed so as to require a telegraph company to transmit messages for two patrons under different conditions at the same rate. *Western Union Tel. Co. v. Call Pub. Co.*, 729.
24. **DISCRIMINATION.**—Although a telegraph company charges one patron a different rate for services than that charged another patron under a substantial difference in conditions affecting the difficulty or expense of performing the services, no cause of action arises unless it can be shown that the difference in rates is disproportionate to the difference in conditions. *Western Union Tel. Co. v. Call Pub. Co.*, 729.

See **APPEAL**, 7.

TIME.

- DEFINITION.**—THE WORD "BETWEEN," when it refers to a period of time from one day, month, or year to another, excludes both dates. "Between" two days is exclusive of both. *Weir v. Thomas*, 741.

TRESPASSERS.

See **RAILROADS**, 7-9; **TRUSTS**, 1.

TRIAL.

1. **ARGUMENT OF COUNSEL IN MURDER CASE.**—The prosecuting attorney may, on a trial for murder, argue to the jury that they ought not to sentence the accused to imprisonment, because if they do so he may obtain a pardon afterward through the solicitation of his friends. *McNeill v. State*, 17.
2. **ARGUMENT—STATEMENTS OUTSIDE OF EVIDENCE.**—Comments of counsel in arguing a case before a jury are controllable in the discretion of the trial court. This discretion is subject to review, and when counsel make material statements, outside the evidence likely to do the accused an injury, it is deemed an abuse of discretion when not stopped by the court on objection made at the time. *Jenkins v. State*, 267.
3. **COUNSEL MAY, DURING ARGUMENT,** take a pistol that has been put in evidence and identified as belonging to the accused, and request the jury to examine it, and the jury may thereupon properly examine the pistol to ascertain its condition. *Jenkins v. State*, 267.
4. **THE COURT HAS NO RIGHT TO EXCUSE OR DISCHARGE** a juror because his given name is incorrectly stated in the summons requiring him to appear and serve as a juror. *Sullivan v. State*, 22.
5. **INSTRUCTIONS—OBJECTION TO PART OF CHARGE.**—In considering an objection to a portion of a charge given to the jury, the entire charge must be considered, and, if as an entirety it is free from the objection made, it is sufficient and proper. *Jenkins v. State*, 267.

8. **INSTRUCTIONS ON CIRCUMSTANTIAL EVIDENCE.**—An instruction that in cases of circumstantial evidence the conclusion to which the jury must be conducted is that degree of certainty that they would come to before acting in their own grave and important concerns, and that this degree of certainty justifies them in returning a verdict of guilt, is improper and erroneous, as laying down an improper standard for the guidance of the jury in arriving at conclusions from the evidence in criminal cases. *Jenkins v. State*, 267.
7. **EVIDENCE—CIRCUMSTANTIAL—INSTRUCTIONS—REASONABLE DOUBT.**—An instruction that in cases of circumstantial evidence it is not necessary that the proof shall be conclusive; that it is sufficient if the jury believe from all the facts and circumstances that the accused is guilty, and that they have no reasonable doubt in their minds of this fact; that if the jury think that all the facts are consistent with the supposition that the prisoner is guilty, and cannot reconcile the circumstances in evidence with any other supposition than that of his guilt, it is their duty to find him guilty; that all that can be required is not absolute and positive proof; but such proof as convinces them that the crime has been made out against the accused is correct, and not open to objection as a whole. *Jenkins v. State*, 267.
8. **EVIDENCE—ORDER OF—ADMISSION AND EXCLUSION OF IRRELEVANT TESTIMONY.**—The court can regulate the order of the introduction of evidence, but when irrelevant testimony is offered and objected to, and is admitted on the theory that its relevancy may be shown by subsequent evidence, if such evidence is not introduced the irrelevant part should be excluded by the court upon its own motion and without further action on the part of the party objecting. A failure to so exclude it is error. *Jenkins v. State*, 267.
9. **EVIDENCE IN CRIMINAL CASES.**—In cases of circumstantial evidence every fact material, relevant, and within the issues from which the jury may legitimately deduce the guilt or innocence of the accused should be submitted to them, and although the relevance of any fact when standing alone may not be apparent, yet when taken in connection with any other fact or all the other facts, properly admitted, its relevancy is made to appear, it should go to the jury. *Jenkins v. State*, 267.
10. **EVIDENCE—TRUTH OF FOR JURY.**—If the defendant testifies that certain statements have been made by plaintiff, the jury may determine their truth, although they are not denied by plaintiff, his attention not having been called to them while testifying. *Mullally v. Greenwood*, 613.
11. **WHEN JURY MAY TAKE OUT EXHIBITS.**—If a writing admitted in evidence clearly tends to prove nothing but the fact that it was admitted to prove, it should go to the jury; but if, by reason of peculiar circumstances, it clearly may be treated by the jury as evidence of other facts not admissible, it should not go to the jury. Between the two extremes the question is largely one of discretion in the trial judge. *Curtis v. Bradley*, 177.
12. **PRACTICE—MODE OF TRIAL OF ISSUE ARISING UPON MOTION.**—Where a motion is made to modify or to obtain other relief from a judgment on the ground that it was taken contrary to oral stipulations of the parties, it is more satisfactory to have sharply contested issues of fact determined upon common-law evidence taken before the court or a referee, where the parties have an opportunity to cross-examine the

witnesses, and to have such motion determined upon affidavits. *Metual Life Ins. Co. v. O'Donnell*, 796.

12. **VERDICT—DIRECTING.**—A FINDING OF A JURY in a case involving a charge of murder that they find the defendants guilty as charged, but recommend one of them named to the mercy of the court, is a nullity, and cannot be considered by the court as a verdict of murder in any degree. The case is still in the hands of the jury, whose duty remains unchanged, and the court cannot then, any more than at any other time, intimate to the jury what its verdict should be. *Jenkins v. State*, 267.

See **APPEAL**.

TROVER.

1. A CONVERSION IS any unauthorized act which deprives a man of his property, permanently or for an indefinite time. A wrongful assumption of the ownership of property may be a conversion of it rendering a demand and refusal unnecessary. *Union Stockyard etc. Co. v. Mallory*, 341.
2. **FRAUDULENT SALE.**—Though a fraudulent purchase of chattels is made, and because of the fraud the vendor has a right of rescission, and though a conversion of the chattels takes place, the title being still in the purchaser because of the failure to rescind, the vendor cannot sustain an action of conversion. *Union Stockyard etc. Co. v. Mallory*, 341.
3. IN AN ACTION OF TROVER PLAINTIFF MUST RECOVER UPON THE STRENGTH OF HIS OWN TITLE, and not upon the weakness of his adversary's, and must show not only a conversion of personal property by the defendant, but also that at the time of the conversion plaintiff had a right of property, general or special, in the chattels converted, and the possession or immediate right to the possession thereof. *Union Stockyard etc. Co. v. Mallory*, 341.

TRUST DEEDS.

See **FRAUDULENT CONVEYANCES**; **SUNDAY**, 1.

TRUSTS.

1. THE RIGHT TO ELECT TO TREAT A PERSON EITHER AS A TRUSTEE OR TRESPASSER exists in favor of one whose estate such person has sought to control and manage. *Bailey v. Bailey*, 826.
2. **TRUSTEE—ESTOPPEL.**—If ONE VOLUNTARILY ASSUMES THE SITUATION OF A TRUSTEE, it does not lie in his mouth to disclaim that position when called to account for moneys received thereby. *Bailey v. Bailey*, 826.

See **ASSIGNMENT FOR THE BENEFIT OF CREDITORS**, 4; **EQUITY**, 4; **FRAUDULENT CONVEYANCES**, 2.

ULTRA VIRES.

See **CORPORATIONS**, 5.

USAGE.

See **CUSTOM**.

USURY.

1. **NOTE FOR COMMISSIONS.**—A loan negotiated by an agent for both parties, and bearing legal interest on its face, is not rendered usurious by the act of the agent in taking a commission note for his services pay-

able to the lender, thus raising the total interest above the legal rate, provided the lender neither authorizes nor ratifies the act of the agent. *Richards v. Purdy*, 458.

2. **BURDEN OF PROOF** is on a party setting up the defense of usury. *Richards v. Purdy*, 458.
3. **CONFLICT OF LAWS**.—A note dated in one state, executed and delivered by a resident of that state in another state, reserving a rate of interest legal in the former, but illegal in the latter, state, may be enforced in the former state, if it is shown that the parties intended that the law of that state should govern the contract. *Bigelow v. Burnham*, 442.
4. **CONFLICT OF LAWS**.—If a contract is made in one state to be performed in another, at a rate of interest lawful in the one state and unlawful in the other, it is presumed that the parties contract with reference to the laws of the state wherein the stipulated rate of interest is lawful, and such presumption prevails until overcome by proof that the transaction is a device to defeat the usury laws. *Bigelow v. Burnham*, 442.

VACCINATION.

See **BOARDS OF HEALTH**.

VARIANCE.

See **DISORDERLY HOUSES**, 2.

VENDOR AND PURCHASER.

1. **FAILURE OF VENDEE TO SIGN CONTRACT FOR SALE OF LAND—STATUTE OF FRAUDS—OFFER TO PERFORM—MUTUALITY**.—If one signs a writing, offering to sell land, and the vendee afterward offers, in writing, to perform, the agreement may be enforced against the vendor, though neither it nor any promise to pay the price was signed, at the time, by the vendee, as the offer makes the contract mutual, and there is no want of consideration. *Peevey v. Haughton*, 592.
2. **STATUTE OF FRAUDS IS SATISFIED AS TO MEMORANDUM BY VENDEE'S BILL FOR SPECIFIC PERFORMANCE**.—After land has been sold, an offer contained in a bill, properly signed and verified, and brought by the vendee for specific performance, is sufficient as an offer to perform, and makes him chargeable as on a memorandum of the contract signed by him. Hence, if the land is to be paid for in cotton, to be delivered at certain times in certain quantities, an offer to pay its money value, to be ascertained by an accounting, is sufficient, though the bill is filed after the date at which the consideration was, by the terms of the contract, to be paid. *Peevey v. Haughton*, 592.
3. **EXECUTED CONTRACT FOR SALE OF LAND—RESCISSION—FAILURE OF TITLE**.—If a contract for the sale of land has been executed, a court of equity has no jurisdiction to rescind it on the ground of a defect in or failure of title to part of the land, in the absence of fraud or material misrepresentation or concealment on the part of the vendor. *Decker v. Schulze*, 856.
4. **CONTRACT FOR SALE OF LAND—RESCISSION**.—A complaint by a vendee simply alleging that the vendor was not seised in fee or possessed of the right to sell and convey the land in dispute, does not state a sufficient defect of title to enable the vendee to sustain an action to rescind the contract of conveyance on the ground of failure of title. *Decker v. Schulze*, 858.

5. **VENDOR'S LIEN—PURCHASE PAYABLE IN PROPERTY OR SERVICES.**—If a purchaser of real property, in addition to paying a sum named therein, agrees to fence it and to construct stock gaps where the outer fences are crossed and to provide road crossings at convenient places, no vendor's lien exists for the amount of damage sustained in the event of the failure of the vendee to perform the acts agreed by him to be done. The only remedy is either by an action at law for damages or by a suit in equity to enjoin the use of the land until the terms of the contract of purchase are complied with. *Parrish v. Hastings*, 50.
6. **VENDOR'S LIEN.**—Where the purchase price is promised to be paid in money, even if there be a stipulation that it may be discharged in something else, and there is a failure to so discharge it at the time stipulated, a suit may be maintained to enforce a vendor's lien for the amount remaining unpaid. *Parrish v. Hastings*, 50.

See DEEDS.

VENDOR'S LIEN.

See VENDOR AND PURCHASER, 6.

WAGES.

See ASSIGNMENT, 3; EXECUTION, 10.

WAIVER.

See APPEAL, 4; INSURANCE, 10-14, 21-22.

WARRANTY.

See LANDLORD AND TENANT, 8; SALES, 10-12.

WATERS.

1. **NAVIGABILITY.**—Under a statute declaring navigable all streams emptying into Elk river, "which are now, or at any time have been, used for the purpose of floating logs or lumber," the south fork of that river being a small stream insufficient to float single sawlogs, except during extreme winter freshets and with the aid of dams, which use has been abandoned as impracticable, is not a navigable stream. *People v. Elk River Mill etc. Co.*, 125.
2. **NAVIGABILITY.**—A stream to be floatable and navigable must be capable of being used as a highway to float logs during some considerable portion of the year, and the fact that it can be so used for a few days during the rainy season, with the aid of dams, does not make it navigable. *People v. Elk River Mill etc. Co.*, 125.
3. **NAVIGABILITY—POWER OF LEGISLATURE.**—If a stream is in fact non-navigable it is not a public way, and the legislature cannot make it such by enacting a law declaring it to be navigable and thus take private property for public use without compensation. *People v. Elk River Mill etc. Co.*, 125.
4. **RIPARIAN OWNERS—RIGHT OF NAVIGATION.**—The right of the state to improve a stream as a highway for the purpose of aiding navigation is subject to the rights of riparian owners. It may take and divert without compensation so much of the water as may be required to improve the navigation of the stream, and this water may be sold and leased, provided it is not diverted for the purpose of creating a water power

under the pretense of improving navigation. *Green Bay etc. Canal Co. v. Kaukauna Water etc. Co.*, 937.

8. **RIPARIAN PROPRIETORS—RIGHT TO DAM STREAMS.**—A statute declaring that whenever a water power shall be created by reason of any dam erected or other improvement made, such water power shall belong to the state, does not vest the state with any greater right to the use of the water than would belong to the owner of both banks of the stream, had he erected the dam for the purpose of creating the water power. *Green Bay etc. Canal Co. v. Kaukauna Water etc. Co.*, 937.
9. **OVERFLOWED VALLEY AS A RUNNING STREAM OR WATERCOURSE.**—The whole valley through which runs an overflowing stream is not necessarily land within a watercourse. Hence, if the flood waters of a creek, having a channel about twenty feet deep and one hundred and twenty-five feet wide, periodically overflow its valley from two to three miles in width, the whole valley cannot be considered a running stream, though such flood waters flow with the stream. *Kansas City etc. R. R. Co. v. Smith*, 579.
10. **RIPARIAN PROPRIETORS—WATER POWERS.**—The right of the state or of any private person to make an improvement in a stream for the purpose of creating a water power cannot be sustained to the extent of working an injury to a lower riparian proprietor, except in aid of navigation. *Green Bay etc. Canal Co. v. Kaukauna Water etc. Co.*, 937.
11. **RIPARIAN PROPRIETORS—FLOW OF WATERS.**—Unless affected by license, grant, prescription, public right, or the like, any proprietor of lands on the bank of a stream of water, whether navigable or not, has the right to use the water as it is wont to flow, without material alteration or diminution, and no riparian owner has the right to use the water to the prejudice of other proprietors above or below him by throwing it back upon the former or subtracting it from the latter. *Green Bay etc. Canal Co. v. Kaukauna Water etc. Co.*, 937.
12. **PUBLIC USE—COMPENSATION.**—CONSTITUTIONAL PROVISIONS making water for sale, rental, or distribution a public use do not grant power to appropriate water for the use of the public without compensation. *People v. Elk River Mill etc. Co.*, 125.
13. **RULES AND PRINCIPLES GOVERNING.**—The rules governing the rights and duties of individuals in reference to waters rest upon principles which underlie very many other property rights. They depend, at last, upon the two legal maxims that one may make such use as he will of his own, and that he must so use his own as not to impinge the legal rights of others. *Kansas City etc. R. R. Co. v. Smith*, 579.
14. **RIPARIAN OWNERS—RETURNING WATER TO STREAM.**—If water is taken from a stream for the purpose of creating a power, it must be returned thereto in such place, and in such manner, as that it shall flow past the banks of lower riparian owners in its accustomed channel, and as it was accustomed to flow. *Green Bay etc. Canal Co. v. Kaukauna Water Co.*, 937.
15. **COMMON LAW, APPLICABILITY OF—WATERS.**—It is a mistake to assume that the common law of England, though adopted and accepted as the law of the state, and though unchanged by statute, is, under all circumstances and conditions, to be applied as the local common law. In many instances a directly opposite rule is the common law of the state, and the opposite rule applies to injuries occasioned by overwhelming flood waters. *Kansas City etc. R. R. Co. v. Smith*, 579.

12. **SURFACE WATERS—DISTINCTION BETWEEN CIVIL AND COMMON LAW.**—There seems to be no good reason for drawing a distinction between the civil and the common law in reference to surface waters. *Kansas City etc. R. R. Co. v. Smith*, 579.
13. **ADVERSE TITLE TO.**—The diversion of an inconsiderable part of the waters of a stream is not such a strong act of exclusive possession, that it is notice per se of an adverse claim of right. *Green Bay etc. Canal Co. v. Kaukauna Water Co.*, 937.
14. **OVERFLOW—RIPARIAN RIGHTS—ENGLISH DOCTRINE.**—In England, it seems that riparian owners are entitled to have streams flow in their usual course, whether in times of low or flood water, and that flood water, overflowing the banks and following the course of the stream along the valley, but without the channel, is a part of the stream, against which one owner may not protect himself to the injury of another. *Kansas City etc. R. R. Co. v. Smith*, 579.
15. **FLOODS—HOW CASES ARE TO BE DETERMINED.**—It is difficult, if not impossible, to formulate exact rules by which the rights of parties injured by periodically recurring floods, under varying circumstances, may be adjusted. Hence, such rights must be determined by flexible, rather than rigid, rules applicable to the conditions and circumstances of the case under consideration. *Kansas City etc. R. R. Co. v. Smith*, 579.
16. **RIGHT TO OBSTRUCT EXTRAORDINARY FLOOD.**—The waters of an extraordinary flood may be obstructed, impeded, or turned aside without liability to adjacent proprietors where they in reality suffer no real injury. *Kansas City etc. R. R. Co. v. Smith*, 579.
17. **OVERWHELMING FLOOD—IMMATERIALITY OF NAME.**—In determining the relative rights and duties of parties in cases of injury from overwhelming flood waters, it is unimportant whether such waters be dealt with as surface water, channel water, the water of a stream, or as a separate and distinct sort. It is the thing that must be dealt with, and not its name. *Kansas City etc. R. R. Co. v. Smith*, 579.
18. **PRACTION.**—AN ACTION ON THE CASE is the proper remedy to recover compensation for injuries by a riparian proprietor from the pollution of the waters of a stream running through his land. *Drake v. Lady Ensley Coal etc. Ry. Co.*, 77.
19. **MEASURE OF DAMAGES FOR POLLUTING.**—In an action by an executor for the pollution of waters running through the land of his testator, where there is some evidence showing injuries of a permanent character, the court has no right to restrict the amount of recovery to the diminution of the rental value for one year. The difference between the value with and without the permanent injury is recoverable. *Drake v. Lady Ensley Coal etc. Ry. Co.*, 77.
20. **DEPOSIT FROM MINES.**—The owner of lands through which a water-course runs and who therewith washes ores mined on his land and returns the water to the stream polluted so as to be unfit for watering stock, and other domestic uses, is answerable in damages to the riparian proprietors of the land thus injured by its pollution. *Drake v. Lady Ensley Coal etc. Ry. Co.*, 21.
21. **RIPARIAN RIGHTS—PRIORITY OF USE—POLLUTION.**—If a riparian owner has expended large sums of money in the erection of a mill on a stream, and in other property connected with his business, and has

made a reasonable use of the water as against lower proprietors for many years before water is taken from the stream to supply a town, the water company cannot, instead of taking pure water from another source, seek to purify such stream for the supply of the town, by destroying the property of the millowner without compensation. *People v. Elk River Mill etc. Co.*, 125.

23. **RIPARIAN RIGHTS—CONSTRUCTION OF STATUTE.**—A statute making criminal acts therein specified, when the direct effect of such acts is to pollute the waters of a stream from which the residents of a city or town are supplied, does not necessarily deprive riparian owners of property rights, and such intent is not presumed when the language of the statute leaves it doubtful. *People v. Elk River Mill etc. Co.*, 125.
24. **POLLUTION OF—RIGHTS OF EMPLOYEES AT SAWMILL.**—People employed at a sawmill on a non-navigable stream have a right to live there and to maintain privies, taking all reasonable precautions against unnecessarily polluting the water of the stream, and, if they exercise due care, they cannot be compelled to remove from the stream or be expropriated for the benefit of urban communities further down the stream. *People v. Elk River Mill etc. Co.*, 125.
25. **POLLUTION—RIPARIAN RIGHTS.**—A person owning land and a sawmill on a non-navigable stream, who conducts the business of his mill in a reasonable manner and so as not to pollute the water of the stream to such a degree as to render it unfit or unwholesome for domestic use, cannot be enjoined from continuing the mill business. *People v. Elk River Mill etc. Co.*, 125.
26. **DAMS—NAVIGABILITY—PURPRESTURE.**—A dam across the bed of a non-navigable stream is not a purpresture. *People v. Elk River Mill etc. Co.*, 125.
27. **POLLUTION—USE OF LAND.**—If the conformation of an upper riparian owner's land is such that he cannot carry on a dairy without putting filth directly into the water of a stream used by lower riparian owners for domestic purposes, he must find some other use for his land, or answer for the maintenance of a nuisance.—*People v. Elk River Mill etc. Co.*, 121.
28. **POLLUTION—REASONABLE USE.**—Depasturing stock upon land forming the watershed drained by a stream, or maintaining stables or hogpens at a reasonable distance from the stream, is not an unreasonable use of which the lower riparian owner can complain, although winter rains wash impurities therefrom into the stream, thus injuring its use for domestic purposes. *People v. Elk River Mill etc. Co.*, 121.
29. **POLLUTION—NUISANCE.**—The maintenance of stables and hogpens directly upon the banks of a stream, thus polluting its waters and rendering them unfit for domestic use, is an unreasonable use and a nuisance as against lower riparian proprietors. *People v. Elk River Mill etc. Co.*, 121.
30. **POLLUTION—RIPARIAN RIGHTS.**—An upper riparian owner is entitled to a reasonable use of the waters of a stream flowing by or through his land, but he is not entitled, as against lower riparian owners, to pollute the stream by putting filthy matter directly into it, thus rendering it unfit for domestic use. *People v. Elk River Mill etc. Co.*, 121.
31. **POLLUTION OF—PUBLIC NUISANCE.**—If the waters of a non-navigable river, at and below a certain point, are used for domestic purposes by

a considerable number of persons residing along its banks, such use is a public use making the pollution of the water at that particular point by an unreasonable use a public nuisance. *People v. Elk River Mill etc. Co.*, 121.

22. **POLLUTION OF.**—A complaint alleging that defendant maintains on the banks of a river a sawmill and also a cookhouse, outhouses, barn, and stables, and other fixtures usually accompanying a saw mill, and that he causes and permits sewage, offal, waste, and fetid matter from the sawmill, cookhouse, and stables to be drained and deposited in the stream, thereby polluting and rendering it unwholesome and unfit for domestic purposes and use, is sufficient to support findings that defendant has allowed a large manure-pile to accumulate from the stables upon the bank of the stream, thereby polluting its waters, and that he has also maintained near such stream a corral or hogpen, thereby further polluting such waters, and that as matter of law such manure-pile and hogpen are nuisances, thus suppressing the use of the stable rather than the stable itself. *People v. Elk River Mill etc. Co.*, 121.
23. **SURFACE WATERS—DISCHARGE OF, UPON ANOTHER'S LAND.**—One cannot collect surface water and lawfully discharge it injuriously upon the lands of another. *Kansas City etc. R. R. Co. v. Lackey*, 539.

See RAILROADS, 3-5.

WILLS.

1. **IN THE CONSTRUCTION OF WILLS, THE INTENTION** of the testator, when apparent, overrides all established rules of interpretation. *Matter of James*, 774.
2. **PRETERMITTED HEIRS—INTENTION OF TESTATOR.**—PAROL EVIDENCE is inadmissible for the purpose of determining whether the omission from a will of one entitled, in the event of intestacy, to take of the estate, was intentional on the part of the testator. This can be determined only from the face of the will. *In re Salmon*, 164.
3. **PRETERMITTED HEIR—INTENTION OF TESTATOR.**—The fact that a testator mentions in his will one closely related by blood or intimately associated in family relations with an omitted heir does not overcome the presumption that he was unintentionally omitted, nor show as matter of construction that he was in the mind of the testator and intentionally omitted. *In re Salmon*, 164.
4. **CONSTRUCTION OF—DEVISE, REVOCATION OF, BY MISTAKE.**—If a testator having three sons and other heirs gives to each of the sons a specific piece of property, and the residue of his estate, both real and personal, to all of the sons, share and share alike, but subsequently executes a codicil to his will revoking the specific devise to one of the sons, on the ground that he has sold the property, and expressly ratifies and republishes the will except as changed, whereas such property is not sold at the time of his death, but is then still owned by him, the legal effect of the codicil is to eliminate from the will all reference to the property devised to that particular son. The revocation is valid as being intentional, not induced by mistake, and unconditional. The property, therefore, falls into the residuum, and is not liable to distribution among the heirs at law. *Giddings v. Giddings*, 192.
5. **TENANT FOR LIFE AND REMAINDERMAN—CONFLICTS BETWEEN.**—When there is anything in the will from which it may be fairly inferred

that the testator expected the tenant for life to enjoy the property specifically, it cannot be converted into money or public funds, and the remainderman must take his chances in anything remaining after the termination of the life estate. *Matter of James*, 775.

See DEVISE.

WITNESSES.

1. **COMPETENCY OF GRAND JURORS AND PROSECUTING ATTORNEY.**—It is the duty of the prosecuting attorney when required by the grand jury to attend that body for the purpose of examining witnesses in its presence and to give it advice upon legal matters, and whenever it is proper for a grand juror to testify to the statements of witnesses before the grand jury the prosecuting attorney may testify to such matters within his knowledge. *Jenkins v. State*, 267.
2. **COMPETENCY OF GRAND JURORS.**—A statute providing that "members of the grand jury may be required by any court to testify whether the testimony of a witness examined before them is consistent with or different from the evidence given by such witness before such court, and they may also be required to disclose the testimony given before them by any person upon a complaint against such person for perjury or upon his trial for such offense," does not restrict the inquiry to the facts expressly mentioned in the statute, and a grand juror is competent and may be required to testify to any other competent fact within his knowledge which he is not expressly prohibited by law from disclosing. *Jenkins v. State*, 267.
3. **COMPETENCY OF GRAND JURORS.**—A grand juror is not permitted to testify how any member of the jury voted, or the opinion expressed by any of them upon any question before them, or to disclose the fact that an indictment for felony has been found against any person not in custody or under recognizance, or to state in detail the evidence on which an indictment was found, but he may be required by the court, when justice demands it, to testify to what a witness testified to before the grand jury, or to testify to any other competent fact, not within the foregoing restrictions. *Jenkins v. State*, 267.
4. **EVIDENCE IN CRIMINAL CASES—DECLARATIONS OF ACCUSED BEFORE GRAND JURY.**—Written memoranda of evidence made by the prosecuting attorney in the ex parte examination of a witness by him before a grand jury, not read to or signed by such witness, are not admissible against him as evidence per se of what he there testified to concerning a crime then under investigation, and for which he is subsequently placed on trial. Such memoranda can be used for refreshing the memory, but for no other purpose. *Jenkins v. State*, 267.
5. **CROSS-EXAMINATION—IMPEACHMENT AS TO COLLATERAL MATTER.**—If a witness upon cross-examination testifies to a collateral matter, not responsive to any fact brought out on his examination in chief, his answer is not open to contradiction. *Redington v. Pacific Postal Tel. etc.* (... , 132.
6. **EVIDENCE.—WHETHER LEADING QUESTIONS SHALL BE PERMITTED** rests very much in the discretion of the court, and rulings in respect to them are not the subject of exceptions, unless there has been an improper exercise of such discretion. *Porath v. State*, 954.

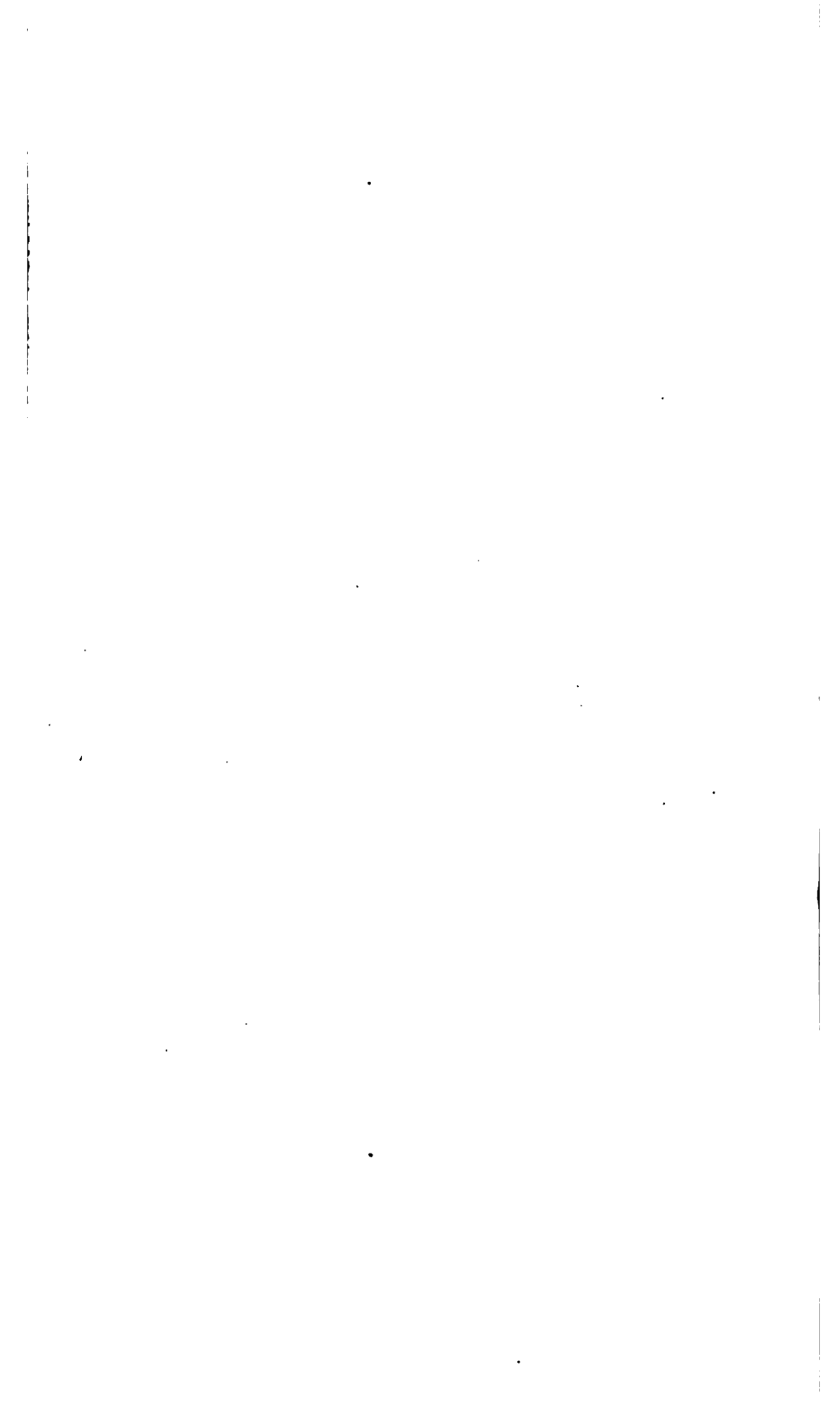
7. **EVIDENCE—ADMISSIBILITY—REFRESHING MEMORY OF WITNESS.**—The admissibility of a paper as competent documentary evidence is not affected by its use in refreshing the memory of a witness. If it utterly fails to refresh his memory its exclusion for that purpose becomes imperative, but it may still be competent, and its use as evidence be imperatively necessary to a fair and just trial. The admissibility of the paper and the right of the witness to refresh his memory may be separate and distinct questions. *Curtis v. Bradley*, 177.
8. **EVIDENCE—ILLUSTRATION OF TESTIMONY.**—A witness may refer, in illustration of his testimony concerning the size and condition of a revolving shaft to a piece of iron of about the same dimensions as such shaft, if he does not pretend that it is a model and the jury is so informed. *Davis v. Pacific Power Co.*, 156.
9. **EVIDENCE—ADMISSIBILITY OF ORIGINAL MEMORANDUM.**—If a memorandum of the details of a transaction relevant to the issue is shown by testimony to be the original unaltered paper, and to have been correct when written, such paper is, in connection with such testimony, admissible as competent, documentary evidence, though the witnesses have no recollection either before or after examining the paper of its details; and the memorandum may properly be marked as an exhibit. *Curtis v. Bradley*, 177.
10. **EXPERT EVIDENCE.**—A witness may be asked whether cars were well and properly loaded, if a sufficient predicate has been made to render his opinion on that subject competent. *McCarthy v. Louisville etc. R. R. Co.*, 29.
11. **NEGLECT—EXPERT EVIDENCE—FORM OF QUESTION.**—An expert witness cannot be asked to determine a question of negligence, whether a certain structure is safe, or whether certain methods are prudent, but facts may be elicited from such witness from which the conclusion inevitably follows, and if negligence is fully proven by other evidence, the defendant is not prejudiced by the form of the question put to the expert. *Grandi v. Electric Improvement Co.*, 114.
12. **EVIDENCE—THE OPINION OF A WITNESS** as to whether a party was badly injured by a fall is admissible in evidence, especially when the effect of the accident is fully shown by other evidence without objection. *Button v. Snodomsch*, 847.

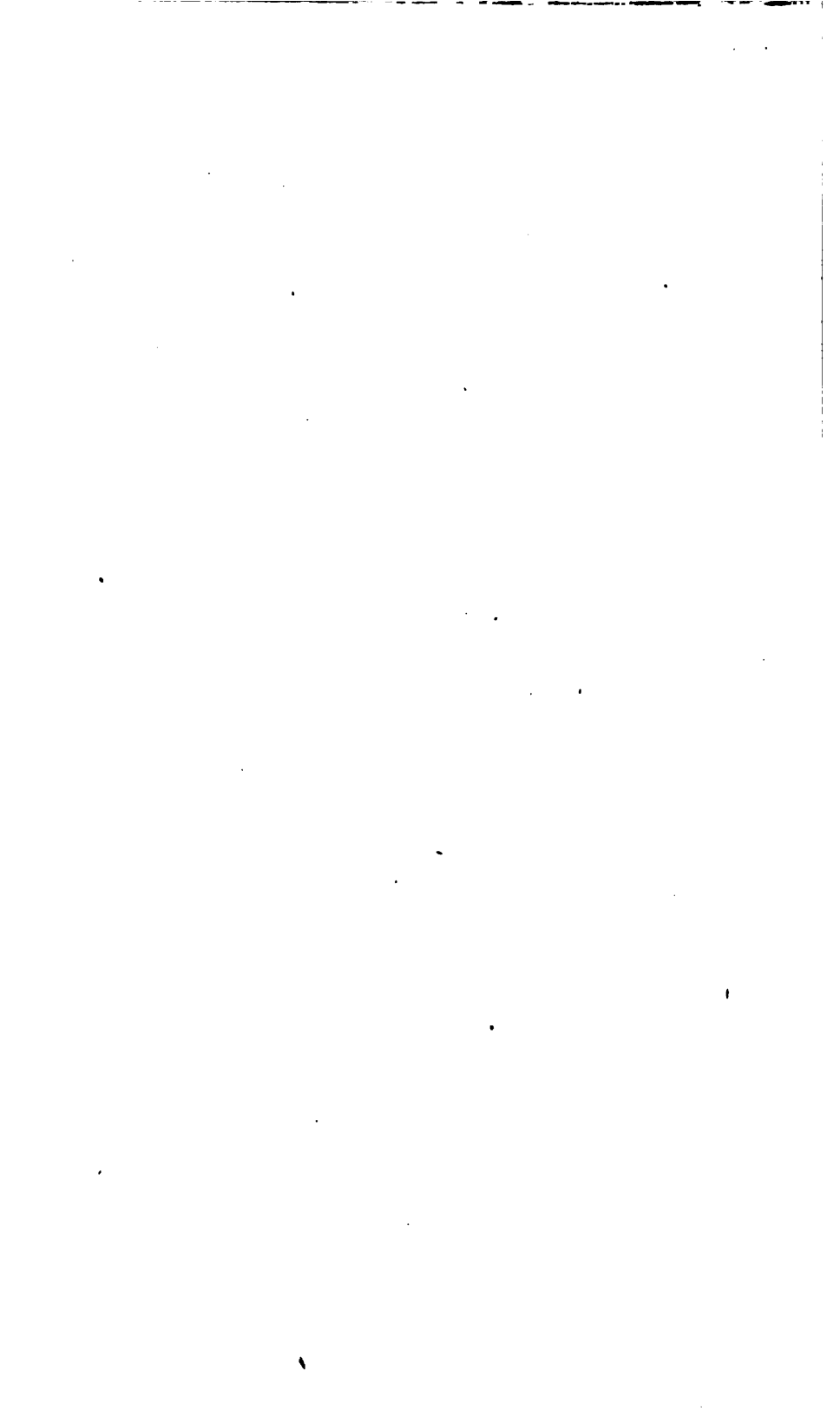
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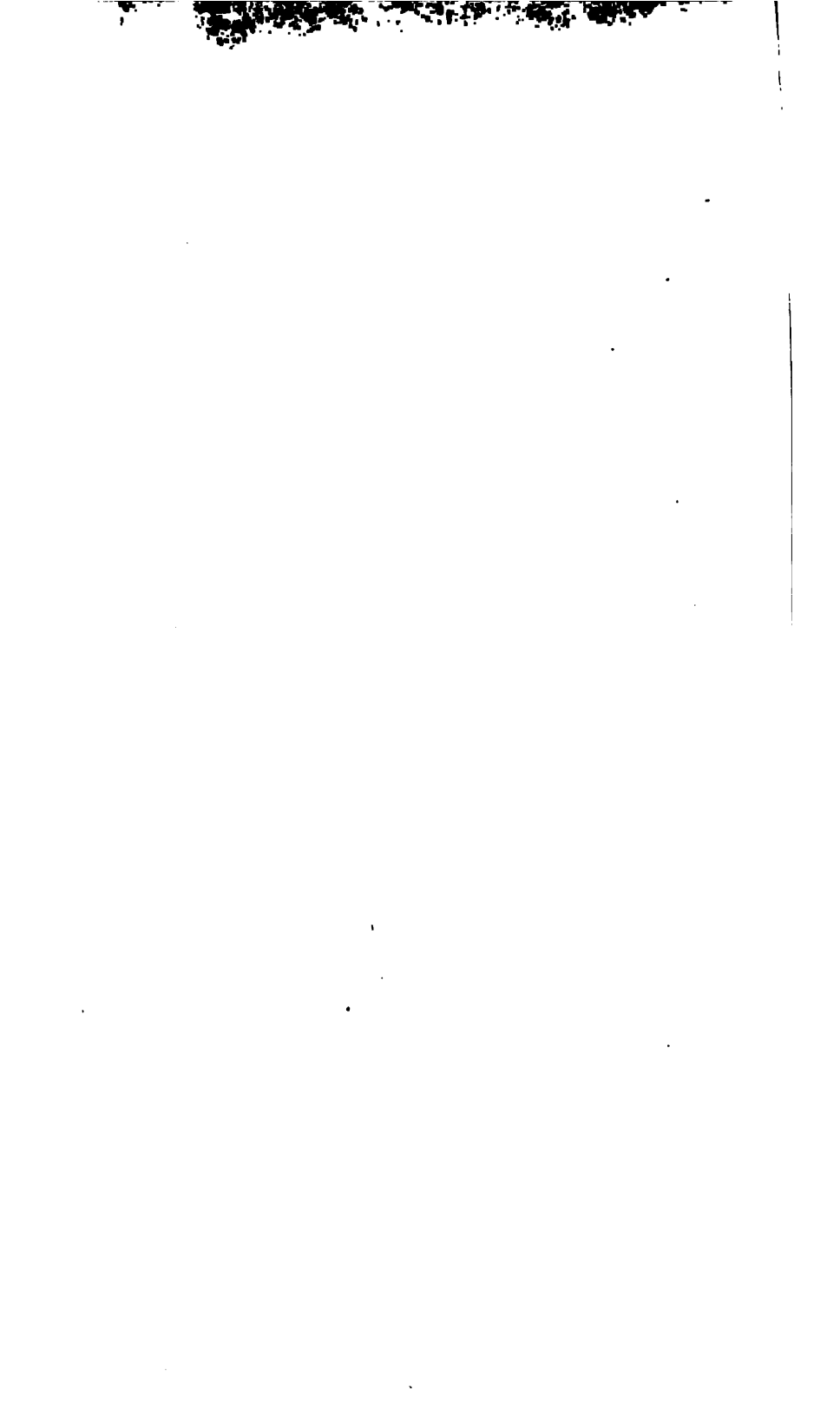
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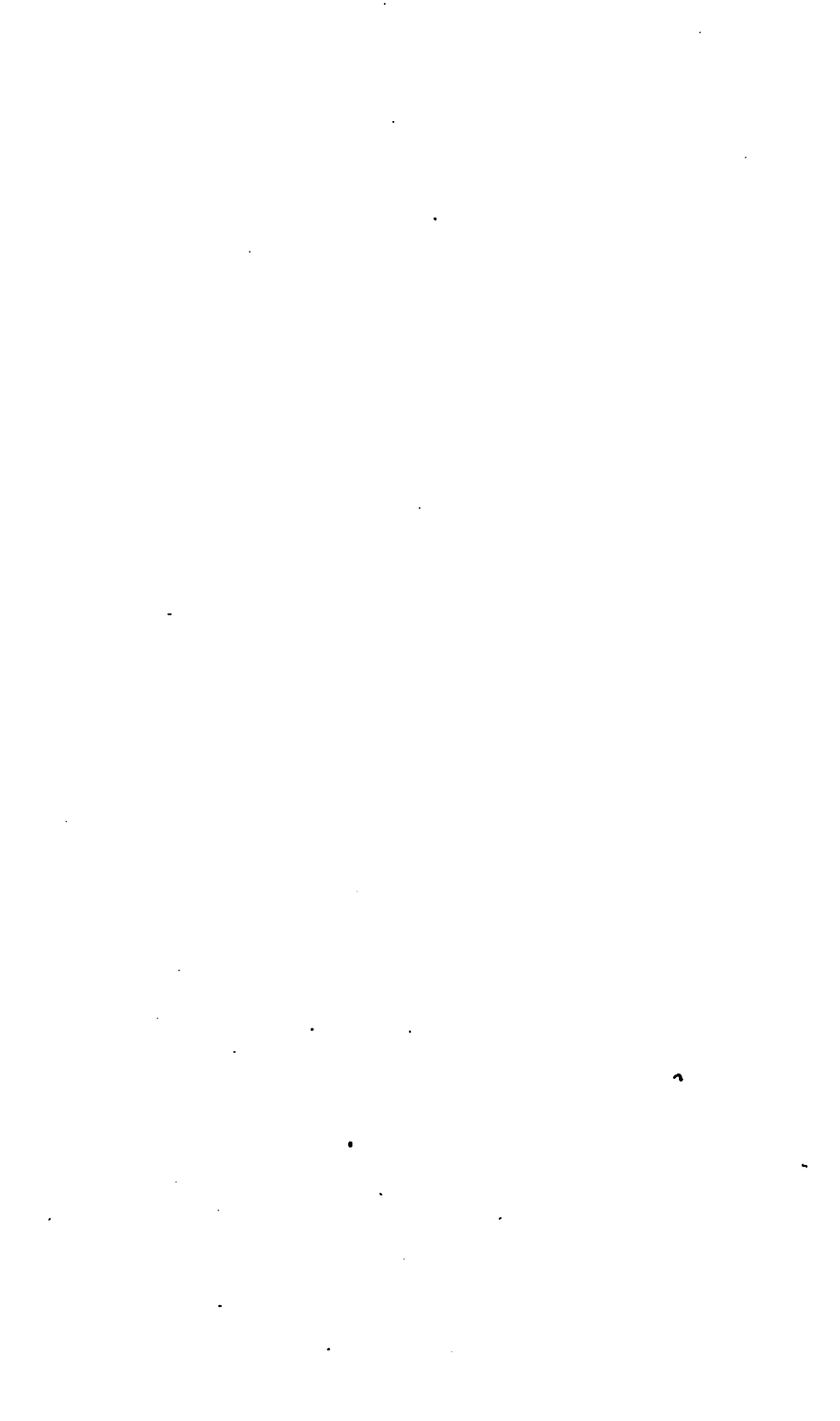
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